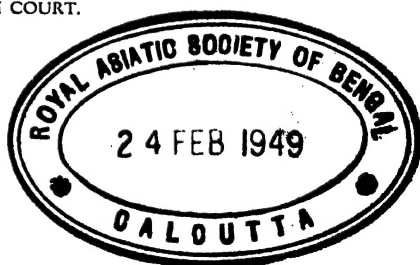


PRINCIPLES & FORMS OF PLEADING

BY
SURES CHANDRA GHOSH

OF LINCOLN'S INN, BARRISTER-AT-LAW,
ADVOCATE, CALCUTTA HIGH COURT.

WITH A FOREWORD BY
THE HONOURABLE
MR. JUSTICE LORT-WILLIAMS, KT., K. C.,
CALCUTTA HIGH COURT.



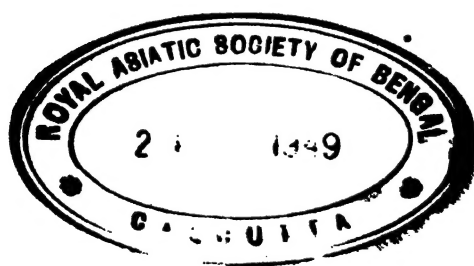
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FOREWORD

PLEADING is an Art, in which Perfection depends on Practice, and Brevity is the Soul of Pleading as of Wit.

The Object of Pleading is Definition, and a good pleading is Concise, Precise, Relevant and Comprehensive, while a bad pleading is Prolix, Discursive, Irrelevant, Vague and Wanting in Particulars.

The result of good pleading is Despatch, and of bad pleading Loss of Time, Labour, Money and Judicial Urbanity.

Bad pleading is a disease which is still wide-spread in the Mofassil of Bengal, but Calcutta is gradually approaching convalescence. Recently certain pleaders had the hardihood to complain about the brevity of pleadings nowadays, and a prominent and respected leader of the Calcutta Bar argued quite seriously that the object of pleading was to keep your opponent guessing. There cannot then be any doubt about the urgent need of a book on Pleadings and Precedents in Bengal.

India is vast and conditions vary in each Province. To attract and appeal to the profession, precedents should be couched in familiar terms and have some reference to local names, habits and conditions.

A busy practitioner has little time to study principles, but by copying and adapting good precedents he may at least avoid humiliation, if he cannot achieve perfection.

We have nothing suitable to Bengal, and I am glad to know that this book has been compiled by Mr. S. C. Ghosh with so much skill, learning and patient care, and with so great a knowledge and so clear a preception of the true art of pleading. The precedents are excellent and will be of great help to the pleader be he young or old, experienced or aspiring.

This book fills a great and pressing need, and so, concisely and precisely, I recommend it to Bench and Bar.

High Court, Calcutta,
December, 1940.

John Fort Williams.

PREFACE

The system of pleading in vogue in this country has an historical background. The ancient Hindu system anticipated fundamentally the modern English rules of pleading in that the pleadings under that system were required to be concise, precise, relevant and unambiguous. The pleadings in Mahomedan times were free from technicalities of form and were subordinated to the end of securing substantial justice. The tribunal determined the issues by a *viva voce* examination of the parties even outside their respective pleadings. The English rules of pleading by a series of experiments at adaptations to Indian conditions at last emerged in a multi-coloured garb in the Civil Procedure Code of 1908.

Part I of this book deals briefly with the History of Pleadings from the earliest times and depicts in broad outline the present day English and the Indian systems of pleading. A proper understanding of the relative values of the two systems is essential from a practical, not merely an academic, point of view.

Part II deals with the Principles of Pleading, Part IV, with Forms of Pleading.

The rules of pleading contained in the Civil Procedure Code and the special rules contained in the Original Side Rules of the High Courts of Calcutta, Bombay, Madras and Rangoon, and those of the Federal Court have been set forth in their proper places. The special chapters on 'Parties' including 'Classes of Persons', 'Causes of Action', 'Jurisdiction', 'Special Defences', 'Particulars', 'Set-off and Counter-claim' are intended to serve as a practical guide to a vastly varied nature of suits which may be instituted and defended. To be able to decide in a given case, who is entitled to sue, who is liable to be sued, what causes of action may be joined, what reliefs may be claimed, what facts ought to be pleaded with particularity, where the suit ought to be instituted, and what special defences are open to a defendant, all comprehensively dealt with in Part II of this book, is a more vital question than the mere language or form of

pleadings, for, even according to modern practice, the Court is not to dictate to parties how they should frame their case, so long as they do not offend against the rules of pleading laid down by the law.¹

The Forms of Pleadings have been selected so as to cover a wide range of subjects. A good many Forms of Plaints are based upon leading cases and mostly upon the facts of those cases. Extracts from the judgments on which the Forms are based have been given, in the foot-notes showing what essential facts must be alleged and proved to entitle the plaintiff to particular reliefs. Once the fundamental principles underlying the judgments are clearly borne in mind, there will be no difficulty in drafting a plaint adapted to particular facts.

The Forms have been grouped alphabetically according to the subject. The Plaints and Defences have been brought together under each group. This will make reference easy. But the method adopted is not free from the vice of overlapping. For example, in a suit by a principal against his agent for accounts, the claim may be brought under either of the two heads, 'Agency' or 'Accounts'; in a suit for administration against executors, the claim may be brought under one of the two heads—'Administration' or 'Executors'. In all such cases, the Form is given under one of these heads, but in the Index it is shown under both heads. The classified notes given under each Form, will, it is hoped, not only be helpful in the drafting of pleadings but also in fighting cases in Court.

Certain matters have been omitted from the body of the plaints, *e.g.*, facts showing that the Court has jurisdiction, a statement of the value of the subject-matter of the suit for the purposes of jurisdiction and of Court-fees (which is necessary in district court pleadings, but unnecessary in pleadings on the Original Sides of the High Courts other than the Madras High Court), or a statement of an address for service (which is required by the Madras High Court Original Side Rules).

In Part III some selected Forms of Petitions have been given. Some Forms of Petitions appended to the Original Side rules of some of the High Courts have been reproduced as models to be followed. In Part II, Chapters XXV and XXVI, certain Forms of Appeals and Affidavits have been incorporated along with the rules relating thereto.

In writing this book I frankly acknowledge my own limitations. The subject comprises all branches of law—statute law,

1. (*Per Bowen L.J., in Knowles v. Roberts, (1898) 38 C.D. 263, 270.*)

common law, customary law and personal law—and represents problems of infinite variety and complexity. In India, the uniformity of statute law is greatly hampered by the rapidity with which statutory changes are made and by the growing number of provincial enactments which directly affect the rights and remedies of parties to litigation in spheres to which they apply. Important among the recent provincial statutes are the provincial Money-Lenders Acts, Agricultural Debtors Acts, Hindu Religious and Charitable Endowments Acts and Wakf Acts—all of varied patterns within each group. Apart from the diversity of statute law, of customary law and personal law, there is the growing volume of conflicting case-law to cope with. To cater equally for the special needs of all provinces, when such diversities exist, is hardly feasible.

I have, therefore, confined myself within a reasonable compass mostly to giving Forms of Pleadings which are of general application and have, wherever necessary, indicated in the explanatory notes, in the preparation of which the latest and the best original authorities have been consulted, the effect of special provincial legislation, customary law, or the conflict of case-law where it exists, not omitting to point out where the Indian law differs from the English law. Even so, the pleader in not a few cases will have to depend upon his own resources and his knowledge of local laws and customs to adapt his pleading to the requirements of the case. Nevertheless, the Principles of Pleading will, it is hoped, be of service in indicating valuable points which should not be overlooked, and the Forms of Pleadings as they are will at least serve as useful guides.

I take this opportunity to express my deep sense of gratitude to His Lordship the Honourable Sir John Lort-Williams, K. C., for the Foreward he has so kindly written for this book. To His Lordship the junior members of the Calcutta Bar owe not only an impetus but practical guidance in the drafting of concise and precise pleadings, and, to His Lordship's observations in Court, I owe in a large measure my inspiration to pursue the cultivation of the art of pleading.

I gratefully acknowledge my indebtedness to Mr. K. P. Khaitan, Barrister-at-Law, who during the progress of the work assisted me by making valuable suggestions from time to time and gave me whole-hearted encouragement. My grateful thanks are also due to Mr. Sambhu Nath Banerjee, Barrister-at-Law, for some of his weighty

suggestions. Among friends to whom my grateful thanks are due for making useful suggestions at times are Mr. J. N. Majumdar, Senior Standing Counsel, Bengal, and Messrs I. P. Mukerji and A. K. Ray (jr.), Barristers-at-Law.

It remains to express my indebtedness to Mr. Hemanta K. Bose, Advocate, and Mr. Dharendra K. Ghosh, Barrister-at-Law, for their unremitting collaboration in sifting the voluminous case-law for the bulk of this work, and to Mr. P. Raghaba Iyer, Advocate, for a part thereof. I am indebted to Mr. Dharendra K. Ghosh also for his great assistance in verifying the references to cases with the original reports and in reading the proofs, but for which my task would have been rendered much more arduous. I also acknowledge my indebtedness to Mr. Satya Charan Chakravarty for his skill and industry in preparing the Table of Cases.

To economise space, one Report for each case has been cited in the body of the book. But the Table of Cases contains references to most of the contemporary series of Reports, especially Indian Reports. The Index will facilitate the practitioner's task in finding the reference he requires.

Since printing the body of the book, a judgment of far-reaching importance has been delivered by Mr. Justice Edgley of the Calcutta High Court, in *Noor Jehan Begum v. Eugen Tiscenko* on the non-maintainability of a suit for dissolution of marriage claimed by a non-Moslem wife after her conversion to Islam, upon refusal by the husband to comply with the wife's request to embrace that faith. This judgment ought to be read in connection with Form No. 415, pp. 1081, 1082.

Bar Library,
Calcutta.
January, 1941.

S. C. G.

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ADDENDA ET CORRIGENDA.

- P. 81, f.n. (2)—substitute (1839) 9 C. & P. 204 for (1839) C. & P. 204.
do (3)—substitute (1835) 3 A. & E. 132 for (1835) 3 A. & B. 132.
- P. 82, f.n. (7)—substitute (1840) 11 Sim. 23 for (1840) 11 Sind 23.
- P. 132, f.n. (3)—substitute 1933 Mad. 883 for 1933 Mad. 881.
- P. 135, f.n. (1)—read also 34 C.W.N. 761 and 42 C.W.N. 65, 68.^c
- P. 141, f.n. (5)—read also 42 C.L.J. 280, 467.
- P. 143, f.n. (3)—read also 61 Cal. 711 ; A.I.R. 1940. Rang. 178.
- P. 158, f.n. (7)—substitute 53 Cal. 132 for 58 Cal. 132.
- P. 165, f.n. (3)—substitute (1925-26) 30 C.W.N. for (1930-31) 30 C.W.N.
- P. 178, f.n. (3)—substitute 28 All. 112 for 23 All. 112.
- P. 204, f.n. (3)—read also 22 Cal. 8 ; 1940 Mad. 810 ; 54 All. 646 ;
1935 Pat. 24 ; 1928 Lah. 674.
- P. 361, f.n. (5)—substitute 1935 Pat. 503 for 1935 Pat. 593.
- P. 383, f.n. (6)—read also 1930 Cal. 678 ; 1932 Rang. 114, 117.
- P. 385, f.n. (3)—substitute 38 Cal. 812 for 83 Cal. 812.
- P. 434, f.n. (2)—read also 1940 Rang. 207 ; 57 All. 242 ; 13 Rang. 43.
- P. 490, l. 13 —substitute 'need not' for 'must'.
- P. 496, f.n. (4)—substitute 5 Rang. 705 for 5 Rang. 51.
- P. 501, l. 34 —substitute 'Condition of mind' for 'knowledge'.
- P. 628, f.n.l. 1—substitute 38 C.W.N. 813 for 34 C.W.N. 813.
- P. 707, l. 1 —add "less, then lying in" before the words "the
plaintiff's premises".
- P. 815,—substitute 'PLAINT' for 'CLAIM' above the number '193'.

INTRODUCTION

Pleadings in India are more often than not loose, prolix, argumentative, full of unnecessary and irrelevant matters and sometimes contain personal attacks on the adversary and, according to the English standard, possess in an ample measure the vices of defective pleading. The pleadings in the Muffassil Courts are generally in a more defective state than those on the Original Side of the High Courts. The High Court pleadings are written in the English language and are drafted by lawyers who are more or less familiar with the English system and are instructed by trained solicitors and generally receive adequate remuneration for the work ; whereas the Muffassil pleadings are usually written in the vernacular languages and drafted by lawyers (sometimes by the clerks), who are generally insufficiently instructed by the lay clients or by their equally lay agents and who in many cases receive a poor remuneration out of all proportion to the work involved. It often happens that when a lay client or his agent instructs his lawyer to file a plaint or a written statement, he has not brought with him the necessary documents and papers which have to be referred to or relied on and the pleader has no opportunity to know exactly their contents. It may well be that the plaint has got to be filed the same day the pleader is instructed so as to prevent the cause of action being barred, or the written statement has got similarly to be filed because of a peremptory order. What usually happens in such cases is that the pleader in his wisdom is compelled, if it is a plaint, to make vague allegations and not to commit himself to a definite case, and, if it is a written statement, to make evasive denials. Many of the vague allegations and evasive denials in pleadings are attributable not so much to the want of knowledge of the rules of pleading on the lawyer's part as to the peculiar situation in which the lawyer is placed by reason of the dilatory habits of his client. Added to this, are the forces of tradition and habit. The pleaders stick to the system of pleadings handed down to them from generation to generation and the Courts accustomed to loose pleadings that are filed from day to day accept them as the settled order of things. The Select Committee who shaped the Civil Procedure Code in its present form consisted of lawyers of great eminence

possessing intimate knowledge of Indian conditions; and they thought it wise to relax the rigour of some of the English rules to accommodate those conditions. They embarked on a great experiment. Experience has shown that the special rules in the Code permitting issues to be raised by the oral examination of parties and from materials outside the pleadings,¹ and permitting even matters admitted to be proved,² have rendered the rules of pleading contained in Orders VI, VII and VIII of the Code as ideals to be kept in view rather than as rules to be rigorously followed.

These special rules of the Code are also applicable to the pleadings on the Original Side of the High Courts and have not been abrogated by any of their own rules. But in practice, the issues are generally raised on the pleadings and the Judges make a more frequent exercise of their power to order amendments of pleadings and filing of additional pleadings. This is one of the additional reasons why the High Court pleadings are generally in a better state than the pleadings in the Mufassil. Even so, they are not free from the vices of defective pleading. The habit of the Indian litigant to sleep over his rights and to instruct his lawyer at a time when it is not possible to consider his case fully before drafting his pleading is one of the reasons. Another reason is, that juniors in the profession in the present day do not generally care to pass through a period of probation by devilling with competent seniors before aspiring to draft pleadings. Prolixity is much too prominent a characteristic in Indian pleadings and the advice of the Hon'ble Mr. Justice Lort-Williams of the Calcutta High Court to junior members of the Bar to follow the standard of Bullen & Leake's Precedents of Pleadings has come none too soon.³

A few suggestions for improving the present state of pleadings: The present defective state of pleadings in India, as has been pointed out, is due to a variety of factors of which the forces of tradition and habit are the strongest. No radical improvement in the state of pleadings is possible except through the combined efforts of legislators, who are to lay down the rules, the lawyers who are to follow the rules, the Judges who are to see that the rules are obeyed, and

1. O. 10, r. 1 and O. 14, rr. 1-4, C.P. Code.

2. O. 8, r. 5, C. P. Code.

3. *Ramprasad v. Hazari null*, (1931) I. L. R. 53 Cal. 418.

the Universities which are to impart to young men the knowledge of the rules.

Amendment of the Code : The first thing necessary is to amend the Code. The rules of pleading formulated by the Code were intended to suit Indian conditions at the time they were made. They were in the nature of an experiment and they have been in force for the last thirty years. They certainly need revision in the light of experience gathered in their working and in the light of greater facilities of service of educated lawyers which litigants now have than before. It is not suggested that the English rules of pleading ought to be indiscriminately adopted irrespective of Indian conditions. What is suggested is that the existing rules may be modified to suit the present conditions and with a view to bring about a change for the better in the present state of pleadings. To what extent they need modification ought to be left to an expert Committee. The High Courts ought also to make rules applicable to their Original Sides superseding such of the rules of the Code as have caused laxities in pleading¹ and ought also to make fuller rules for filing of subsequent pleadings. Such of the High Courts as have not made any rules for Counter-claim and Third Party Procedure ought to consider if such rules should not be made.

Forms of pleading : The Code contains certain Forms of pleading in Appendix 'A' and it is enjoined that the said Forms when applicable, and where they are not applicable Forms of the like character, as nearly as may be, shall be used for all pleadings.² But these forms are in the English language and are seldom consulted by the Mufassil pleaders in drafting a pleading in the vernacular language. The pleader's clerks who generally in petty cases do the drafting of pleadings are not aware if any Forms of pleading exist. It is suggested that Forms of pleading in the Vernacular language may be compiled by each High Court for use in the subordinate Courts. These Forms may be appended to the Rules that may be framed by the High Courts under Sec. 122 of the Code.

Text Books on Pleadings : Text books containing the law and precedents of pleading in the English and Vernacular languages are also likely to stimulate in young minds a sense of correct pleading.

1. Such as Proviso to O. 8, r. 5 ; O. 10, r. 1 ; O. 14, r. 1 (5) and rr. 2-4 C. P. Code.

2. O. 6, r. 3 C. P. Code.

Exercise of control by the High Court : The danger of tradition overcoming the rules of law is so great in India that no substantial advance in the state of pleadings is likely to result unless the High Courts exercise vigilance over the Subordinate Courts. The High Courts ought consistently to condemn the practice of raising issues which do not arise on the pleadings, of letting in evidence upon matters which have not been pleaded, and to insist on the Subordinate Courts exercising their power of rejection and amendment of pleadings and of ordering additional pleadings to be filed and further and better particulars to be furnished in all proper cases.

What the Universities can do : When a young law graduate after passing out of the University joins the Mufassil Bar, he soon gets himself initiated in the system of pleadings which prevails in the Mufassil Courts. Not having received any practical education or training in the drafting of pleadings in the University, he cannot but take the pleadings of his seniors as his model and to slavishly imitate them. The need for University education in the art of drafting pleadings has long been felt. The University training in this special line will enable the junior members of the bar to combat the forces of tradition. Not only so. The members of the Subordinate Judiciary are recruited from members of the bar and when those having such University training and some experience at the bar are on the bench, they are likely to correct the errors of pleading and thereby bring about an improvement in the state of pleadings. This improvement will necessarily be a slow process but if the system is improved and steps in the other directions as suggested above are taken, pleadings are bound to improve from stage to stage.

Principles and Forms of Pleading.

PART I.

HISTORY OF PLEADINGS.

CHAPTER I.

PLEADINGS DURING THE HINDU PERIOD.

The system of pleading in civil suits in British India has its roots in the remote past. There were specific rules of pleading in the Hindu times and also in the Mahommedan times. But under the judicial system introduced by the British, the English rules came to be gradually introduced, and we have in the Civil Procedure Code of 1908 a curious mixture of the indigenous and the foreign systems. A short resume' of the Hindu and Mahommedan systems of pleading is given in order to show that the chain connecting the distant past with the present has not been completely snapped.

The Hindu Period dealt with in this Chapter is limited to the period beginning with the establishment of the Maurya Dynasty in 322 B. C. and ending with the Mahommedan conquest of Hindusthan towards the end of the 12th century A. D. There were independant Hindu kingdoms even during the period known as the Mahommedan period. For obvious reasons, they have been omitted from consideration and the subject of this Chapter has been confined to the more important Hindu dynasties and to a period during which a continuous narrative has been rendered possible.

The first historical records of Hindu civil institutions are to be found in the Arthasastra written by the able minister of Chandra Gupta Maurya¹ about 300 B. C. The Mauryas had a regular system of civil administration which, in the words of Vincent Smith, "anticipated in many respects the institutions of modern times."²

1. Variouslly known as Vishnu Gupta, Kautilya, Chanakya.

2. Vincent Smith's Oxford History of India (2nd Edn.), p. 92.

The Code or Institutes of Yajnavalka¹ written about the 4th Century A. D., possibly in the early days of the Gupta Emperors,² was a sort of revised Code of law and procedure. As to pleadings, the Yajnavalkya Code, however, reproduced the rules of pleading as embodied in the Arthashastra. According to Yajnavalkya, the pleadings consisted of the *Plaint (Bhasa)* and the *Answer*. A *plaint* was of two kinds : (1) a *plaint founded on suspicion*³ (in consequence of defendants keeping bad company) ; (2) a *plaint founded on facts*. A *plaint founded on facts* was two-fold : (1) containing a statement of denial (of the plaintiff's claim on the part of the defendant) ; (2) containing a statement of an active or positive wrong.

Suits were commenced by informing the King.⁴ This information was reduced to writing when made and was called the first complaint. The plaintiff (*Arthi*) was interrogated by the King or his proxy and, if the complaint was found to be proper, an order, bearing the seal or a messenger was sent to summon the defendant. After the defendant (*Pratyarthi*) appeared, whatever was alleged by the plaintiff was again reduced to writing by the Chief Judge with greater particularity⁵ in the presence of the defendant, at first on a board in white chalk, and then, after revision, on paper. No departure contrary to or inconsistent with the first complaint, and no amendment of the *plaint* after the defendant had made his answer was permissible. The *plaint* must disclose the cause of action (*artha*), must be intelligible, concise, precise, unambiguous and must include the whole claim. The answer of the defendant was taken in writing in the presence of the plaintiff. The defendant might admit or deny the claim or, while admitting the plaintiff's claim, set up a special plea by way of avoidance, or plead former judgment in bar (*res judicata*). The answer must not be dubious, either too short or too long, irrelevant, incomplete, inconsistent or unreasonable. Except in cases of tort, the defendant was

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1. See Yajnavalkya-Smriti (with commentary called *Mitakshara* of Sree Vijnaneswara) edited by J. R. Gharpure.
 2. Gupta period commenced from 320 A. D. and lasted till 647 A. D.
 3. The word 'apprehension' would better suit the context.
 4. By 'King' is of course meant (i) 'the King in person' where he is personally administering justice, (ii) where he is not personally administering justice 'his representative', that is, in the various Dharmasthiya Courts, 'the Chief Judge' and in the local Courts of the village, the Gramabradha, and so on.
 5. i.e., marked with the year, the month, the fortnight, the day and the

not permitted to set up a counter-claim or a counter-charge until the complaint was disposed of. Pleadings subsequent to the defendants' answer were unknown.

The *Narada Smriti* which was written during the Gupta period not earlier than the 4th and 5th Century A. D., marks an advanced stage of development in the system of law and procedure. According to *Narada*, (1) the claimant shall cause the plaint to be written, and (2) the defendant, immediately after having been acquainted with the tenor of the plaint, shall write down his answer¹.

Asahaya's Naradabhāṣya, which is a commentary on *Narada-Smriti*, says that during the time of *Narada* the parties had to file their pleadings in writing². But the words "the claimant shall cause the plaint to be written" appearing in the *Narada-Smriti* hardly justifies the necessary conclusion that the plaintiff had to file a written plaint in Court, or, as Mr. Jayaswal says, "Plaints prepared by plaintiff at home were filed by him in Court"³. That this conclusion is hardly justified will appear from *Brihaspati-Smriti* which, according to all authorities, was written very near the time of *Narada*, and according to Jolly, was written in the 6th or 7th century A. D.,⁴ that is, long after the *Narada-Smriti* was written. According to *Brihaspati*, the rule was as follows, "The plaintiff shall write down on the floor, till the whole matter has been definitely stated. When the plaint has been well-defined, a clear exposition given of what is claimed and what not, and the meaning of the plaint fully established, the Judge shall then cause the answer to be written by the defendant."⁵

As to when the practice of filing written pleadings came into vogue it is impossible to say. But if the system followed by the early Mahomedan conquerors who adopted the Hindu Code is any index, it appears that up to the 13th century A. D. and possibly beyond it, it was optional with the parties to state their respective cases verbally or in writing.

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1. *Sacred Books of the East*—edited by Max Muller, Vol. XXXIII, p. 24.
 2. *Sacred Books of the East*—edited by Max Muller, Vol. XXXIII, p. 24 (note.)
 3. K. P. Jayaswal's *Manu & Yagnavalkya*, Tagore Law Lectures, 1917, p. 123.
 4. K. P. Jayaswal's *Manu & Yagnavalkya*, Tagore Law Lectures, 1917, p. 64.
 5. *Sacred Books of the East*—edited by Max Muller, Vol. XXXIII, p. 292.

CHAPTER II.

PLEADINGS DURING THE MAHOMMEDAN PERIOD.

In Moslem India (by which expression is meant the territories governed by Moslem kings), prior to the establishment of the Slave Dynasty in 1206, there was no machinery worth the name for the administration of civil justice in the conquered territories. The period 1206 to 1555 was one of settled government when administration of justice was placed in the hands of regular judicial tribunals. The Moghul period (1555-1765) marked the steady development in the administration of civil justice. There were regular tribunals of different grades. As among the Hindu rulers, the sovereign constituted himself the superior Court and the final arbiter of the destinies of litigants. There were two classes of Courts: (1) Courts of Canon Law, (2) Courts of Secular Law. The designations of the tribunals of the Courts of secular law were different under different monarchs. An important designation was that of 'Munsif' to try civil suits, an outcome of the judicial reforms of Sher Shah. Rules of Procedure as laid down in the books of Fiqah and other text books were the guide but not necessarily binding on the Sovereign.

The fundamental rules of pleading under the Mahommedan Code were as follows: The plaintiff can make his claim (*dawa*) either verbally or in writing. If the claim is made verbally, it is reduced to writing by a scribe or assistant of the Court. The '*dawa*' must contain the names, descriptions of parties, the names and particulars regarding witnesses and must disclose a good cause of action. If the plaintiff makes out a *prima facie* case by the examination of himself and his witnesses and if the claim has been made before a tribunal having jurisdiction (both pecuniary and territorial)¹ then and then only the defendant, the '*Khashm*' (opponent of the claimant), is called upon to answer. If the defendant does not appear after service of summons upon him, the Court enforces his attendance. If his attendance cannot be secured, the Court appoints a representative for watching the interest of the defendant during trial. If both parties are present in Court the plaintiff is asked to state his case and if his claim is in writing he is required

1. Fat. Alam, Vol. IV., p. 1.

to verify it. The defendant may admit the claim or deny it. If he denies, the plaintiff may put him upon oath. If he refuses to take the oath, the plaintiff must proceed to regular trial. The defendant may admit the plaintiff's claim and plead new facts by way of avoidance. He is also permitted to take an objection in point of law, such as want of jurisdiction, limitation. He can also raise pleas analogous to *res judicata* and *estoppel*. There were rules relating to the joinder of parties, representative suits, representation of minor or lunatic by a guardian, representation of a deceased person's estate and so on. There were rules enabling the parties to refer matters in dispute to arbitration. It should be noted that the policy of the Mahommedan Law was to administer speedy and substantial justice and as such there were no technical forms of pleadings with which the modern system is loaded. The Memorandum of claim, if any, was in the form of a narrative of the plaintiff's claim which could run into any length setting forth both facts and evidence. Where the pleadings were verbal, a Memorandum of the parties' respective cases was taken down in the Minutes of the Court. The pleadings were supplemented by the examination of the parties in Court and it was the duty of the Court to determine the issues before the trial.

CHAPTER III

PLEADINGS DURING THE BRITISH INDIAN PERIOD UP TO 1908.

In the early days of the British settlement the Mahommedan practice was generally followed in the trial of suits in the Courts established by the East Indian Company. In course of time the Mahommedan system was invaded by Regulations, by legislative enactments and by the English doctrines of law and procedure until it was replaced about the year 1781. But the system has left a legacy of legal terms such as *Adalat* (court), *Amanat* (trust), *Arzee* (plaint), *Batil* (void), *Dawa* (claim), *Hakim* (judge), *Hazir* (present in court), *Khas* (one's own), *Malik* (proprietor), *Muddai* (plaintiff, claimant), *Muddad a Laihi* (corrupt form : *Muddalgh*, defendant), *Munsiff* (judge of the lowest grade trying civil cases), *Salami* (earnest money), and its force of tradition even on the present day Muffasil pleadings.

The pleadings in civil suits or actions in the British Indian Courts from the earliest times down to about 1861 were influenced by the rival or parallel judicial institutions : (1) the courts established by the Crown and Parliament which administered the English Common and Statute Law and followed the English practice and procedure save as altered by the Regulations and legislative enactments, and (2) the Courts usually denominated, Zilla, City and Provincial Courts, which were governed by Rules, Ordinances, Regulations and legislative enactments and which had nothing to do with English law and procedure save as applied by the said Rules Ordinances, etc. The foundation of this dual system was due to the disinclination of the British settlers to be governed or regulated by anything but their own laws and procedure and the unsuitability of applying the English law and procedure to any great extent to natives who had become accustomed to the simplicity of Moghul Jurisprudence and had their special habits, customs and prejudices.

1. The Courts established by the Crown and Parliament :—

The first authority to establish Courts of Judicature was given to the Governor and Council in 1683 by the Charter granted by Charles II. The Courts were directed to decide according to equity and good conscience, and according to the laws and customs of merchants.

The Mayor's Courts (which superseded the then existing Courts) at Madras, Fort William and Bombay in 1726¹ were to try, hear and determine all civil suits, actions and pleas between parties who were not natives of the several towns. The laws applicable to the Mayor's Courts were all the Common law and Statute law at that time extant in England. By the Charter of 8th January, 1753, Mayor's Courts were re-established at Bombay and Calcutta and a Court of Record was established at Madras. It was enacted that suits between natives were not to be entertained by the said Courts except by their consent.

By the Charter of 26th March, 1774, a Supreme Court of Judicature was established at Fort William and by an Amending Act of 1781 the jurisdiction of the Supreme Court at Fort William was defined as limited to Calcutta.

The Mayor's Courts at Madras and Bombay were superseded by

the Recorder's Courts in 1798. A Supreme Court of Judicature was established at Madras in 1801¹ and at Bombay in 1823² on the same lines as the Supreme Court at Fort William. The said Supreme Courts at Madras and Bombay superseded the Recorder's Courts.

All the three Supreme Courts had Civil, Criminal, Ecclesiastical, Equity and Admiralty Jurisdictions. The laws administered were the Common law and Statute law of England, Statute expressly extended to India, Civil law as it obtained in the Admiralty and Ecclesiastical Courts in England, Regulations and the Hindu and Mahommedan law. Actions in the Supreme Courts were commenced by a plaint or bill in writing containing the cause of action or complaint and the defendant after service of summons or precept in the nature of summons (containing a short notice of the cause of action) upon him could appear and plead such matter in abatement, bar or other avoidance or otherwise as he might be advised. The plaintiff's Reply to the Defence was called Replication. Although the rights of the Hindus and Mahommedans were to be determined according to Hindu and Mahommedan law, yet the forms of pleading in relation to those rights were to be according to English law.³ On the Equity side of the Supreme Court, there were rules prescribing the form of bills of Equity, the defendant's right in answering replication, the mode of receiving suits, the mode of determining questions of legal right without referring to the Common Law side. The pleading on the Equity side followed the lines of elaborate chancery pleadings in England. The rule that "all scandalous and impertinent matter may be expunged" was aimed against irrelevant pleadings. The Supreme Court was to take judicial notice of the Regulations of the Bengal Government but not of the practice and mode of procedure of the Muffasil Courts.⁴

2. The Zilla, City and Provincial Courts :—

After Hastings became Governor in 1771, the Committee appointed by the Court of Directors strongly criticised the inefficiency of the Mahommedan Law Courts and characterised them as "instruments of oppression."

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1. 39th and 40th Geo. III. C. 79.
 2. 4th Geo. IV. C. 71.
 3. Dictum of Anstruther C. J., in *Lloyd v. Hurroprayah Debee* (18th Nov. 1799) Sm. R. II; Morley's Digest, Vol. I, p. 499.
 4. *Woodub Ohunder Mallick v. Braddox* (15th Jan. 1844), 1 Fulton; Morley's Digest, Vol. I, p. 500.

In accordance with the report of the Committee, the native Courts in Bengal (the Fiscal Court, the Court of the Daroga Adawlut *al alea* and the Courts of the Cauzee and Mufti) were replaced by the establishment of a Civil Court for each district (Muffassil Dewany Adawlut) presided over by the Collector of each district and a Civil Appellate Court (Sadar Dewany Adawlut) at the seat of Government. In the district of Calcutta a Civil Court was established on the plan of the District Courts, presided over by a member of the Council.

The rules relating to pleadings and trial of civil actions so far as these courts were concerned were contained in a series of Regulations. By the General Regulations made and ordained by the President and Council in Bengal on the 21st August, 1772, actions in these courts were to be commenced by petitions, called 'petitions of complaint' (Arzee) lodged in a box placed at the door of the Court (Kutchery). All petitions so lodged were on each court day to be read out in the presence of the Collector by the Arizbeggy of the Kutchery. A limited time was to be allowed to the defendant to give answer which when received was to be filed and read. Thereafter parties were to be examined *viva voce*, and if necessary, witnesses were to be examined. *A sensible and effective safeguard against 'trivial and groundless complaints' was provided in the authority given to the court to impose a fine or to inflict corporal punishment not exceeding 20 lashes with a rattan (clause 17).*

The Regulation passed by the Governor-General and Council on 11th April, 1780, prescribed the procedure of the Provincial Dewany Adawlat as follows : First, to file and read the petition of the complainant ; secondly, to summon the defendant and require him to give security to answer the plaint, which if he does not give, the Superintendent may either confine him by peons or otherwise at his discretion ; to allot a limited time for the defendant to give answer which when received, shall also be filed and read (clause 6). The same Regulation provided that the plaint must be signed or sealed by the plaintiff or his authorised Vakeel and must contain a particular statement of the case. The same rules were to be observed by the defendant in his answer and the rejoinders or replies which might follow (clause 7). A commission was to be charged on every plaint and was to be deposited at the time of filing of the plaint and every plaint must necessarily state the sum or value, and in disputes regarding land, the annual produce or jama of the subject of the suit (clauses 37, 38). Language of the pleadings was to be Persian or

Bengali. No English petitions were to be delivered (clause 9). To curb and restrain 'trivial and groundless complaints', the same use was to be made of the rattan as before (clause 21).

By the Bengal Regulation of July, 1781, an innovation was introduced by which the Court, after a person had preferred a complaint, was required to issue a Tállub Chitty (summons) containing a short account of the nature or demand contained in the complaint. This is the origin of the Concise Statement of the present day which has got to accompany summons¹.

In 1781, an Act of Parliament² extended Parliamentary recognition of the Provincial Courts which existed independently of the Supreme Court at Fort William and at the same time empowered the Council to frame Regulations for the said Courts.

Since 1781 a large number of Regulations continued to be enacted for over half a century regulating the procedure of the Saddar and Provincial Adawlat. In 1786, during the Governor-Generalship of Lord Cornwallis, a Civil Court under a European Judge was established for each district. These new Courts were provided with a bulky Code prepared by Mr. George Barlow. But it was much too loaded with formalities and technical rules of procedure. It is not necessary to trace the further growth of the Adawlat in the different parts of British India, nor to attempt to specify the different Rules and Regulations applicable to the several Courts. It will be sufficient to note that the Adawlat system at Madras and Bombay were based upon the Regulations passed by the respective Governments of those Presidencies in the year 1802 and 1827 and that the plan introduced into Bengal was the foundation of these systems.³ Another important point to be remembered is that prior to 1793 the territorial possessions of the East India Company were without a systematic Code of British laws and Regulations.

The rules of pleading contained in Regulations IV of 1793 and subsequent Regulations were as follows :—Pleadings are to be in writing ; no complaint or answer to a complaint is to be received but from the plaintiff or defendant, as the case may be, or from their respective Vakeels. Every complaint is to state precisely

1. Cf. O. V, r. 2, C. P. Code, 1908.

2. 21 Geo. III, C. 70.

3. Morley's Justice in British India, p. 41.

the matter of complaint, the amount or value of the subject-matter, the name of the person complained against and the time when the cause of action arose; and every plaint is to be signed, numbered, and dated in the order in which it is received by the Judge. Institution fee is to be tendered, and security for the pleader's fee, if a Vakeel be employed, is to be furnished at the time of presentation of plaint. When this is done, a summons containing a short account of the demand is issued requiring the defendant to accompany the officer deputed to serve the summons or to deliver to him good and sufficient security to appear in person or by Vakeel and answer to the complaint on a day appointed. If the defendant refuses or fails to give security, the Nazir of the Court is to take his person into custody and bring him before the Court which is empowered to commit him to close custody until he shall have given the required security. No security need be furnished if the defendant admits the plaintiff's claim or refuses to make any answer. No persons are to be joined as defendants unless they have a joint interest in the matters at issue in the cause or are jointly answerable for plaintiff's claim. The plaintiff however may be allowed to rectify his plaint. It is the duty of the Judge to reject in the first instance any complaint which may not be preferred in conformity with the Regulations¹.

When the defendant delivers his answer to the complaint, the plaintiff is to reply to it on the next Court day. The defendant is entitled to deliver his Rejoinder on the same day with the Reply or on the succeeding Court day. No further pleadings are ordinarily admissible, but, for sufficient cause, the Court may allow supplemental complaint and supplemental answer and also Reply and Rejoinder there to be filed. An interesting rule was that when a defendant refused or neglected to rejoin at the time appointed, the Registrar of the Court was to enter a Rejoinder for him². It may be noted that the provision of corporal punishment for 'trivial and groundless complaints' was omitted in Regulation IV of 1793 and has not been revived since.

The Regulation prescribing the procedure of the Provincial Courts were "by the constant process of repeal and amendments at last gave a very uncertain and obscure expression to the rules which they provided." And although the declared intention of the British

1. Harrington's Analysis, p. 65 (note)

2. Harrington's Analysis, p. 69.

Government was against any general application of English laws and procedure to the inhabitants of the country, in practice, many technicalities of English law and procedure were gradually assimilated into the Regulations.

The Civil Procedure Code of 1859 :—

In 1858, the East India Company was abolished and the Crown assumed direct responsibility of the Government of India. This had its effect, so far as the administration of civil justice was concerned, in the establishment of a uniform system of Courts, in the application of a uniform civil law as far as practicable, and in the formulation of rules prescribing equal liability to jurisdiction.

In 1859, the policy of bringing about uniformity was manifested by the passing of the Civil Procedure Code (Act VIII of 1859) regulating the procedure of the Courts of Civil Judicature not established by Royal Charter.

In 1861, an Act of Parliament¹ made it lawful for His Majesty, by Letters Patent, to establish High Courts in India. Clause 15 of the said Act provided that each of the High Courts when established shall have superintendence over all Courts which may be subject to its appellate jurisdiction and shall have power to make and issue general rules for regulating the practice and proceedings of such Courts.

In 1862, the Supreme Courts and the Courts of the Saddar Dewany Adawlat were abolished and in their stead, by Letters Patent, High Courts were established at Fort William, Madras, and Bombay, having Original Civil, Criminal, Admiralty and Vice-Admiralty, Testamentary and Intestate, and Matrimonial jurisdictions and also having appellate jurisdiction over Civil Courts in the Provinces.

With the abolition of the Supreme Courts, their procedure in civil actions between party and party was abolished and the Letters Patent of the respective High Courts provided that except in matters testamentary and intestate, and in matters matrimonial, the proceedings in other civil suits were to be regulated by Act VIII of 1859, or by such further or other enactments of the Governor General in Council in relation to the Civil Procedure as were in force at the date of the several Charters.² This was modified by

1. 24 and 25 Vict. C. 104.

2. The enactments in force were Act XVII of 1852 and part of Act VI of 1854.

clause 37 of the Letters Patent of 1865 which prescribed that in making rules and orders for the purpose of regulating all proceedings in civil cases, the High Court is to be guided, as far as possible, by the provisions of the Code of Civil Procedure (Act VIII of 1859) and the provisions of any law which has been made amending or altering the same, by competent legislative authority for India.

Since 1865 various other High Courts have been established in different places, at Allahabad in 1866, at Patna in 1916, at Lahore 1919, at Rangoon in 1922 and at Nagpur in 1936. Of these, only the Rangoon High Court has got the Original Side. Various provincial Courts have also been established by various Acts of the Indian Legislature.

The Civil Procedure Code of 1859 brought about uniformity in the rules of pleadings and procedure. It specified the rules relating to the form and contents of pleadings and as to what pleadings are to be delivered. It provided that all suits were to be commenced by a plaint (sec. 25). Every plaint must be distinctly written in the language in ordinary use in proceedings before the Court and must contain particulars with regard to the name, description and place of abode of the parties, the relief sought for, the subject matter of the claim, the cause of action and where it accrued, and the grounds upon which exemption from the law of limitation is claimed (Sec. 26). Every suit must include the whole claim (Sec. 7), and every plaint must be properly subscribed and verified (Secs. 27, 28). In case of violation of any of the above rules, the plaint is to be rejected subject to the right of the Court to allow amendment (Secs. 29, 32). Before the defendant is called upon to state his defence, the plaint is also to be rejected if, upon the face of it, or after questioning the plaintiff, it appears to the Court that the subject-matter of the suit does not constitute a cause of action or that the right of action is barred by lapse of time¹ (Sec. 32). The defendant's answer to the plaint is his Written Statement. The word "Written Statement" however applied as much to the Written Statement of the plaintiff (plaint) as to the Written Statement of the defendant (cf. Secs. 120, 122, 123, and 124). The Code did not anticipate the modern rule, namely, "pleadings should state facts—not evidence." In a case decided on the original side of the Calcutta High Court in the year 1862, it was held as follows: "The Written Statements are intended to be

1. *Safuji-Kesraji v. Rajrangji*, (1878) 1 L. R. 2 Bom. 162; *Chetti Gaundan Sundram Pillai*, (1864) 2 Mad. H. C. R. 51.

detailed statement of the facts or evidence in support of the case of each party, not in the nature of pleadings, but an interchange of statements to ascertain what facts are admitted, and what are in dispute"¹. So far as the defendant is concerned, his Written Statement is not a pleading in confession and avoidance by which he is bound by the confession, and so compelled to prove the avoidance.² It is like an answer in Chancery and as such the whole admission must be taken together. A set-off, legal and equitable, can be pleaded by the defendant in his Written Statement so long as the sum claimed does not exceed the amount cognizable by the Court.³ Written Statements shall be as brief as the nature of the case will admit and shall not be argumentative or by way of answer one to the other and shall be subscribed and verified (Sec. 123). A Written Statement which is argumentative or unnecessarily prolix may be rejected by the Court. This was supplemented by the Court occasionally imposing fines on Vakeels for filing lengthy Written Statements.⁴ An important change effected was with regard to subsequent pleadings, that is, pleadings subsequent to the defendant's Written Statement. In the Supreme Courts there were Replication and Answer to the Replication, and, under the Regulations, the plaintiff could as of right file a Reply and the defendant a Rejoinder. The Code provided that no pleading subsequent to the defendant's Written Statement could be filed as of right, but the Court was empowered to call for an additional Written Statement on plain paper from any of the parties (Sec. 122). The additional Written Statement which the plaintiff might be required to file must not be by way of Rejoinder to the Written Statement of the defendant⁵. It was intended that the plaintiff should not only state fully the plaintiff's case, but that it should answer the defendant's case by anticipation⁶. Greater latitude was to be shown in the case of defendant's Written Statement than in the case of Plaintiff. In rejecting a prolix and argumentative Plaintiff, Seton-Karr and Macpherson J.J., observed that mere argument was inadmissible

1. *Hurchurn Dutt v. Hazaree Mull*, (1862) 1 Jur. 62 (O. S. Cal. High Court).
2. Per Peacock C. J., in *Sultan Ali v. Chand Bibi*, (1868) 9 Suth. W. R. 130.
3. Sec. 121 C.P.C. 1859; *Clark v. Ruthnavaloo Chetti*, (1865) 2 Mad. H. C. R. 296.
4. *Boolee Singh v. Hurobuns Narain Singh*, (1867) 7 Suth. W. R. 212.
5. *Jadub Ram Deb v. Ram Lochun Muduck*, (1866) 5 Suth. W. R. 56, at 53.
6. *Hurchurn Dutt v. Hazaree Mull*, *supra*.

even in the Written Statement in which greater latitude was allowed than in a Plaint¹.

The Code of 1859 was amended from time to time² but it was not until 1882 that any special rules relating to pleadings were formulated.

The Civil Procedure Code of 1882 :

The Civil Procedure Code, Act XIV of 1882, introduced some definite changes in the rules of pleadings. Such changes related to (i) the language in which pleadings were to be written (Sec. 49), (ii) the particulars to be contained in the plaint (Sec. 50), (iii) joinder of parties (Sec. 32), (iv) joinder of causes of action (Secs. 44 & 45), (v) grounds for rejection of plaint (Secs. 53 and 54), (vi) frame of Written Statements (Secs. 114 and 116); (vii) additional pleadings (Sec. 112). One important change was made by Sec. 53 whereby the Court was given the discretion at, or any time before, the settlement of issues, to reject a Plaint if it did not disclose a cause of action. In considering whether a Plaint should be rejected the Court should not interrogate the plaintiff but should confine itself to the Plaint³. Another important change was that an additional Written Statement by way of answer to the Written Statement of the defendant could be filed by the plaintiff, if required by the Court, or with the permission of the Court (Sec. 112). Some model forms of pleadings were for the first time set forth in the Fourth Schedule annexed to the Code. The C. P. Code, 1882, held the field for quarter of a century. In 1907 the Government of India appointed a Select Committee to consider the amendment of the Civil Procedure Code. This Committee submitted its Report in February, 1908, and the Civil Procedure Code, Act V of 1908, was passed by the Legislature and received the Governor-General's assent on 21st March, 1908, and came into force on the 1st day of January, 1909.

1. *Bishen Sahoye Singh v. Berr Kishore Singh*, (1867) 8 Suth. W. R. 296.

2. Act. IV of 1860 ; Act XLIII of 1860 ; Act XXIII of 1861 ; Act IX of 1861.

3. *Girdharlal v. Jayannath*, (1896) I. L. R. 10 Bom. 182.

CHAPTER IV.

SYSTEM OF PLEADING IN ENGLAND.

From the earliest times the method of arriving at an issue by alternate allegations has been practised in England. In the days when pleadings were oral and not written, it was the duty of the judges to 'moderate' the oral allegations made by each party in turn in such a way as at length to arrive at a point where some specific matter was affirmed on one side and denied on the other. In those days the judges allowed only one issue to be raised in respect of each cause of action and if the defendant had two or more defences to the same claim, he was compelled to elect between them. Even when oral pleadings were discontinued about the reign of Edward IV and the pleader delivered his pleading already written, there was no change in the form of allegation to be made, and the parties were made to come to an issue they had previously been made to do.

Before 1875, what is now a Statement of Claim was called a Declaration; a Defence, a Plea or Pleas; and a Reply, a Replication. The pleadings subsequent to a Reply, such as Rejoinder, Sur-rejoinder, Rebutter, Sur-rebutter are unchanged, except that now they cannot be delivered without leave and are seldom ordered.

Until the passing of the Common Law Procedure Act of 1852, the rules of pleading and the principles upon which pleadings were framed remained substantially the same and one essential feature of the prevailing system was that the merits of the case were subordinated to technicalities of form. The Common Law Procedure Acts 1852-1860 aimed at minimising the rigour of the technicalities of form and to correct the other defects in the old system.

In 1873, the Supreme Court of Judicature Act introduced in the High Court of Justice a comprehensive system of pleading which is still in force. This Act and the subsequent Amending Acts are now merged in the Supreme Court of Judicature (Consolidation) Act, 1925. The rules framed under those Acts are known as the "Rules of the Supreme Court, 1883". These Rules have the force and effect of a Statute. They have been amended from time to time.

The pleadings of the Courts other than the High Court of Justice are regulated by the rules of procedure of each Court. Thus there are special forms and rules of pleading for the Ecclesiastical

Courts¹, the County Courts², the Mayor's Court³ and every inferior Court of Record. Even as regards the High Court there are special rules of pleading as regards Divorce and Matrimonial causes, proceedings on the Revenue side and Crown side of the King's Bench Division.

It is not necessary to consider in this chapter the rules as regards the system of pleading in any Court other than the High Court of Justice. And further as regards the Rules of the Supreme Court, 1883, relating to pleading, it is not necessary to consider the rules relating to matters assigned to the Chancery Division or the Probate, Divorce and Admiralty Divisions.

The Supreme Court of Judicature (Consolidation) Act, 1925, and the Rules of the Supreme Court, 1883, applicable to the King's Bench Division of the High Court of Justice, are considered hereunder :

Pleadings : definition of—Sec. 225, Judicature Act, 1925, defines pleading thus :

“Pleading includes any petition or summons, and also includes the statements in writing of the claim or demand of any plaintiff, and of the defence any defendant thereto, and of the reply of the plaintiff to any counter-claim of a defendant”.

An originating summons⁴ is a pleading. So is a specially indorsed writ for some purposes⁵. So are particulars for some purposes.⁶

1. In the Ecclesiastical Courts, civil suits are commenced by a citation or monition which are followed by pleadings or pleas. After the defendant's answer, the plaintiff brings a rejoinder or counter allegation : Hals., 2nd Edn., Vol. XI, p. 612.
2. See County Court Rules, 1936, and County Court Acts, 1888 to 1934. The pleadings consist of a plaint containing particulars of claim and the defendant's defence or counter-claim. The rules as to the form of such particulars, set-off and counter-claim are the same as those of the High Court : Hals. 2nd Edn., Vol. XXV, p. 235.
3. The pleadings in “an original Mayor's Court Action” tried in the Mayor's and City of London Court are governed by the Rules of the Supreme Court as adopted by the Mayor's and City of London Court Rules, 1921 : Hals., 2nd Edn., Vol. XXV, p. 235, 236 (n).
4. Originating summons means “every summons other than a summons in a pending cause or matter”; O. LXXI, r. 1A., R. S. C.
5. *Anlaby v. Prætorius*, (1838) 20 Q. B. D. 764.
6. *United Telephone Co. v. Smith*, (1889) 61 L. T. 617; *Arnold & Butler v. Bottomley & others*, (1908) 2 K. B. 151.

Object of pleadings:—The alternate pleadings (statement of claim, defence, reply, rejoinder, etc.) of the English system are so conducted as to bring the parties to an issue and “the meaning of the rules of Order XIX (Rules of the Supreme Court) was to prevent the issues being enlarged, which would prevent either party from knowing when the cause came on for trial what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to definite issues and thereby to diminish expense and delay, especially as regards the amount of testimony required on either side”¹.

What pleadings are to be delivered :—Omitting from consideration the pleadings in the nature of petition or Summons², Special indorsements of writs³, Points of claim and Points of defence in Commercial cases⁴, the other pleadings that may be delivered in the High Court of Justice, unless they are dispensed with, and the rules by which they are regulated, are as follows :—

1. *Statement of claim*⁵—in which the plaintiff states the material facts upon which he relies in a summary form and claims the reliefs he seeks either simply or in the alternative.

2. *Defence*⁶—in which the defendant is permitted to take any of the following courses :

- (i) he may deny or refuse to admit the opponent's allegations.
This is called ‘traversing’;

1. Per Jessel M. R., in *Thorp v. Holdsworth*, (1873) 3 Ch. D. 637, 639.
2. Sec. 225 Jud. Act, 1925, which says that pleading includes petition or summons.
3. A writ can be specially indorsed in all actions in the King's Bench Division except actions for libel, slander, malicious prosecution, false imprisonment, seduction, or breach of promise of marriage, and actions in which fraud is alleged by the plaintiff. (O. III, r. 6, R. S. C. as amended in 1933 and 1937).
4. Cf. Odgers on Pleadings, 11th Edn., p. 70 and App. K., No. 4 D., R. S. C.
5. Under O. XX, r. 1, R. S. C. as amended by R. S. C. (No. 1), 1933, a statement of claim must as a rule be delivered in all actions commenced on or after 1st July, 1933, unless a Court or a Judge otherwise directs. In Admiralty actions in rem the plaintiff shall within twelve days from the appearance of the defendant, deliver his statement of claim (O. XX, r. 3, R. S. C.). For consequences of default of plaintiff in delivering statement of claim, see O. XXVII, r. 1, R. S. C.
6. O. XXI, R. S. C. For consequences of default of defendant in delivering Defence, see O. XXVII, rr. 2—11.

- (ii) he may confess or admit them and plead new facts to destroy the effect of the allegations admitted. This is called 'confessing and avoiding' or 'special pleading' ;
- (iii) he may admit the plaintiff's case and take an objection in point of law, formerly called 'demurer' ;
- (iv) he may counter-claim.

2a. *Defence containing matters arising since writ* : Any ground of defence which arises after action brought, but before the defendant has delivered his Defence, and before the time limited for his doing so has expired, may be raised by the defendant in his Defence, either alone or together with other grounds of defence.¹

2b. *Further defence* : Where any ground of defence arises after the defendant has delivered his Defence, or after the time limited for his doing so has expired, the defendant may within eight days after such ground of defence has arisen, or at any subsequent time by leave of the Court or Judge deliver a Further Defence setting forth the same².

2c. *Confession of such Defence* : Whenever any defendant in his Defence, or in any Further Defence alleges any ground of defence which has arisen after the commencement of the action, the plaintiff may deliver a confession of such defence with such variations as circumstances may require³.

2d. *Defence by a Third Party* : Where in the plaintiff's suit the defendant claims a remedy against a third party by way of contribution or indemnity or a relief relative to or connected with the subject matter of the plaintiff's action which is substantially the same as some relief claimed by the plaintiff or where any question between himself and a third party is substantially the same as some question arising between himself and the plaintiff, the defendant can bring in a third party by serving upon him a third party notice under O. XXIV, r. 1, R. S. C. The third party on being served with a 'third party notice' becomes a party to the action and is entitled to defend and even counter-claim against the defendant. He may in his turn bring in a fourth party and the fourth may bring in a fifth and so on.

1. O. XXIV, r. 1, R. S. C.

2. O. XXIV, r. 2, R. S. C.

3. O. XXIV, r. 3, R. S. C.

3. *Reply by the plaintiff* : The plaintiff may deliver a Reply by merely joining issue upon the Defence (though not on the counter-claim, if any). But he need not do so, because if no Reply is delivered all material statements of fact in the pleading last delivered shall be deemed to have been denied and put in issue.¹ But if the plaintiff has any new facts to plead he ought to state them in his Reply.² "The Reply is the proper place for meeting the Defence by confession and avoidance".³ The plaintiff cannot however in his Reply allege any fact inconsistent with his previous pleading.⁴

If the defendant has pleaded a Counter-claim, the plaintiff in his Reply must plead to it as though it were a Statement of Claim. He cannot merely join issue on a Counter-claim. He must deal specially with each allegation of fact of which he does not admit the truth except damages.⁵ If the plaintiff does not deliver a Reply to a Counter-claim, the statements of facts contained in such Counter-claim shall be deemed to be admitted.⁶

The plaintiff may in his Reply set up a Counter-claim as a shield against the defendant's Counter-claim.⁷ He may cause a third party notice⁸ to be issued against a person (not a party to the action) from whom he claims contribution or indemnity. "If after a Defence has been delivered, any ground of defence arises to any set-off or counter-claim alleged therein by the defendant, it may be raised by the plaintiff in his Reply, either alone or together with any other ground of reply".⁹

3A. *Further Reply by the plaintiff* : "Where any ground of defence to any Set-off or counter-claim arises after Reply, or after the time limited for delivering a Reply has expired, the plaintiff may within eight days after such ground of defence has arisen or at a subsequent time by leave of the Court or a Judge, deliver a Further Reply setting forth the same".¹⁰

1. O. XXVII, r. 13, R. S. C.
2. O. XIX, r. 15, R. S. C.
3. Per James L. J., in *Hall v Eve*, (1876) 4 Ch. D. 341 at 345.
4. O. XIX, r. 16, R. S. C.
5. O. XIX, rr. 15-17, R. S. C.
6. O. XXVII, r. 13, R. S. C.
7. Provided it arose at the same time and out of the same transaction as the Counter-claim : *Toke v Andrews*, (1882) 8 Q. B. D. 428.
8. O. XVII, R. S. C.
9. O. XXIV, r. 1, R. S. C.
10. O. XXI, r. 2, R. S. C.

3B. Reply by a third party : A third party who is made a party to the suit can deliver a Reply in the following cases :

- (a) Where the defendant by his Defence sets up any Counter-claim which raises questions between himself and the plaintiff along with the third person.¹
- (b) When the defendant claims any contribution or indemnity against the third party². In his Reply the third party may even counter-claim against the defendant.³ He may also bring in a fourth party who in his turn may bring a fifth.⁴

4. Pleadings subsequent to the Reply : The pleadings subsequent to the Reply are Rejoinder, Sur-rejoinder, Rebutter and Sur-rebutter. The last three are seldom ordered.⁵ No pleading subsequent to the plaintiff's reply can be delivered without leave.

Close of pleadings⁵ : Where a pleading subsequent to Reply is not ordered, then, at the expiration of seven days from the delivery of the Defence or Reply (if any) ; or, where a pleading subsequent to Reply, is ordered, and the party who has been ordered or given leave to deliver the same fails to do so within the period limited for that purpose, then, at the expiration of the period so limited, the pleadings shall be deemed to be closed and material statements of fact in the pleading last delivered shall be deemed to have been denied and put in issue : Provided that this rule shall not apply to a Reply to a Counter-claim and that unless the plaintiff delivers a Reply to a Counter-claim, the statements of fact contained in such Counter-claim shall at the expiration of fourteen days from the delivery thereof or of such time (if any) as may by order be allowed for delivery of a Reply thereto be deemed to be admitted, but the Court or Judge may at any subsequent time give leave to the plaintiff to deliver a Reply.

When pleadings dispensed with : The English rules do not insist that actions should be tried upon pleadings in all cases. In certain cases actions may be disposed of without pleadings. The following illustrations may be noted :

- (a) When the parties to any cause or matter concur in stating

1. O. XXI, rr. 11-14, R. S. C.
 2. O. XVII, r. 7, R. S. C.
 3. *Barclays Bank v. Tom*, (1923) 1 K. B. 221.
 4. XVII, r. 7, R. S. C.
 5. O. XXVII, r. 13, R. S. C.

the question of law arising therein in the form of a special case for the opinion of the Court, or when a special case is stated by order of the Court¹.

- (b) When the parties to a cause or matter are agreed as to the questions of fact to be decided between them, they may, after writ issued and before judgment, by consent and order of the Court or a Judge, proceed to the trial of any such questions of fact by stating those questions in the form of an issue without formal pleadings².
- (c) When particular issues of fact may be directed to be tried separately from the action³.
- (d) When leave is given to defend, the Court may direct that the affidavit filed by the defendant shall serve in lieu of a defence⁴.
- (e) Where the writ is specially indorsed and the defendant has filed his affidavit stating his defence.⁵
- (f) If a cause is fit for the Commercial List, Counsel frequently state the case of their respective clients orally and then Points of Claim and Points of Defence which resemble pleadings are usually ordered⁶.

Improvements in the system of pleading introduced by the Judicature Acts and the Rules of the Supreme Court: The improvements introduced are considered under the following heads :

- (a) *Forms of action* : Formerly great stress was laid on the Forms of action, whether the action was in trespass, in detinue or in trover. "If the plaintiff sued in trespass and trespass did not lie, he was non-suited although trover would lie." Now, "Forms of action" are abolished and if upon the facts pleaded 'the plaintiff would have been entitled to recover in any form of action, he will now recover in the action which he has brought.'⁷

1. O. XXXIV, r. 1, R. S. C.

2. O. XXXIV, r. 9, R. S. C.

3. O. XXXIII, r. 1, R. S. C.

4. O. XIV, r. 8, R. S. C.

5. In such a case the Master may order that any further pleading is unnecessary : Odgers on Pleading, 11th Edn., p. 70.

6. Odgers on Pleading, 11th Edn., p. 70 ; Annual Practice, 1938, pp. 336 (n), 446 (n).

7. Odgers on Pleading, 11th Edn., p. 186 ; cf. *Kelly v. Metropolitan Rail Co.*, (1895) 1 Q. B. 944 (where the question was whether the plaintiff could sue in contract or in tort).

- (b) *Technicalities of form and irregularity* : Formerly the merits of the case were subordinated to technicalities of form. Now, "no technical objection shall be raised to any pleading on the ground of any alleged want of form."¹ And non-compliance with the R.S.C., or with any rule of practice shall not render any proceedings void, unless the Court or Judge so directs ; and no application to set aside any proceedings for irregularity shall be allowed unless made within reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity.²
- (c) *Pleas in abatement* : Formerly misjoinder of party was ground of non-suit, while non-joinder of a party was the subject of a plea in abatement³. Now no cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties and the Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it⁴. No plea or defence shall now be pleaded in abatement. The defendant may, if he is so advised, shall take out a summons to have the missing plaintiff or defendant added as a party⁵.
- (d) *Demurrer* : Formerly, an objection in point of law implied that the pleading objected to was sufficient on the face of it ; hence a party could not both demur (take an objection in point of law) and plead. If he demurred he would not file any pleading but would await the judgment of the Court whether any case was made out for him to answer⁶. Now no demurrer shall be allowed,⁷ and any party may raise by his pleading any point of law, and any point so raised shall be disposed of by the Judge, and if in the opinion

1. O. XIX, r. 26, R. S. C.

2. O. LXX, rr. 1 & 2, R. S. C.

3. A plea in abatement was a plea for abating or quashing the statement of claim on the ground that it was improperly framed. Pleas in abatement were abolished in 1875.

4. O. XVI, r. 11, R. S. C.

5. O. XVI, r. 11, R. S. C.

6. See Odgers on Pleading, 11th Edn., p. 135.

7. O-XXV, r. 1, R. S. C.

of the Court or a Judge the decision of such point of law substantially disposes of the whole action or of any distinct cause of action, ground of defence, set-off, counter-claim, or reply therein, the Court or Judge may thereupon dismiss the action or make such other order therein as may be just¹.

(e) *Traverse* : Formerly, a party could not traverse an allegation to which he pleaded by way of confession and avoidance. Now an allegation may be traversed in point of fact and at the same time any collateral matter may be pleaded to destroy its effect².

(f) *Pleading of facts* : "The old rules were designed to choose the cause of action and then plead the relevant facts. The modern system is to plead the facts and state the legal conclusion it is sought to draw from them"³.

Although under the old rules each party was required to state precisely the points which he intended to raise, in practice he did not state the facts which he meant to prove but only the legal conclusion which it is sought to draw from them⁴. The following is an instance of a common form of declaration: "The plaintiff sues the defendant for £.....for money received by the defendant to the use of the plaintiff". Now, the plaintiff must state the facts which make such receipt by the defendant a receipt to the use of the plaintiff.

Subsequent pleadings : Formerly the defendant might deliver a Rejoinder to the plaintiff's Reply and the plaintiff in answer to the Rejoinder might deliver a Sur-rejoinder; and the pleadings might be further continued by a Rebutter or Sur-rebutter. But now, as indicated above, the pleadings seldom go beyond Reply.

The above is a bare outline of the current English system of pleading. The pleadings are regulated by elaborate rules which provide for matters that should or should not be pleaded, the consequences of unnecessary, scandalous, embarrassing or prolix pleading, the joinder of parties and causes of action, the consequences of non-joinder and misjoinder of parties and causes of action, amendment

1. O. XXV, rr. 2 & 3, R. S. C.

2. Odgers on Pleadings, 11th Edn., p. 135.

3. Hals. 2nd Edn., Vol. 25, p. 235.

4. "The common law pleadings, where these conclusions came in, were more like algebraical symbols than allegations of fact": Odgers on Pleading, 11th Edn, p. 79.

of pleadings, discovery, etc. The said rules have been framed to avoid multiplicity of suits and to bring the parties to an issue, to prevent the issues being enlarged and thereby "to diminish expense and delay especially as regard the amount of testimony required on either side." The rules relating to joinder of parties including the rules relating to Set-off, Counter-claim and Third-party procedure all specially aim at avoiding multiplicity of suits. The forms of pleading in Appendices C, D, and E. (Part II, Div. I) R. S. C. are given as specimens of the character and standard of pleading required.

Before 1873 great stress was laid on technicalities of form, and in the words of a Lord Chief Justice "truth and justice were sacrificed to the science of artificial statement." Now no technical objection shall be raised to any pleading on the ground of any alleged want of form¹ and "the Court is not to dictate to parties how they should frame their case"². Even so, pleadings in England are strictly construed and Courts of Appeal discourage decisions given upon grounds not raised on the pleadings. In case of insufficient pleading amendments are ordered and the party who has to submit a corrected pleading is put to delay and expense. "Pleadings therefore still test the competent lawyers."

The rigidity of the old rules of pleading at common law had at least one advantage. It accustomed the lawyers to be precise. The tradition of preciseness in pleading was handed down to the future generations so that even after the introduction of the new rules which aim at subordinating the technicalities of form to the merits of the case, it can be said generally that the pleadings in England continue to be precise, concise and otherwise to conform to the rules. Apart from tradition, the Forms of pleading appended to the Rules of the Supreme Court, and those set forth in Bullen & Leake's *Precedents of Pleading* serve to educate the lawyers in the art of correct pleading, as the *Pleading and Practice* by Odgers, which has gone through twelve editions, serves to educate them in the principles of pleading. The newly published *Encyclopaedia of Court Forms and Precedents* edited by Lord Atkin is a welcome addition to the remarkable series of text books on the Principles and Precedents of pleadings.

1. O. XIX, r. 26, R. S. C.

2. Per Bowen L. J., in *Knowles v. Roberts*, (1888) 33 Ch.D. 263.

CHAPTER V.

SYSTEM OF PLEADING IN BRITISH INDIA AND BURMA.

The Civil Procedure Code of 1908 marked the beginning of a new era and a stage of definite advance in the system of pleading in British India which at the time and until lately included Burma¹. It reduced the system of pleading to definite rules many of which it borrowed from the Rules of the Supreme Court of Judicature, 1883, as amended up to the year 1908. Thus many of the Rules of the Supreme Court as they stood before 1908 relating to joinder of parties, misjoinder and non-joinder of parties, joinder of causes of action, pleadings generally including matters to be pleaded and mode of pleading, amendment of pleadings, striking out or amending any matter in any pleading which may be unnecessary or scandalous or which may tend to prejudice or embarrass or delay the fair trial of the suit, discovery and inspection, admissions and so on were assimilated in Orders I, II, VI, VII, VIII, XI and XII of the C. P. Code.

Although the Code retained some antiquated fragments of the old system as suited to Indian conditions, it preserved² the powers of the High Courts (including the Chief Courts of Oudh and Sind), to make rules and by such rules to annul, alter or add to all or any of the rules in the 1st Schedule of the Code³, or to provide for new matters not included in the Code⁴, for the purpose of regulating their own procedure and the procedure of the Civil Courts subject to their jurisdiction. The only reservation is that such rules framed for the Courts subordinate to the High Courts should not be inconsistent with the body of the Code⁵, and where the

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1. C. P. Code, 1908, still applies to Burma. Cf. Sec. 148 Govt. of India Act, 1935.
 2. Secs. 122-131, C. P. Code, 1908. Similar powers were contained in Sec. 652 C. P. Code, 1882. Cf. Letters Patent of the High Courts: Cl. 37 Calcutta, Madras and Bombay; Cl. 28 Allahabad; Cl. 29 Patna; Cl. 27 Lahore; Cl. 35 Rangoon; Cl. 27 Nagpur.
 3. Sec. 122 C. P. Code, 1908.
 4. Sec. 128 (Ibid).
 5. Sec. 128 (Ibid); cf. the language used in the Letters Patent, Calcutta, Madras, Bombay and Rangoon, "Provided always, that the said High Courts shall be guided in making such rules and orders as far as possible by the provisions of the C. P. Code", and in the Letters Patent,

rules relate to the original side of the High Courts they should not be inconsistent with their respective Letters Patent¹.

Amongst others, the Code made no provision for counter-claim, third-party procedure, summary procedure and originating summons,² the Select Committee to whom the draft Code was referred having suggested that these forms of proceeding might usefully be adopted in some areas but that it was a matter which should be left to each High Court to decide. Accordingly rules have been framed by the High Courts of Calcutta, Bombay, Madras and Rangoon in respect of their respective original sides on one or more of these proceedings. Rules relating to originating summons³ have been framed by all the said High Courts, those relating to third party procedure⁴ by all except the Calcutta High Court, those relating to counter-claim⁵ by the Bombay and Madras High Courts and those relating to summary procedure,⁶ by the Calcutta High Court in all cases covered by clause (f) of Sec. 128 C. P. Code, by the Madras High Court in some cases covered by the said clause. In addition to the above rules the said High Courts have also made some other rules relating to pleadings applicable to their respective original sides. The said rules are with reference to the language of pleadings,⁷ the

Allahabad, Patna, Lahore and Nagpur, "make rules and orders for the purpose of adopting, as far as possible, the provisions of the C. P. Code".

1. Sec. 129 C. P. Code. There is a difference of opinion as to the interpretation of this section. One view is that the rules should not be inconsistent with the Letters Patent only but may be inconsistent with the body of the Code. See Mulla's C.P. Code, 10th Edn., p. 400; *Umesh Chandra v. Kunjilal*, (1929) I. L. R. 57 Cal. 676. The other view is that such rules should not be inconsistent either with the body of the C. P. Code or with the Letters Patent: *Pahunchi Lal v. Bhup Singh*, A. I. R. 1930 All. 558.
2. Sec. 128, C. P. Code, 1908.
3. Cal. High Court, O. S. rules, Chap. XIII; Bom. High Court O. S. rules 230-251, Part II, Chap XIII; Mad. High Court O. S. rules 1 to 15 of Order XLV; Rang. High Court O. S. rules 171 to 196, Chap I.
4. Bom. High Court O. S. rules 142 to 146, Chap, VII; Mad. High Court O. S. rules 1 to 9 of Order V-a; Rang. High Court rules 164 to 168, Part II, Chap I.
5. Bom. High Court O. S. rules 130-139 of Chap. VII; Mad. High Court O. S. rules 3 to 9 of Order V.
6. Cal. High Court O. S. rules, Chap. XIII A; Mad. High Court O. S. rules 1 to 10, Order VII.
7. The pleadings shall be in the English language written, type written or printed: Cal. High Court O. S. rule 1, Chap VII; Bom. High Court O. S. rule 93, Chap VI; Mad. High Court O. S. rule 8, Order II; Rang. High Court O. S. rule 10, Part II, Chap. I.

pleading of the grounds upon which leave to sue is asked for,¹ the description of representative parties in suits under O. 1, r. 8 of the C. P. Code,² particulars in special cases³ and subsequent pleadings.

Rules of pleading for the District Courts : It will appear from the above that as for the district or maffasil Courts, the rules of pleading are those contained in the C. P. Code, no special rules relating to pleading having been made by any of the High Courts or by the Chief Court of Oudh for any of the Courts subject to their respective appellate jurisdiction except with regard to documents to be filed along with the pleadings and certain other minor matters which it is not necessary to specify.

Rules of pleading for the Original Sides of the High Courts : The rules relating to pleadings are those under the Civil Procedure Code and their own special rules applicable to their respective original sides.

Rules of pleading for the Federal Court : The Federal Court has framed rules regulating its own procedure in the exercise of its original jurisdiction⁴.

Rules of pleading for the Presidency Small Cause Courts : The pleadings of the Presidency Small Cause Courts are governed by the Presidency Small Cause Courts Act, 1882, and the Rules framed by the High Courts under section 9 of the said Act.

Definition of pleading : Under O. VI, r. 1, C. P. Code, "pleading

1. See Cal. High Court O. S. rule 11 of Chap. VII ; Rang. High Court O. S. rule 25, Part II, Chap. I.
2. Madras High Court O. S. rules 20, 21 of Order III.
3. Where the suit is for recovery of debt there shall be annexed to and filed with the plaint particulars of the plaintiff's claim ; Bom. High Court O. S. rule 96 of Chap. VI. Where a settled account is impeached on the ground of error in a partnership action, the specific errors or irregularities must be alleged ; if on the ground of fraud or of mistake full particulars of the fraud or mistake must be alleged : Mad. High Court O. S. rule 3 of Order XXX. The same rule shall apply to a suit for an account : Mad. High Court O. S. rule 11 of Order XXX. In partition suits, the particulars shall include items of joint property, the incumbrances, charges and outgoings, if any, to which the same are subject, the outstanding debts and liabilities of the family and alienations of the properties made by individual members : Mad. High Court O. S. rule 2 of Chap. XXXI.
4. For the rule making power of the Federal Court, see Sec. 214 of the Govt. of India Act, 1935.

shall mean a plaint or a written statement". There is a similar provision in the Rules of the Federal Court¹.

Petition, summons, special case, affidavit, etc., are not pleadings within the meaning of the Code.

Petitions and affidavits in original proceedings, however, are for all practical purposes pleadings in the suits. In some cases parties to the said proceedings are called plaintiffs and defendants, as in a contentious probate proceeding, for example². It is not uncommon that Courts expressly direct that certain affidavits used may be treated as the Plaint or the Written Statement in the suit. Thus, according to the Rangoon High Court O. S. rule 123, the Court, while granting leave to the defendant to defend, may direct the affidavit in opposition of the defendant to the application of the plaintiff for summary judgment under O. XXXVII of the C. P. Code, 1908, to be taken as his Written Statement. Like orders are made in applications for summary judgment under the summary procedure provided for by the Original Side Rules of the High Courts of Calcutta and Madras.

It is permissible in all the above cases, either to look upon the proceedings in which such petitions and affidavits are used as cases where formal pleadings are dispensed with, or to call such petitions and affidavits themselves as pleadings. The first view seems to have been taken by the Code, the second view is taken by the Madras High Court, which by its Original Side rule 4(13) of Order 1, defines pleading, on the lines of Sec. 225 of the Judicature Act, thus: "Pleading includes a plaint, written statement, petition, special case, memorandum of appeal, memorandum of objections".

Forms of pleading: Forms of pleading in Appendix A to the Code, when applicable, and when they are not applicable, forms of like character, as nearly as may be, shall be used for all pleadings³. These forms are intended to serve as specimens of the character and standard of pleadings required. But they are not to be taken as perfect. In England, Forms of pleading have been set out in Appendices⁴ C, D and E to the Rules of the Supreme Court. But in spite of the carefulness with which the said forms have been drafted, in one case, a better statement of claim was ordered

1. O. XXI, r. 1, Rules of the Federal Court.

2. Sec. 90 and O. XXXVI, rr. 1-3, C.P. Code; cf. Sec 295, Ind. Suc. Act, 1925.

3. O. VI, r. 3, C. P. Code.

4. The Isis, 8 P. D. 227.

although the original statement of claim scrupulously followed Form No. 6 Part II, Div. I of App. C. In another case, Kay J., held that Form No. 5, App. C. was insufficient¹. In a Calcutta case,² Lort-Williams J., has similarly pointed out that "the Forms in App. A. to the Code must be used with caution. They seem to have been drafted by some one with an imperfect knowledge of pleading, and sometimes are in direct conflict with the Code. For example, where they provide that original documents which are part of the evidence should be annexed to the plaint. They are to be taken as the standard of the requisite brevity, and also no doubt as specimens of the character of pleadings required. But they are not to be adhered to slavishly ; they are in fact not perfect by any means".

What pleadings are to be delivered :—

1. **Under the Civil Procedure Code :** Every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed³. After the plaint is filed, the defendant may, and, if so required by the Court, shall, at or before the first hearing or within such time as the Court may permit, present a written statement of his defence⁴. In such written statement the defendant may raise any ground of defence which has arisen both before and after the institution of the suit⁵.

The other pleadings that may be delivered are classed under two heads :

- (a) Subsequent pleadings.
- (b) Additional pleadings.
- (a) *Subsequent pleadings :* The plaintiff may file a Written Statement (Reply) by way of defence to a set-off without the leave of the Court, and a Written Statement (Reply) other than by way of defence to a set-off with the leave of the Court and upon such terms as the Court thinks fit. The Court may at any time require a Written Statement or an Additional Written Statement from any of the parties⁶. In the Written Statement of the plaintiff by way of defence to a set-off the plain-

1. *Wethered v. Cox*, (1888) W. N. 165.

2. *Ramprasad v. Hazarimull*, (1931) I. L. R. 58 Cal. 418.

3. Sec. 26, C. P. Code.

4. O. VIII, r. 1, C. P. Code.

5. O. VIII, r. 8, C. P. Code.

6. O. VIII, r. 9, C. P. Code.

tiff may raise any ground of defence which has arisen not only before but after the defendant's Written Statement claiming a set-off¹.

- (b) *Additional pleadings* : The pleadings that are filed after the filing of the Plaint and the Written Statement of the defendant are not 'subsequent pleadings' in the true sense. They are generally additional pleadings by way of further and better statement of the nature of the claim or defence or further or better particulars of any matter stated in pleadings. These pleadings may be ordered under O. VI, r. 5 of the Code which corresponds to O. XIX r. 7. R. S. C.

2. Under the Presidency Small Cause Courts Act, 1882, and the Rules framed by the High Courts² thereunder : The pleadings to be filed are as follows :—

Plaints :—In Calcutta³ and Madras⁴ in all cases, and in Bombay⁵ where the claim exceeds Rs. 1000/-, every suit shall be instituted by the presentation of a plaint. In Bombay, all suits for sums not exceeding Rs. 1000/- shall be instituted by an application to be made by or on behalf of the plaintiff for a summons accompanied with or containing particulars of the claim⁶.

Written Statements :—Under Sec. 24 of the Presidency Small Causes Court Act, "except in cases of set-off under the Code, no Written Statement shall be received unless required by the Court."⁷ But under Rule 40 of the Rules of Practice, Calcutta, the defendant shall in all cases (that is, irrespective of whether set-off is pleaded or not) file a memorandum of appearance stating his points of defence.

1. O. VIII, r. 8, C. P. Code.
2. For the rule-making power of the High Court, see Sec. 9 Pres. S. C. C. Act, 1882.
3. R. 11 (Rules of Practice, Calcutta).
4. R. 1, O. IV (Rules of Practice, Madras).
5. Sch. to the Rules of Practice, Bombay.
6. R. 3, Rules of Practice, Bombay. Where the amount of the claim exceeds Rs. 500/- but does not exceed Rs. 1000/-, the summons together with a copy of the particulars of the claim, and where the claim does not exceed Rs. 500/-, the summons with endorsement of particulars thereon have to be served on each defendant : Rules 2, 3 and 4, Rules of Practice, Bombay.
7. Under r. 3 (1), O. VIII, Rules of Practice, Madras, the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the Court, present a written statement containing the particulars of the debt sought to be set off.

Subsequent pleadings :—In Calcutta, Bombay and Madras, the plaintiff may file a Written Statement (Reply) to the Written Statement of the defendant pleading a set-off¹.

3. Under the Original Side rules of the High Court of Calcutta, Bombay and Madras : Besides the pleadings that are to be filed under the C. P. Code, the other pleadings that may be filed are noted below :

*Bombay and Madras High Courts*² :—

- (i) Written Statement of the defendant pleading a Counter-claim.
- (ii) Plaintiff's Reply to Counter-claim.
- (iii) Reply to Counter-claim by a third party, where the defendant by his Written Statement sets up any Counter-claim which raises questions between himself and the plaintiff along with any other person.
- (iv) Written Statement or Defence of a third party under the Third party procedure.
- (v) Written statement of a defendant to that of his co-defendant who claims to be entitled to contribution or indemnity against him.

*Rangoon High Court*³ :—

- (i) Written Statement or Defence of a third party under the Third party procedure.
- (ii) Written Statement of a defendant to that of his co-defendant claiming to be entitled to contribution as against him.

Calcutta High Court :—The Calcutta High Court has made no rules relating to Counter-claim or Third party procedure. The pleadings that are to be filed are those provided for in the Code. But there are two special matters relating to pleadings which are noted below :

- (a) a person sued as a partner and appearing under protest is not entitled to file any Written Statement. Any Written Statement already filed must be taken off the file⁴.

1. Sch. A. to Rules of Practice, Calcutta ; R. 3 (1), O. VIII, Rules of Practice, Madras ; Sch. to O. VIII, Rules of Practice, Bombay.
2. Bom. High Court O. S. Rules 130 to 137, Chap. VII ; Mad. High Court O. S. Rules Chap. V.
3. Rang. High Court O. S. Rules 164, 170, Part. I.
4. *International Continental Etc. v. Mehta & Co.*, (1927) I. L. R. 54 Cal. 1057.

- (b) A defendant not being *sui juris*, will not be required to file a Written Statement, but a voluntary statement may be filed on his behalf by the guardian for the suit assigned to him.¹

Rules of Pleading relating to Originating Summons according to the Original Side Rules of the High Courts: As regards Originating Summons the following pleadings are to be delivered :

*Bombay,*² *Madras*³ and *Rangoon*⁴ : The person who applies by Originating Summons shall present with it a plaint without a prayer setting forth concisely the facts upon which the relief sought by summons is founded. The Plaint shall specify at the end but not in the form of a prayer the relief which is sought by the summons.

A Written Statement or affidavit may be made in answer to the plaint but there shall be no obligation to make the same unless the Court otherwise directs.

*Calcutta*⁵ : The person entitled to apply by Originating Summons shall present with it an Affidavit setting forth concisely the facts upon which the relief sought by the summons is founded. No Written Statement or Affidavit shall, in the first instance, be made in answer to the Affidavit.

According to all the said High Courts, the Plaint or Affidavit, as the case may be, when accepted, shall be filed and numbered as an ordinary suit but after the serial numbers, the letters "O. S." shall be placed. And nothing in O. II, r. 2, C. P. Code, shall apply to plaints or to affidavits, filed to support an Originating Summons, or to any proceedings thereunder.

4. **Under the rules of the Federal Court :** The rules as regards the filing of pleadings have been framed on the lines of the Civil Procedure Code.⁶ There are rules as regards Counter-Claim but not Third party procedure. The pleadings with regard to Counter-claim are similar to those under the Bombay and Madras High Court Original Side rules⁷.

1. Cal. High Court O. S. rule 11, Chap. IX.
2. Bom. High Court O. S. rules 241, and 244, Chap. XIII.
3. Mad. High Court O. S. rules 4 & 7, Order XLV.
4. Rang. High Court O. S. rules 182 and 184, Part I.
5. Cal. High Court O. S. rules 13 and 16, Chap. XIII A.
6. Cf. rule 1 of O. XVIII and rules 1, 2, 7 of O. XX, Rules of the Federal Court.
7. Cf. rule 9 of O. XX, Rules of the Federal Court.

Essential points of difference between the English and the Indian systems of pleading : There are many points of similarity and dissimilarity between the two systems. The essential points in which the two systems differ are considered under the following heads :

1. Subsequent pleadings.
2. Framing of issues.
3. Construction of pleadings.

1. *Subsequent pleadings :* Under the English system, the plaintiff is not required to anticipate the defence, that is, plead matters in anticipation of possible objections. He is therefore permitted to deliver a Reply to the Defence without the leave of the Court. He may, but need not, deliver a Reply by merely joining issue upon the Defence, because, under the rules, if no Reply is delivered all material statements of fact in the Defence will be deemed to have been denied and put in issue. If he has any new facts to plead he ought to deliver a Reply by way of confession and avoidance. When a pleading subsequent to Reply is not ordered or where a pleading subsequent to Reply has been ordered but not delivered, all material statements of fact in the pleading last delivered shall be deemed to have been denied and put in issue.

Under the Indian system, the plaintiff can file a Written Statement (Reply) to the Written Statement of the defendant claiming a set-off without the leave of the Court. In other cases he can file such a Written Statement with the leave of the Court or if ordered by the Court. All Written Statements other than the plaintiff's Reply to the defendant's Written Statement pleading a set-off¹, all subsequent pleadings that may be filed under the C. P. Code are left to the discretion of the Court. On account of the wide powers given to the Court to record admissions and denials by the oral examination of parties, this discretion is seldom exercised and when further pleadings are ordered, they are generally more by way of amendments of pleadings than by way of what under the English system is known as 'subsequent pleading'. Moreover, parties are not apt to plead where they are not required to do so. Two results have followed : The first result is, as Martin and Fawcett JJ., have pointed out, that under the ordinary prac-

1. O. VIII, r. 6 (3) C. P. Code, which reads as follows : "The rules relating to a written statement by a defendant apply to a written statement in answer to a claim of set-off".

tice in the Muffasil, it is not customary, and on the Original Side of the High Court, not essential, for the plaintiff to put in a Reply to the defendant's Written Statement, and it frequently happens that the pleadings are left in what to an English trained lawyer is a defective state¹. The second result is, that the plaintiff, in order to avoid the necessity of filing any subsequent pleading, which may or may not be ordered, is tempted to plead matters in his plaint in anticipation of possible defences. But where the plaintiff in his plaint does not plead matters in anticipation of possible defences or where he is unable to plead matters sufficiently in anticipation, and where he does not file a Reply setting up an affirmative case of his own (where he has one) in answer to the defendant's allegations in his Written Statement, the position becomes highly anomalous and is attended with great inconvenience and risk to the parties.

Illustration :—

A sues B for a declaration that he is a permanent tenant. B in his Written Statement relies upon certain rent notes which A's father is alleged to have executed containing a clause to the effect that the tenant is to give up possession at the end of the year of the tenancy. A does not file any Written Statement in answer to B's allegations. At the trial, A's pleader cross-examines B's witnesses in order to bring out that the rent notes were obtained by misrepresentation and fraud. B's pleader can at once object that A is not entitled upon the pleadings to go into the point, or, alternatively, that if no amendment or further pleading is ordered, then the trial should stand over to enable B to meet the evidence on the new point. It is at this stage that the Court, if it thinks that B has been taken by surprise, would order amendment of the plaint or delivery of additional pleading. But suppose that B's pleader does not object to the said cross-examination at the time when it is made, it will be too late to urge on behalf of B at the stage of appeal that misrepresentation and fraud ought to have been pleaded or that an express issue should have been raised, or that in any case the evidence on the point should not have been admitted².

2. *Framing of Issues* : Under the Code the issues may not be framed upon the pleadings alone. After the pleadings are filed it is the duty of the Court to 'clear up the ground further' by ascertaining from each party or his pleader whether he admits or denies such allegations of fact as are made in the Plaint or Written Statement (if any) of the opposite party, as are not expressly admitted

1. *Juvansingji Motisingji Thakur v. Dola Chhala*, A. I. R. 1925 Bom. 390 at 392.
2. Per Marten and Fawcett JJ., in *Juvansingji Motisingji Thakur v. Dola Chhala*, *Supra*.

or denied by the party against whom they are made and to record such admissions or denials.¹ The object of such record is to prevent the real matter in dispute remaining undecided or left out from consideration². Such a record, again, as Tyabji J., has pointed out, "may take the place of plaintiff's 'Reply' in other systems of pleading."³ It is in any case in the nature of supplementary pleading, and no plea inconsistent with it can be raised at a later stage except by way of amendment of pleading.⁴

After the recording of admissions and denials, the next step for the Court is to ascertain, after reading the Complaint and the Written Statement, if any, and after such examination of the parties as may be necessary, upon what material propositions of law or fact the parties are at variance and then proceed to record the issues.⁵ The Court may also frame and record the issues from all or any of the following materials⁶ :—

- (a) allegations made on oath by the parties, or by any person present on their behalf, or made by the pleader of such parties ;
- (b) allegations made in the pleadings or in answer to interrogatories delivered in the suit ;
- (c) the contents of documents produced by either party. If any person whose examination is necessary is not before the Court or if the Court wants to inspect some document not produced in the suit, the Court may adjourn the framing of the issues to a future day and may compel the attendance of any person or the production of any document by summons or other process.⁷ Even after the issues have been framed in the aforesaid manner, the Court may at any time before passing the decree amend the issues or frame additional issues as may be necessary or strike out issues that appear to have been wrongly framed or introduced.⁸

The control which the Court is given over the matters that have

1. O. X, r. 1, C. P. Code.
2. *Balaji v. Vithoba*, A. I. R. 1924 Nag. 191, 195.
3. *Narayanswami Iyer v. Krishnamurti*, A. I. R. 1915 Mad. 984.
4. *Muhammad Yahya v. Rahim Ali*, A. I. R. 1929 Lah. 165.
5. O. XIV, r. 1 (15), C. P. Code.
6. O. XIV, r. 3, C. P. Code.
7. O. XIV, r. 5, C. P. Code.
8. O. XIV, r. 5, C. P. Code.

to be stated in the pleadings and over the framing of issues was necessitated by the prevalence of vague allegations and evasive denials which at the time of the passing of the Code had been a notorious feature of pleadings. But, by a vicious circle, the rules themselves have perpetuated the evil which they intended to circumvent.

3. *Construction of pleadings* : Under the English system the pleadings are strictly construed. An allegation in the statement of claim, if not denied specifically or by necessary implication, is taken to be admitted and the defendant is not permitted to traverse that fact at the hearing.¹ Under the Indian system the rigour of the English rule has been relaxed, and it is provided that the Court in its discretion may require any fact admitted (that is, not denied specifically or by necessary implication) by the defendant to be proved otherwise than by such admission.² Thus, under special circumstances, the defendant may be permitted to traverse at the hearing allegations in the plaint which he omitted to traverse in his pleading³. Further, in the case of pleadings in the District Courts, the Judicial Committee and the High Courts have held that they are not as strictly to be construed as the English pleadings. "We have a much larger range of vision", observed MacLeod C. J. and Shah J. in a Bombay case, "and the plaintiffs' case cannot be defeated merely on the ground of some technical defect in their pleadings, provided on the real issues in the case they succeed."⁴

In a recent case the Judicial Committee pointed out that if fair notice of the case to be made by the plaintiff has been given, and issue has been joined on the enquiry but faintly adumbrated in the the pleadings, the structure of the pleadings need not be strictly stressed.⁵

1. O. XIX, r. 13, R. S. C.

2. O. VIII, r. 5, C. P. Code. See also, Sec. 53 Ind. Evidence Act.

3. *Madho Pershad v. Gajadhar* (1883-84) L.R. 11 I. A. 186, 192.

4. *Dharamdas v. Ranchhodji*, (1922) I. L. R. 46 Bom. 200.

5. *Someshwar v. Tirbhawan*, (1934) L. R. 61 I. A. 224.

PART II.

PRINCIPLES OF PLEADING.

Preliminary matters to be considered.

The pleader who is instructed to draft a pleading should consider the following matters :

1. Parties.
2. Causes of action.
3. Jurisdiction.

The above three matters are interrelated. "The question of parties involves that of cause of action and *vice versa*. A person is made a party because there is a cause of action against him ; and where causes of action are joined parties are joined"¹. Again, the joinder of parties and cause of action assumes the existence of a suit in the Court having jurisdiction to try it.²

CHAPTER VI.

PARTIES : DEFINITION, SELECTION AND CLASSIFICATION OF :—

Parties—definition of—The term 'party' has not been defined in the Civil Procedure Code. But it has been held that the expression 'parties to the suit' are the persons whose names appear on the record as parties. Thus, where a benamdar is a party on the record, he, and not the real owner interested in the suit, is a party to the suit.³ Where a party is given up at one stage of the suit, but the plaint has not been amended by striking out his name, he must still be regarded as party to the suit.⁴ But persons not named on the record may in certain circumstances be deemed as parties. For example, in representative suits by or against the Karta of a joint Hindu family, or by or against an executor, administrator or trustee,

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1. Per Woodroffe J., in *Ramendra v. Brojendra*, (1918) I. L. R. 45 Cal 111, 123.
 2. *Bengal & North Western Railway Co. v. Sadaram*, (1922) I. L. R. 49 Cal. 895.
 3. *Biswamber v. Nilambar*, (1923-29) 33 O. W. N. 997.
 4. *Kuthala Mudaliar v. Venkata Reddiar*, A. I. R. 1927 Mad. 253.

or under O. 1, r. 8, C. P. Code, the persons represented are deemed to be parties to the suit and are bound by the decree that may be made in the suit. In England, under sec. 225 of the Judicature Act, 'Party' includes every person served with notice of or attending any proceeding, although not named on the record. In practice this rule is followed in India,¹ and it is well that the rule is embodied in the Civil Procedure Code.

Parties—selection of—"In the selection of parties there is a two-fold chance of error : A plaintiff may omit parties whose presence is essential ; or he may add parties whose presence is improper. Hence you must learn what parties are necessary and what unnecessary, who must be joined, and who may be joined or not, as the plaintiff chooses²". Error in the selection of parties may lead to dismissal of the suit, dismissal (striking out) of parties from the suit, addition or substitution of parties involving, in the first case, loss of a right, in others, delay, in all cases, costs.

Parties—classification of—Strictly speaking, parties to suits must come under one of the two following heads :

- (a) Necessary parties.
- (b) Proper parties.

For the purposes of this chapter, the subject of parties has been considered under the following heads :

1. Necessary parties.
 2. Proper parties.
 3. Interveners.
 4. Representative parties :
 - (a) Parties on behalf of themselves and others.
 - (b) Parties on behalf of others.
 5. Parties suing without being entitled to claim the decree to be made in their favour.
 6. Parties as plaintiffs upon lending their names.
 7. Parties in more than one capacity.
 8. Parties for the purpose of watching proceedings : *Quasi-parties*.
 9. Pro-forma defendants.
1. e. g., creditors who are required to prove their claims in administration suits are for all practical purposes parties, although not named on the record ; cf. Cal. High Court O. S. Rules, Chap. XXVI, r. 59.
 2. Odgers on Pleading, 11th Edn. p. 15.

1. **Necessary parties** :—Parties necessary for the constitution of the suit are necessary parties. Without them no decree at all can be passed.¹ Thus all joint promisees must join in the suit to enforce a debt due to them, they being all necessary parties². In a suit for partition all co-sharers are necessary parties³. Where there are several trustees, executors or administrators they shall all be made parties to the suit⁴. But in a suit for infringement of an easement, where the cause of action is only against those who have infringed the plaintiff's right, all persons entitled to the easement are not necessary parties.⁵ Similarly all co-sharers are not necessary parties in a suit for ejectment by a co-sharer against a trespasser⁶ or against a tenant on sufferance when the period of tenancy has expired and there has been no privity between him and the original landlords.⁷

For effect of non-joinder of parties and omission to take objections as to non-joinder at the earliest opportunity, see heading 'Non-joinder of parties', *infra*.

2. **Proper parties** : The distinction between necessary and proper parties must not be overlooked. The parties necessary for constitution of a suit are necessary parties. Their non-joinder affects the merits of the case and the jurisdiction of the Court and without them no effective decree can be passed in the suit.⁸ In addition to the necessary parties it may be proper or desirable to join other persons as parties "whose presence before the Court, may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit."⁹ Strictly speaking no person can be added if he is neither a necessary

1. *Kishan Prasad v. Har Narain*, (1910-11) L. R. 38 I. A. 45.
2. *Vyankatesh Oil Mill & Co. v. Velmahadan*, (1928) 30 Bom. L. R. 117.
3. *Shahasaheb v. Sadashiv*, (1919) I. L. R. 43 Bom. 575, 580.
4. O. XXXI, r. 2, C. P. Code.
5. *Surja v. Chandra*, (1924) 40 C. L. J. 74.
6. *Gangaram v. Relu*, A. I. R. 1933 Lah. 999. But the decree given in favour of one of the proprietors under such instances would be for the benefit of the entire body of proprietors : *Budha Singh v. Sant Singh*, A. I. R. 1926 Lah. 545 (1).
7. *Magantal v. Bhular*, (1927) I. L. R. 51 Bom. 149.
8. *Sahasaheb v. Sadashiv*, (1919) I. L. R. 43 Bom. 575. For distinction between necessary and proper parties, see *Sital Prasad v. Asho Singh*, A. I. R. 1922 Pat. 651.
9. O. 1, r. 10 (2) C. P. Code.

party nor a proper party.¹ Various interpretations have been put upon the words "questions involved in the suit." In some cases it has been held that '*questions involved in the suit*' are limited to questions as between parties to the suit. In other words, a party in order to be a proper party must be directly interested in the issues between the plaintiff and the defendant, that is to say, in the result of the suit². In other cases it has been held that third persons may be added as proper parties even against the plaintiff's wish if there is one subject matter out of which several disputes arise and the main evidence and the main enquiry upon the issues raised by the new parties sought to be added will be the same as the main evidence and the main enquiry upon the issues raised by the defendant on the record.³ The latter view seems to have the sanction of the highest authority.⁴

A person who claims adversely to both plaintiff and defendant cannot be joined. He must file his own suit. The reason of the rule is, if joinder of plaintiffs or defendants is impossible under O. 1, rr. 1 and 2 it does not become possible under O. 1, r. 10, C. P. Code.⁵

One object of adding proper parties is to protect their interests and particularly the interests of the defendants in the suit. Another object is to bind them and the parties by the decree and thus avoid future litigation.

Illustrations :—

(i) A, alleging that he is the adopted son of B (deceased), sues C, the widow of B, for possession of certain properties. Held, the reversioners to the estate of B who dispute such adoption may be added as parties in order to protect their interests : *Rajaratnam v. Halasyasundaram*, 44 M. L. J. 322.

1. *Vaithilinga v. Sadasira*, (1926) I. L. R. 50 Mad. 34 ; *Baikuntha Kumar Shil v. Sarat Chandra*, A. I. R. 1925 Cal. 1257.
2. *Thirthasami v. Gopala*, (1890) I. L. R. 13 Mad. 32.
3. *Montgomery v. Foy*, (1895) 2 Q. B. 321, followed in *Secretary of State v. Murugesu Mudaliar*, A. I. R. 1929 Mad. 443. See *Byrne v. Brown*, (1889) 22 Q. B. D. 657 followed in *Chidambaram Chettiar v. Subramaniam Chettiar*, A. I. R. 1927 Mad. 834. See also *Dwarka Nath v. Kishorilal*, (1910) 11 C. L. J. 426, followed in *Secretary of State v. Murugesu*, supra.
4. Cf. *Esquimaux and Naimo Ry. Co. v. Wilson*, (1920) A. C. 358, followed in *Ramaswami v. Vellayappa*, A. I. R. 1931 Mad. 357.
5. *Chidambaram Chettiar v. Subramaniam Chettiar*, A. I. R. 1927 Mad. 834 (case of a third party who wished to claim that he was the real purchaser adversely to the pleas of both plaintiff and the defendant).

(ii) A, a legatee under a will, sues B, the executor, for a legacy. B states that the estate is not sufficient to pay all the legacies in full and that there ought to be a rateable abatement. Held, other legatees may be added as parties for the protection of the executor : *Purushotham v. Kal Govindji*, (1902) I.L.R. 26 Bom. 301, 304.

It is clear that a necessary party is a proper party but a proper party is not always a necessary party¹. •

3. **Intervenors** : An intervenor is a third person who intervenes in a suit to which he was not originally a party. If a third person is a necessary party, he ought to be joined. But if the suit can be and is properly constituted without him, can he insist upon his joinder as a proper party ? As regards the last question, there exists both in England and India some amount of divergence of judicial opinion.² According to one view, of which *Norris v. Beazley*³ is a typical example, "the defendant to be added must be a defendant against whom the plaintiff has some cause of complaint, which ought to be determined in the action, and that it was never intended to apply where the person to be added as defendant is a person against whom the plaintiff has no claim and does not desire to have any". In a Madras case,⁴ Srinivas Ayangar J. followed the principle of the above decision and held as follows :—

"If it is not a question of a necessary party but only a question of a permissible party, then on principle it follows that such cannot generally be ordered when it is opposed by the party to fight whom he is so brought on the record. The basic principle of judgements *inter partes* is that the judgments are not judgments *in rem* but declaratory and operative as between them. The plaintiff being generally *dominus litis*, I fail to see on what principle of justice he can be compelled to fight against some other litigant not of his own choice unless such a process is required by a positive rule of law".

According to the other view, of which *Montgomery v. Foy*⁴ is a typical example, "where there is one subject-matter out of which several disputes arise all parties should be brought before the Court and all disputes should be determined in one and the same

1. *Sital Prasad v. Asho Sing*, (1922) I. L. R. 2 Pat. 175.

2. (1877) 2 C. P. D. 80.

3. *Vaithlinga v. Sadasiva*, (1926) I. L. R. 50 Mad. 34 ; Cf. *Vithoba v. The Secy. of State for India*, A. I. R. 1925 Nag. 373.

4. (1895) 2 Q. B. 321.

action". In that case a ship-owner was not paid his freight by the shipping agent, so he put the cargo in a ware-house with notice that it was subject to a lien for freight. The agents deposited the amount under protest. The ship-owner sued for the deposit and for a declaration that he was entitled to freight against the consignee of the goods who had no property in the cargo. The shippers of the cargo applied to be added as defendants as proper parties in order that they might counter-claim against the plaintiffs, damages for short delivery and injury to cargo. The plaintiff objected that his cause of action only lay against the agents who were bound to pay his freight: nor could a plaintiff be compelled to join as defendants a person whom he did not wish to sue: *Held* by Lord Esher, M. R., that "the Court may add the owners of the cargo as defendants in the original action and so settle the whole matter in one action and by one trial". In *Byrne v. Brown*¹. Lord Esher further observed: "It is not necessary that the evidence on the issues raised by the new parties being brought in it should be exactly the same, it is sufficient if the main evidence and main inquiry will be the same".

The following are some of the Indian cases which have followed the rule laid down by Lord Esher, either by reference to *Montgomery v. Foy*, or independently of it :

- (i) A sued B on a bond. B pleaded that A and his uncle formed a joint Hindu family, that the bond was taken on behalf of that family and that he had made a part payment to A's uncle who supporting the statement made by B, sought to intervene. A resisted the application. *Held*, a material question common to the parties should be tried once for all: *Vyidianada v. Sitaram*, (1882) I. L. R. 5 Mad. 52, followed in *Sivarama Pillai v. Cranesrathnam* A. I. R. 1935 Mad. 353.
- (ii) K sued to eject N on the ground that the holding in suit was not transferable. D, a third party, applied to be made a party to the suit alleging that although he conveyed the holding in favour of the defendant, the conveyance was in reality a mortgage by conditional sale and that he himself was still in possession. The plaintiff resisted the application. *Held*, by Mookerjee J., follow-

1. (1889) 22 Q. B. D. 657.

ing *Montgomery v. Foy*, that the petitioner was a proper party. The learned judge, however, very rightly pointed out that if serious embarrassment or inconvenience would be caused to the plaintiff by the addition of a new party the Court would be very reluctant to force an additional defendant into the action ; *Dwarka Nath v. Kishori Lal*, (1910) 11 C. L. J. 426.

- (iii) A meeting convened for the purpose of electing a member for the District Board was adjourned by the majority, but the minority convened their meeting and treating the adjournment as illegal, elected the plaintiff as such member. The Government withheld the notification of plaintiff's election in the Govt. Gazette and declared by notification that the motion for the adjournment had been legally carried. The plaintiff then sued the District Board and its President for declaration that he was the duly elected member. The Government applied for being joined as defendant Both plaintiff and defendant resisted the application. *Held*, by Venkatasubba Rao, J., following *Montgomery v. Foy*, that in as much as the Local Government is empowered to suspend the execution of any resolution of any Local Board and in fact suspended the execution of the resolution electing the plaintiff as a member, the Government was a proper party to the suit and should be added as a defendant ; *Secretary of State v. Murugesu*, A. I. R. 1929 Mad. 443.

- (iv) A brought a suit on a mortgage executed by an administratrix without the sanction of the Court. The beneficiaries applied to be made parties to the suit on the ground that they would object to the mortgage as being voidable for want of Court's sanction. The plaintiff objected. *Held*, it was the duty of the Court to join them inspite of the plaintiff's objections : *Chandri Ayul v. Abdul Karim*, (1927) I. L. R. 51 Bom. 16.

A consideration of the above cases leads to the conclusion that a third party is entitled to intervene even against the plaintiff's wish where there is one subject—matter out of which several disputes arise and the main evidence on the issues raised by the new party will be the same ; but in a given case, if serious embarrassment or inconvenience would be caused to the plaintiff by the

addition of a new party, the Court in its discretion may refuse to force an additional party into the action.

In representative suits where the intervener is of a class whom the plaintiff claims to represent, the intervener may say, "I deny that the plaintiff represents me—add me as a defendant"¹.

The above rules have reduced the rule 'plaintiff is *dominus litus*' to the narrowest possible limits. The rule is still recognised in a case where the liability is joint and several and the plaintiff sues one out of the several. In such a case the persons the plaintiff has omitted to sue ought not to be joined against the plaintiff's wish.

Illustration :—

M, *cestui que trust* under a deed of settlement, sues C, the surviving trustee, for a breach of trust by G and his co-trustee C, deceased. An application by the defendant to add X, the legal personal representative of C to facilitate claim for contribution was opposed by the plaintiff. Buckley J., in refusing the joinder, observed, "I cannot hold that the plaintiff ought to have joined C as a defendant and her presence is not necessary in order to enable the Court to decide whether G is liable for a breach of trust": *McCheane v. Gyles* (No. 2), (1902) 1 Ch. 911 (case of a joint and several liability).

When Intervention will be refused : Consistently with the rule laid down in *Montgomery v. Foy*, there cannot be any intervention in the following cases :—

- (i) Where the third party is not directly interested in the issues between the plaintiff and the defendant but is only indirectly affected.

Illustration :—

The plaintiff, the patentee of a machine brought an action against the defendant for using a machine which he alleged was an infringement of his patent. One M, the maker and patentee of the defendant's machine, applied to be added as defendant, alleging that the judgment in the action would injure him and that the present defendant would not efficiently defend the action. The Court of Appeal held, that N, not being directly interested in the issues between the plaintiff and the defendant but only indirectly and commercially affected, the Court had no jurisdiction to add him as defendant. Kay L. J., observed, "M says that the defendant will not contest the case properly, and will not conduct the defence so energetically as he would. But we cannot help that": *Moser v. Marsden*, (1892) 1 Ch. 487.

1. *Wilson v. Church*, (1878) 9 C. D. 552, followed in *McCheane v. Gyles* (No. 2). (1902) 1 Ch. 911.

- (ii) Where a third person claims adversely to both the plaintiffs and the defendants in the suit.

Illustration :—

A sued B for a declaration that a sale deed was obtained by B benami for his benefit. B pleaded purchase of the property by him in his own right. A claimed to have had temporary possession through his agent S. B retorted that S was his agent. Then S applied to be made a party to the suit alleging that B was benamdar for both A and himself. *Held*, S cannot be joined. He must file his own suit: *Chidambaram Chettiar v. Subramaniam Chettiar*, A. I. R. 1927 Mad. 834.

Special rules relating to intervention :

There are special rules relating to intervention by persons not parties. When such special rules are applicable to special classes of suits, the joinder of interveners will be governed by such rules irrespective of whether the plaintiff objects to such joinder. There is however one general rule which governs all cases, namely, in no case can a person intervene in a pending action without being formally made a party to the cause.¹ But after the preliminary decree in an administration suit, all persons who would be entitled to be paid out of the property of the deceased may intervene (without being formally made parties to the suit) and lay such claims against the same as they may respectively be entitled by virtue of the Code.²

Among the special rules relating to intervention are the following :—

Admiralty : In an Admiralty action in rem any person not named in the writ may intervene and appear on filing an affidavit that he is interested in the *res* under arrest or in the fund in the Registry³.

Matrimonial : Where a husband is charged with adultery with a named person, such person is entitled to apply for leave to intervene after service upon him of a certified copy of the pleading containing such charge⁴.

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1. *Per* Jessel M. R., in *Samuel v. Samuel*, (1879) 12 C. D. 152 : "It is not like the hearing on further consideration where we sometimes give leave to a person to appear and contest a point".
 2. O. XX, r. 13 (2) C. P. Code.
 3. Cal. High Court O. S. Admiralty Rule 12; Rang. High Court O. S. Rules, Chap. V, r. 19 : (Corresponding English rule, Order XII, r. 24 R. S. C.)
 4. Cal. High Court Non-domiciled Divorce Rule 9; Bom. High Court O. S. Rule 917, Part II. Ch. XL; Rang. High Court O. S. Rule 9, Part I, Ch. VI.

In every petition presented by a husband for dissolution of marriage, he shall make the alleged adulterers co-respondents in the suit unless the Court otherwise directs¹. A respondent or co-respondent or a woman to whom leave to intervene has been granted may file in Court an answer to the petition².

Where in a suit for dissolution of marriage, the answer of the husband alleges adultery by the petitioner, the alleged adulterer is entitled to intervene³.

The Proctor who desires to show cause against making absolute a decree *nisi* may enter appearance in the suit and file a plea and be made a party to the proceedings.⁴

Any person other than the Proctor wishing to show cause against making absolute a decree *nisi* shall if the Court so permits enter an appearance in the suit in which such decree *nisi* has been pronounced and at the same time file affidavits setting forth the facts upon which he relies.⁵

(iii) *Probate*: Any person who has an interest, or even a possibility of interest, in the estate of the deceased, has a right to intervene in a probate action⁶. When an application for grant of probate or letters of administration is made and it is intended to bind by the proceedings any person who has a conflicting interest a citation may be issued against him to appear and "see the proceedings."⁷ If the person cited does not choose to appear, judgment will be given in his absence.⁸ Alienees since the grant of probate have the right to intervene when the will is proved in solemn form after revocation of the probate.⁹

(iv) *Recovery of Land*: In England, a person not named as a

1. Cal. High Court Non-domiciled Divorce Rule 8.
2. Bom. High Court O. S. Rules 916, 919, Part II, Ch. XL; Rang. High Court O. S. Rules 8, 11, Part I, Chapter VI.
3. Cal. High Court Matrimonial Suits Rules, Ch. XXXV-A, rr. 15B-15F.
4. Cal. High Court Non-domiciled Divorce Rule No. 16 (1). Cf. Secs. 176-182, Jud. Act, 1925, and Eng. Divorce Rules 15-55.
5. Cf. O. XII, r. 23, R.S.C.; *Kipping v. Ash*, 1 Rob. 270 (Any person who has an interest or even a possibility of interest, in the estate of the deceased may intervene).
6. *Kipping v. Ash*, *supra*.
7. Sec. 283 Ind. Suc. Act; *Rammaya v. Betty*, (1926-27) 31 C.W.N. 160; *Wytycherley v. Andrews*, L.R. 2 P. & M. 327; *Young v. Holloway*, (1895) P. 87.
8. *Haimabati v. Kunja*, (1930-31) 35 C.W.N. 387.
9. *Lindsay v. Lindsay*, 42 L.J.P. 32.

defendant in the writ of summons for recovery of land may, by leave of the Court or a Judge, appear and defend on filing an affidavit showing that he is in possession of the land either by himself or by his tenant.¹ In India there is no such special rule, but on general principles, such a person will be entitled to intervene.

4. Representative parties : Representative parties may be grouped under two heads :

(a) *Parties on behalf of themselves and others :* The general rule is that all persons interested in the subject-matter of a suit shall be parties thereto. But some among such persons as parties to suits may also represent others if they are permitted to do so by some law or rule of procedure. Suits in which parties represent themselves and others are a class of representative suits. The following suits are illustrative of such representative suits :

(i) Suits by or against the Karta of a joint Hindu family.

(ii) Suits under Sec. 14 of the Religious Endowments Act, XX of 1865.

(iii) Suits under Sec. 73 of the Madras Hindu Religious Endowments Act, II of 1927, as amended by Act XII of 1935.

(iv) Suits under Sec. 92 C. P. Code.

(v) Suits under O. 1, r. 8, C. P. Code.

Of the above groups the most important form of representative suits is under Order I, r. 8 C. P. Code which provides as follows :

(1) "Where there are numerous persons having the same interest in one suit, one or more of such persons, may with the permission of the Court, sue or be sued, or may defend in such suit, on behalf of or for the benefit of all persons so interested. But the Court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such persons either by personal service, or, where for the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the Court in each case may direct."

(2) "Any person on whose behalf or for whose benefit a suit is instituted or defended under Sub-rule (1) may apply to the Court to be made a party to such suit."²

O. 1, r. 8, Code is an enabling enactment, intended to enable some member or members of a class having the same interest to sue

1. O. XII, r. 25, R.S.O.

2. O. 1, r. 8, C.P.Code. (same as Sec. 30 of the C. P. Code of 1887). Cf. O. XVI, r. 9, R.S.C. which does not provide for issue of notice.

and be sued on behalf of the rest. It prescribes the conditions upon which persons interested in a suit when not made parties may still be bound by the proceedings therein. It allows representation on both sides in the same suit.¹ "It does not debar a member of a community from maintaining a suit in his own right although the act complained of may also be injurious to the whole community."²

In a representative suit the plaintiff ought to make the dissentient persons defendants or else any 'dissentient person whom the plaintiff claims to represent may say, "I deny that the plaintiff represents me—add me as a defendant", and he will be added as a defendant without the plaintiff's consent³. The dissentient person may also apply to take the conduct of the suit out of the hands of the plaintiff who professes to represent but does not represent the wishes of the great body of the absent parties;⁴. He may also apply that neither the plaintiff, nor the defendant properly represents the views of himself and certain other persons of a class and that he may be made a defendant to represent the persons being dissentient from the plaintiff's views.⁵

(b) *Parties on behalf of others* : There may be cases in which parties are not personally interested in the subject matter of suits and litigate only on behalf of others. Common instances are suits by or against (i) executors or administrators, (ii) trustees, (iii) shebait of an idol, (v) mutwalli of a Wakf, (v) benamdar.

5. Parties suing without being entitled to claim the decree to be made in their favour : In cases where executors, administrators or trustees, who are ordinarily entitled to represent the beneficiaries in suits relating to the estate, refuse or are unable to sue, a beneficiary may himself institute a suit, say, against a debtor of the estate, making the executors, administrators or trustees, as the case may be, defendants in addition to other necessary parties, but in such suit he can only ask for a decree in favour of the defendants who are the executors, administrators or trustees and not in his favour⁶.

1. *Wilson v. Church*, (1878) 9 Ch. D. 552.

2. *Kumaravelu v. T. P. Ramaswami*, (1933) L. R. 60 I.A. 278,

3. *McCheane v. Gyles*, (1902) 1 Ch. 911, following *Wilson v. Church*, *supra*.

4. *Watson v. Cave*, (1831) 17 C. D. 19.

5. *Fraser v. Cooper*, (1882) 21 C. D. 718.

6. *Taun Man v. Che Som*, A. I. R. 1932 P.C. 146, 151.

6. Parties as plaintiffs upon lending their names : An illustration of a party under this head is furnished in the case of trustees who refuse to institute a suit. When the trustees refuse to sue, a beneficiary may himself sue by making the trustees defendants in addition to any other necessary parties. He may also call upon the trustees to lend their names by offering them a proper indemnity. If the trustees refuse to allow their names he may compel them to lend their names by obtaining the leave of the Court to sue in the names of the trustees.¹

7. Parties in more than one capacity : A plaintiff can sue and the defendant can be sued in more than one capacity. Thus a person may sue and may be sued in his personal as well as in his representative capacity. An exception to the rule is in the case of claims by or against executor, administrator or heir. Under order II, r. 5 of the C. P., Code, "No claim by or against an executor, administrator or heir, as such, shall be joined with claims by or against him personally, unless the last mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor, administrator or heir, or are such as he was entitled to, or liable for, jointly with the deceased person whom he represents."

Even where it is permissible to sue in different capacities Court has a discretion to order separate suits to be filed or separate trial of the claims made in such capacity. Thus where a plaintiff in his individual capacity sought to recover possession of properties, B., C., D., and E., and as shebait sought to recover possession of property A., it was held in a Calcutta case, that the plaint should be treated as comprising two suits and the two suits should be separately tried².

As a rule the same person (by which expression is meant 'legal person') cannot be both plaintiff and defendant in the same suit³. But in certain circumstances a person in his individual capacity may sue himself in a different capacity. Thus, in a given case, an individual who happens to be a member of a partnership can sue the

1. See 'Trustees', Chap. IX, under "Classes of persons" under sub-head "Suits between beneficiaries and third parties", *infra*. See also Annual Practice, 1938, p. 247.

2. *Harendra Nath v. Purna Chandra*, (1928) I. L. R. 55 Cal. 164.

3. *Ratanbai v. Narayandas*, (1927) I. L. R. 51 Bom. 771.

partnership as its creditor.¹ The plaintiff as the trustee of A. can sue a firm of which he is individually a partner². An individual who is Mayor of a Borough may sue, as an individual, the Corporation constituted by "The Mayor, Aldermen and Burgesses"³.

8. Parties for the purpose of watching proceedings : Quasi-parties :—There are cases where third persons are allowed 'to come and see' the proceedings in order that they may be bound by them. Thus, under Sec. 283 of the Indian Succession Act, 1925, persons claiming to have an interest in the estate of the deceased, to whom citations are issued, are entitled to come and see the proceedings before the grant of probate or letters of administration. In partition suits, mortgagees of co-sharers are sometimes given leave to watch the proceedings in order to safeguard their interests⁴. Such persons are not parties to the suit. In no case, however, ought any body to be added as a party to the suit merely for the purpose of watching proceedings⁵. The converse rule was laid down by Jessel M. R., that no person ought to be allowed to intervene in an action without being formally made a party to the cause⁶.

9. Pro-forma defendants : The expression 'pro-forma defendants' is not known to law.⁷ But "it does happen sometimes" as Rankin C. J., pointed out in a Calcutta case⁸, "that a person is

1. *Premji Luthia v. Dossa Doongersey*, (1886) I. L. R. 10 Bom. 356, 361. See O. XXXI, r. 9, C. P. Code.
2. *Jivraj Lakhamal v. Dinanath & Co*, A.I.R. 1926 Sind 4.
3. See *In re : Abercrombie's Will Trust*, (1931) W. N. 109 ; Annual Practice, 1938, p. 214.
4. *Jadunath v. Murari Mohan*, (1930-31) 35 C. W. N. 296.
5. *National Insurance Co., Ltd. v. Nissim Abraham Gubbay*, (1929) I.L. R. 56 Cal. 447, 451, 452 (Two legatees filed a suit on the original side of the High Court for administration of the estate of A. An application was made by the National Insurance Co., Ltd., who were mortgagees of 11/16th shares and sub-mortgagees as regard 4/16th share to to added as parties to the suit. Costello J., ordered that the applicants be added "for the purpose of watching the proceedings". On appeal, Rankin C. J., held, "It appears to me to be a mistake to make an order for a person to be a party for watching the proceedings. I see neither meaning, nor purpose in such an order. The applicant who have an interest to the extent of 15/16th share in the property ought to be allowed to become parties to the proceedings").
6. *Samuel v. Samuel*, (1879) 12 C. D. 152.
7. *Per Mullick J. in Nardatal v. Naresh*, 41 I. C. 468.
8. *Sadhu Kathalia v. Dharendra*, (1928) I. L. R. 55 Cal. 590.

impleaded merely for the sake of conformity, as for example, the plaintiffs' co-sharers. A person may be impleaded to represent the legal interest although he is a bare trustee having no real interest in the matter, or he may be impleaded because he has a right or title which is affected by the order sought though not prejudicially affected. There are circumstances under which it is not improper in ordinary language to describe a defendant as being joined *pro-forma*." Even so, the learned Chief Justice pointed out that "*pro-forma* defendant" is not a term that ought ever to appear in the cause-title of any suit or proceeding". In the case before his Lordship, the plaintiffs, who claimed a thirteen annas four pies share in a revenue paying estate, sued six persons for ejectment, impleading a group of 107 persons besides as co-sharer *pro-forma* defendants. The plaintiffs claimed no relief against any of the 107 *pro-forma* defendants. They were apprehensive that some of them might lay claim to some right or interest in the suit lands. *Held*, "The plaintiffs would seem to have come under Sec. 42 Specific Relief Act which entitles a person entitled to any legal right as to any property to institute a suit against any person denying or interested to deny his title to such character, but I need hardly say that it is *prima facie* a very curious discretion to grant a declaration against persons who have made no specific claim hostile to the plaintiffs' interest and who have in no way asserted or formulated any claim of a hostile character".

It will thus appear that in a case in which the plaintiff is entitled to sue only persons denying or interested to deny his title, no one ought to be added as a party who does not deny or is interested to deny the plaintiffs' title. To quote from the judgment in the said case, "It is no part of the duty of the law Court to issue notices round the world to persons to come in to make claims, if any, or take objection if any to the plaintiffs evicting the persons who are in actual possession of the plaintiffs' property. I hope if ever again a Court finds a hundred defendants against whom there is no real case made in the plaint it will take the necessary steps to deal with that situation and put an end finally to the litigation".

A *pro-forma* defendant need not be joined in appeal.¹ On the death of a *pro-forma* defendant, omission to bring on record his legal representatives does not cause the suit to abate.²

1. *Krishna Kumar v. Atul Chandra*, (1924) 39 C. L. J. 612.

2. *Brij Inder Singh v. Kanshi Ram*, (1916-17) L. R. 44 I. A. 218, 228.

CHAPTER VII

PARTIES : JOINDER, MISJOINDER AND NON-JOINDER OF—

Joinder of plaintiffs :—Under certain circumstances several persons may join as plaintiffs in the same suit. "All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist whether jointly, severally or in the alternative, where, if such persons brought separate suits any common question of law or fact would arise,¹ but if such joinder would embarrass or delay the trial, the Court can prt the plaintiffs to their election, or order separate trials or make such order as it thinks expedient".²

The first condition is that the right to relief should exist in the plaintiffs *jointly, severally or in the alternative*. A right to relief is *several* where it is enjoyed by one in common with others, so that any one of the several may institute a suit to enforce his individual right without impleading the others as co-plaintiffs with whom the right is enjoyed in common.³ A right to sue *in the alternative* exists where the plaintiffs allege that either one or the other is entitled to relief.⁴ A right to relief is *joint* where several persons are jointly interested in the same. Where two or more persons are jointly entitled to the same relief in respect of a transaction, they not only may but as far as possible must all join as plaintiffs in one suit. Thus, where there are several trustees, they should ordinarily be co-plaintiffs and any of them should be made defendant who is unwilling to be joined as co-plaintiff or has done some act pre-

1. O. 1, r. 1, C. P. Code (identical with O.XVI, r. 1, R. S. C.). The object of the rule is to avoid needless expense where it can be done without doing injustice to any one : *Markt & Co. Ltd. v. Knight S. S. Co. Ltd.*, (1910) 2 K. B. 1021, 1037 ; Per Mukherjee J. in *Ramendra v. Brojendra*, (1918) I.L.R. 45 Cal. 111, 134 : "On the one hand, we had the fundamental principle that needless multiplicity of suits should be avoided ; on the other hand, we have the equally essential principle that the trial of the suit should not be embarrassed by the simultaneous investigation of totally unconnected controversies".

2. O. 1, r. 2, C. P. Code.

3. *Jawahra v. Akbar Husain*, (1885) I. L. R. 7 All. 178 ; of *Baiju Lal v. Bulak Lal*, (1896) I. L. R. 24 Cal. 385.

4. *Fakirāpa v. Rudrāpa*, (1892) I. L. R. 16 Bom. 119, 122, 123.

cluding him from being plaintiff.¹ In the first case, the suit ought not to be dismissed simply because it is not shown that he had refused to join as co-plaintiff. He may, if he chooses, be shifted to the side of the plaintiffs.² In the second case, there is no duty on the plaintiffs to have consulted him before the suit was filed or to have asked him to join in bringing it, and he is not entitled to be transferred to the category of plaintiffs³. It should be noted that the question as to whether a necessary co-plaintiff added as a co-defendant should be transferred to the side of the plaintiffs or not is a matter of perfect indifference to the substantial defendant. He is protected if all the parties entitled to relief against him are on the record, some as the plaintiffs, the others as the defendants⁴.

The second condition is that the right to relief in each plaintiff must be in respect of the same transaction or transactions and that a common question of fact or law should exist.⁵

Under the Civil Procedure Code, 1882, Sec. 26, there was a conflict of decisions as to whether persons having different interests in a property could join as co-plaintiffs to recover possession of the property from the third party if the ground on which the relief was claimed was common to all the defendants. But under the present rule, such persons may join in one suit as plaintiffs.

Further, under the present rule, plaintiffs may sue in a double capacity if the conditions prescribed by O. 1, r. 1, C. P. Code, 1908, are complied with. Thus, where the plaintiffs in a double capacity as trustees interested in the reversion and as actual residents, sued the defendant (the occupier of a piece of land adjoining that of the plaintiffs) and prayed for an injunction restraining the defendant

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1. *Kokilasari v. Mohunt Rudranand*, (1907) 5 C. L. J. 527; *Shanmuga v. Subbayya*, (1922) 42 M.L.J. 133; *Shital Chandra v. Manik Chandra*, (1908-09) 13 C.W.N. 509; *Maung Pe Tru v. U. Thay*, A.I.R. 1934 Rang. 347; *Johnson v. Stephens & Carter Ltd.*, (1923) 2 K. B. 857 (where it was held that a necessary co-plaintiff was rightly joined as a defendant because he in breach of his duty to the plaintiff colluded with the defendant and brought about the breach complained of); *Peari Mohan v. Nobin Chunder*, (1898-99) 3 C.W.N. 271, 275 (F.B).
 2. Per Maclean C. J., in *Peari Mohun v. Kedarnath*, (1893) I.L.R. 26 Cal. 409, 413.
 3. *Mariyil Raman v. K. M. Narayanan*, (1903) I.L.R. 26 Mad. 461.
 4. *Tarini Kant v. Nund Kishore*, (1883) 12 C.L.R. 598.
 5. Cf. *Stroud v. Lawson*, (1898) 2 Q. B. 44, 51-54; *Walbert v. Green*, (1899) 2 Ch. 696, 702.

from committing an alleged nuisance, *held*, that there could not be any objection to the plaintiffs suing in their double capacity.¹

Where there are several plaintiffs, the Court has power to give judgment, without any amendment, for such one or more of the plaintiffs as may be found to be entitled to relief.²

Where there are numerous persons having the same interest in one suit, one or more of such persons may with the permission of the Court, sue in such suit on behalf of or for the benefit of all persons so interested. And any person on whose behalf or for whose benefit a suit is instituted may apply to the Court to be made a party to such suit³. Again, where there are more plaintiffs than one, any one or more of them may be authorised in writing by any other of them to appear, plead or act for such other in any proceeding⁴.

The following are illustrations of the rules regarding joinder of plaintiffs :

Illustrations :—

(a) *Where the right to sue is several :*

(i) Four persons each of whom took debentures on the faith of the statements in a prospectus and covering letter issued by the Directors of a company joined as co-plaintiffs claiming damages for mis-representations contained in the prospectus and covering letter. Byrne J., held, "If in the present case separate actions had been brought there would be common questions of law or fact. It is perfectly true that to establish their respective rights to relief each of the plaintiffs must prove his title, but there is a common ground of action, namely, the loss to the plaintiffs caused by the defendant's issuing the prospectus" : *Drineqhier v. Wood*, (1909) 1 Ch. 393, 397. (An illustration is given in the judgment of Byrne J. as follows : If injury is done to terrace of ten houses by illegal use of a traction-engine passing in front of them, each owner would have to prove the title to his house. but the other questions of fact and law would be common to all the owners, and I have no doubt they could all sue in one action).

(ii) The Universities of Oxford and Cambridge jointly instituted a suit to restrain the defendant from selling his books as "The Oxford and Cambridge Publications". *Held*, they can join in one action as the right to relief arose out of one transaction or a series of transactions (if each publication was a separate transaction) and that the question of publication and the belief that would be induced by such publication were common questions of fact : *Universities of Oxford and Cambridge v. Gill*, (1899) 1 Ch. 55.

1. *Bai Bhicaji v. Perojshaw Jivanji*, (1916) I. L. R. 40 Bom. 401, 408.

2. O. 1, r. 4, C. P. Code.

3. O. 1, r. 8, C. P. Code. See heading "Parties on behalf of themselves and others," *supra*.

4. O. 1, r. 12, C. P. Code.

(b) *Where the right to sue is in the alternative :—*

A, the widow, and B, the adopted son, of C, deceased, filed a suit to recover a debt due to C. The adoption was challenged by C's reversioners. A did not dispute the adoption. The prayer in the plaint was, if the adoption was established a decree should be made in B's favour but if the adoption was held not proved, then a decree should be passed in favour of A. *Held*, the suit was not bad for misjoinder : *Fakirap'a v. Rudrap'a*,² (1892) I. L. R. 16 Bom. 119, 122, 123.

(c) *Where there is no common question of law or fact :—*

The plaintiffs who were holders of a piper service in a temple and entitled to different shares in the inam, instituted a suit for setting aside a wrongful order of dismissal passed by the trustee of the temple. *Held*, the charges of misconduct against the several plaintiffs could not be tried together as each of their cases gave rise to different questions : *Medura etc. v. Sundaram* A. I. R. 1926 Mad. 57, 58.

Joinder of defendants : "All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where if separate suits were brought any common question of law or fact would arise"¹. It is not necessary that every defendant should be interested as to all the reliefs claimed in any suit against him.² The rule does not require that all questions of law or fact must be common to all the parties. It is sufficient that there is a common question.³

Illustrations :

(a) A brought a suit against B, C, D and E for recovery of certain documents of title and the goods covered thereby, in the alternative, the value of the goods. He alleged that the goods in suit were his property ; that defendant B. obtained from him the documents of title relating thereto by fraud and made them over to defendant C ; that defendant C wrongfully dealt with them and sold the goods to defendants D and E ; that D and E claimed to retain the goods and documents of title. *Held*, "The right to relief against each of the defendants is based upon the same act, namely, the alleged fraud of B, and this is so notwith-

1. O. I, r. 3, C. P. Code. (O. XVI, r. 4, R. S. C.); *Shyam Behari v. Mahu Prasad*, A. I. R. 1930 All. 180. The rule also refers to joinder of causes of action : Per Woodroffe J., in *Ramendra v. Brajendra*, (1918) I. L. R. 45 Cal. 111, 123 ; *Harendra v. Purna Chandra*, (1928) I. L. R. 55 Cal. 164 (O. I, rr. 1 and 3 of the C. P. Code deal with joinder of causes of action as well as joinder of parties). The rule is applicable to contracts as well as to torts : *Bullock v. London General Omnibus Co.*, (1907) 1 K. B. 264.
2. O. I, r. 5, C. P. Code.
3. *Ramendra v. Brajendra*, *supra*.

standing the fact that there may have been subsequent acts or transactions in which the different defendants are individually concerned and which may enable them to raise distinct defences. If different suits were instituted, at least one common question of fact would arise, namely, the exact nature of the act imputed to B, which would have to be investigated, presumably on the same evidence separately adduced in several suits: Per Mookerjee J., in *Ramendra v. Brajendra*, (1918) I.L.R. 45 Cal. 111 at 135.

(b) A, holder of 100 shares in a Company, brought an action against the Company, its several directors and promoters and the executors of a deceased director and promoter, claiming as against the Company cancellation of the allotment to him of his shares and return of the money paid by him with interest; damages as against the defendants other than the Company and rectification of the Company's Register of Members by the removal of his name therefrom. He alleged that he had applied for the shares upon the faith of, and induced by the mis-representations contained in a prospectus issued by and with the authority of the defendants (other than the Company and the executors) and of the deceased. *Held*, "In substance, the share-holder has one grievance, call it a cause of action or what you like; and in substance he has one complaint, and all the persons he sues, have according to him, been guilty of conduct which gives him a right to relief in respect of one thing which they have done, namely, issuing of a prospectus: Per Lindley M. R., in *Frankenburg v. Great Horseless Carriage Co.*, (1900) 1 Q. B. 504.

(c) A entered into a contract with B. Co. to supply them with certain printed cards which should conform to certain specimens supplied to him by them. In order to carry out that contract A entered into a contract with W. Co. to supply him with the cards which he had agreed to supply and paid for them. The cards were duly sent to the B. Co. by the W. Co. by the direction of the plaintiff, but the B. Co. refused to accept them on the ground that they did not conform to the specimens supplied by them to the plaintiff. The plaintiff brought an action against the B. Co. & W. Co., claiming as against the former the price of goods sold and in the alternative as against the W. Co. damages for breach of contract in not supplying the cards in accordance with the specimens. Defence: Misjoinder of parties and Causes of action. *Held*, by Lawrence J., that the Court has discretion as to allowing the joinder of the two defendants and that as there was a common question of fact to be tried namely, whether the cards were in accordance with the specimens supplied, the Court would in the exercise of that discretion allow the two defendants to be joined in one action. As a general rule where claims by or against different parties involve or may involve a common question of fact being of sufficient importance in proportion to the rest of the action to render it desirable that the whole of the matters should be disposed of at the same time, then it will allow the joinder of plaintiffs or defendants subject to its discretion as to how the action should be brought: Per Pickford L. J., in *Thomas v. Moore*, (1918) 1 K. B. 555, 565.

It should be noted that "joinder of parties and causes of action is discretionary in this sense that if they are joined there is no absolute right to have them struck out but it is discretionary in the Court to do so if it thinks right." This discretion may be exercised

even if such joinder is within the sound construction of the rules.¹

The plaintiff can at his option, join as parties all or any of the persons jointly or severally liable on any contract, including parties to bills of exchange, hundies and promissory notes.²

If the plaintiff is in doubt as to the person from whom he is to obtain redress, he may join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, may be determined as between all parties.³ The Court has power to give judgment against such of the defendants as may be liable.⁴

Misjoinder of plaintiffs : We have seen that plaintiffs may be joined in one suit in a case covered by O. 1, r. 1, C. P. Code. But if two or more persons are joined in one suit, in a case not covered by O. 1, r. 1, the result is a misjoinder of plaintiffs.

Misjoinder of plaintiffs and causes of action : Under O. 11, r. 3, C. P. Code, the plaintiff, save as otherwise provided in rr. 4 and 5 of O. 11, may unite in the same suit several causes of action against the same defendant, or the same defendants jointly ; and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly, may unite such causes of action in the same suit. This rule is to be read subject to the provisions of O. 1, r. 1 of the Code. Thus, where there are two or more plaintiffs and two or more causes of action, they may be joined in one suit if the right to the relief and the causes of action arise from the same act or transaction or series of acts or transactions and there is a common question of law or fact, though they may not all be jointly interested in all the causes of action.⁵ But, if the right to the relief claimed does not arise from the same act or transaction or series of acts or transactions or if there is no common question of law or fact, the plaintiffs cannot all join in one suit unless they are jointly interested in the causes of action as provided in O. 11, r. 3, of the Code. If the plaintiffs are not jointly interested in all the causes of action the case is one of misjoinder of

1. Per Pickford, L. J., in *Thomas v. Moore*, (1918) 1 K. B. 555, followed in *Mahanth Ramdhan Puri v. Chaudhury Lachmi Narain*, (1936-37) 41 C. W. N. 418, 419, 422 P. C.

2. O. 1, r. 6, C. P. Code.

3. O. 1, r. 7, C. P. Code.

4. O. 1, r. 4, C. P. Code.

5. See Mulla's C. P. Code, 10th Edn. p. 493.

plaintiffs and causes of action¹. Thus, where five plaintiffs contract separately to sell cotton to the same person, they cannot all join in one suit against the said person and claim damages for breach of the five contracts².

Misjoinder of defendants : If two or more persons are joined as defendants in one suit, in a case not covered by O. 1, r. 3, the result is a misjoinder of defendants.

Misjoinder of defendants and of causes of action : *Multifariousness :* Under O. II, r. 3, C. P. Code, the plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly. This rule is to be read subject to O. I, r. 3, of the Code. The effect of the two rules may be stated thus : Two or more persons may be joined as defendants in one suit where there are two or more causes of action provided the right to the relief claimed arises from the same act or transaction or series of acts or transactions and there is a common question of law or fact.³

Non-joinder of parties : We have already stated that all necessary parties must be before the Court. Where the right to sue is joint, all persons jointly entitled to the same must ordinarily join as co-plaintiffs. If a necessary party refuse to join as co-plaintiff, or has done some act precluding him from joining as co-plaintiff, he should be added as defendant. But his omission altogether from the record, would constitute a non-joinder of party.

Consequences of misjoinder and non-joinder : Formerly in England misjoinder of a plaintiff was a ground of non-suit, while non-joinder of a necessary plaintiff was the subject of a plea in abatement. But now under O. XVI, r. 11, R. S. C., no action shall be defeated by reason of misjoinder or non-joinder of parties and the Court may in every cause or matter deal with the matter in controversy as regards the rights and interests of the parties actually before it.⁴ The Court may order the names of any parties improperly joined to be struck out and the names of any parties who ought to have been joined or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the cause or matter to be added. The above rule is intended to

1. *Cf. Ramendra v. Brayendra*, (1915) I. L. R. 45 Cal. 111, 122, 123.

2. *Chandulal v. Dayal*, (1925) 27 Bom. L. R. 472.

3. See Mulla's C. P. Code, 10th Edn., p. 495.

4. *Kendall v. Hamilton*, (1879) 4 App. Cas. 504.

do away with pleas in abatement¹, and to secure the determination of all disputes relating to the same subject matter without the delay and expense of several actions and trials². The same rule finds expression in O. 1, rr. 9 and 10, C. P. Code. The above rule does not mean that judgment can be obtained in the absence of a necessary party to an action³. Thus, where objection as to the non-joinder of necessary party is taken at the very outset and the plaintiffs do not implead him the suit must be dismissed⁴. And where the suit is so dismissed the appellate Court will not accede to any request to allow any opportunity of joining a party so omitted, at that stage⁵.

O. 1, r. 9, is a rule of procedure and it cannot affect the substantive law. It only enables the Court to make a decree between the parties actually before it if that can legally and effectively be done. This rule was never intended and could never have been intended to make an illegal decree. Thus, if no decree fixing the shares in the profits or for an account can be made in the absence of certain persons without affecting them, rule 9 can never give the Court power to make such a decree⁶.

In cases where the joinder of a person as a party is only a matter of convenience or expediency, the absent party may be added under O. 1, r. 10 (2), C. P. Code, or the suit may be tried without him.⁷

O. 34, r. 1, C. P. Code has been held to be subject to O. 1, r. 9, and therefore a prior mortgagee may sue for sale without joining a puisne mortgagee.⁸

Objections as to misjoinder and non-joinder : All objections on the ground of misjoinder or non-joinder must be taken at the earliest possible opportunity, and in all cases where the issues are settled, at or before such settlement, unless the ground of objection

1. *Kendall v. Hamilton* (1879) 4 App. Cas. 504.

2. Per Lord Esher, M. R., in *Montgomery v. Foy*, (1895) 2 Q. B. 321, 324.

3. Per Lord Cave C. in *Performing Right Society Ltd. v. London Theatres of Varieties Ltd.*, (1924) A. C. 1.

4. *Mohana Velu v. Annamalai*, A. I. R. 1923 Mad. 337, followed in *Ragbhar Dayal v. Firm Piare Lal*, A. I. R. 1933 Lah. 93.

5. *Naba Kumar v. Radhashyam*, (1930-31) 35 C. W. N. 977 (P. C.).

6. *Amirchand v. Raoji*, A. I. R. 1930 Mad. 714.

7. *Shanmuga v. Subbaya*, (1922) 42 M. L. J. 133.

8. *Sital Prasad v. Asho Singh*, (1923) 1 L. R. 2 Pat. 175; *Kherodamoyi v. Habib Shah*, (1924-25) 29 C. W. N. 51.

has subsequently arisen; and any such objection not so taken shall be deemed to have been waived¹.

Where a decree is passed it shall not be reversed or substantially varied nor shall the case be remanded, in appeal on account of any mis-joinder of parties or causes of action². The non-joinder of a necessary party, however, is a defect which affects jurisdiction and is not within section 99 of the Code³.

According to the English practice if an action is bad for defect of parties, the point may be raised on the pleadings or an application may be made for adding, striking out, or substituting a plaintiff or defendant, or a preliminary objection taken⁴.

CHAPTER VIII.

PARTIES : ADDITION, STRIKING OUT, SUBSTITUTION & TRANSPOSITION OF—

A. Court's power to add, strike out and substitute parties.—

O. 1, r. 10, C. P. Code⁵, in terms confers power on the Court to cure as far as possible defects of parties. The power is to be exercised in two specified cases : -

- (1) Where a wrong person appears as plaintiff.
- (2) In other cases.

(1) *Where a wrong person appears as plaintiff*⁶ : It may well be that a suit has been commenced in the name of a wrong person as plaintiff, or it may well be that after a suit has been instituted

1. O. 1, r. 13, C. P. Code; *Bhattacharji v. Ishfaq Hussain*, A.I.R. 1933 Oudh 129 (Case where a party raised objection as to non-joinder after the framing of issues, and the objection was not entertained); *Chandranath v. Janki Prosad*, A. I. R. 1933 Pat. 270 (Where objection raised for the first time in second appeal was rejected); *Trikha Ram v. Durga Prasad*, A. I. R. 1934 Lah. 459.
2. Sec. 99, C. P. Code.
3. *Amirchand v. Raoji*, A. I. R. 1930 Mad. 714.
4. Annual Practice, 1938, p. 259.
5. Identical with O. XVI, r. 2, R. S. C.
6. In England it has been held that O. XVI, r. 2, R. S. C. (which is the same as O. X, r. 10 (1), C. P. Code) means that where an

it appears to be doubtful whether it has been instituted in the name of the right plaintiff.

In either case, the Court may order any other person to be substituted or added as plaintiff¹—

- (a) if it is satisfied that the suit has been instituted through a *bona fide* mistake², and
- (b) that it is necessary for the determination of the real matter in dispute so to do.

On an application for leave to amend by adding a plaintiff under this rule, the Court will not go into the merits of the case. But if upon the face of it it appears that the case is a perfectly idle one, it will not give leave³.

action has been commenced between two living parties by a living plaintiff and the living plaintiff afterwards turns out to be the wrong person, the Court may substitute another person for the living plaintiff or may add another person as co-plaintiff as the case may be. But it does not justify the Court in creating a plaintiff in an action for the first time. Thus, where an action is commenced in the name of a dead man, his representative cannot be substituted as plaintiff: *Tellow v. Orela Ltd.*, (1920) 2 Ch. 24. In India, the question as to whether the rule applies where a suit has been commenced in the name of a person who was not alive at the date of such commencement has been canvassed in a number of cases. In *Hazarimal v. Shriram*, A. I. R. 1934 Nag. 55, it was held that O. 1, r. 10 (1) C. P. Code does not contemplate the case of a dead person in whose name an action was commenced. In *Makram Ali v. Abdul Hamid*, A. I. R. 1927 Cal. 880, it was held that where a suit was instituted in the name of two plaintiffs one of whom was not alive at the date of the commencement of the suit, the plaint may be amended by adding the heirs of the deceased co-plaintiff. In *Karimullah v. Bhanu Pratap*, A. I. R. 1938 Nag. 458, Neogi J., *held*, dissenting from the above two cases, that O. 1, r. 10 (1) only contemplates that a suit should have been filed in the name of a wrong person irrespective of whether he is a living or a dead person. It is submitted that the view taken by Neogi J., is open to question. The principle laid down in *Tellow's* case has been applied in *Noorbhoy v. Secy. of State*, A. I. R. 1937 Sind 92.

1. O. 1, r. 10 (1), C. P. Code.
2. A mistake can be called *bona fide* even if it was made without the exercise of due care and caution provided it was honestly made: *Sukhdeo v. Yashodabai*, A. I. R. 1932 Nag. 20. Where the point is doubtful that itself is evidence of *bona fide* mistake. *Doaba Bank v. Hiratal*, (1920) 2 Lah. L. J. 402. Mistake may be either one of fact or of law: *Duckett v. Gover.*, (1877) 6 C. D. 82, 86 (mistake of fact); *Hughes v. Pump House Hotel Co.*, (1902) 2 K. B. 485 (mistake of law).
3. *Ayscough v. Bullar*, (1891) 41 Ch. D. 341.

In granting leave to amend under this rule, the Court may impose such terms as it thinks just¹.

(2) *In other cases* : The Court's power to add or strike out parties is not limited to the addition or substitution of a plaintiff under O. I. r. 10 (1) C. P. Code. It extends to other cases. Thus, the Court may at any stage of the proceeding either upon or without the application of either party order that the name of any party improperly joined be struck out. The Court may also require the addition of (i) a necessary party whose presence is necessary for the constitution of the suit, or (ii) a proper party whose presence before the Court may be necessary to enable the Court to effectually and completely adjudicate upon and settle all the questions involved in the suit. This rule is subject to the *proviso* that no person shall be added as a plaintiff suing without a next friend or as a next friend of a plaintiff under any disability without his consent.

The scope of O. I. r. 10 (2) is wider than that of sub-rule (1). It is not confined to cases of *bona fide* mistake.

A party ought to be struck off from the suit where no cause of action is mentioned against him.² But where cause of action against a defendant is specially pleaded and a distinct relief is claimed against him, and the defendant is not impleaded only for the sake of convenience, an order directing the removal of his name ought not to be made. Such an order if made will be in substance, if not in form, a decree and the party aggrieved may appeal from the said order.³

1. The person who applies for addition or substitution of plaintiff under this rule will generally be ordered to pay the costs of and occasioned by the amendment. He may in a given case also be ordered to bear all the costs of the action up to the time of the joinder of the added plaintiff. Other terms may also be imposed. Thus where A. alone sued B. to restrain him from building contrary to a restrictive covenant and it appeared that B. had a defence against A., and being in doubt as to his title to sue, A. applied to add C. as a co-plaintiff, it was held that there had been a *bona fide* mistake and consequently leave ought to be given, but upon the terms that if it should appear at the trial that A. could not maintain the action but C. could, A. should pay the costs of the action up to the date of the amendment, and C. should only be entitled to such relief as he could have claimed if the action had commenced at the time of his joinder as plaintiff: *Ayscough v. Bullar*, supra.
2. *Malyam Patel v. Lakka Narayana*, (1931) I. L. R. 54 Mad. 793.
3. *Shair Ali v. Jogmohan Ram*, (1931) I. L. R. 53 All. 466.

An order striking off the name of a party is appropriate in cases of actual misjoinder and not in cases of voluntary abandonment by a plaintiff of his claim against a particular defendant, where the proper order to pass is an order of dismissal.¹

The responsibility of deciding whether a certain person should be added as a party or not is entirely with the Court. The matter is entirely discretionary with the Court, but that discretion ought to be exercised judicially and with proper consideration. Ordinarily the High Court would be most reluctant to interfere with an order refusing to make certain persons parties to the suit; but where the judge has omitted to take into consideration certain matters and the order of the Judge really amounts to a refusal to exercise a jurisdiction vested in him, the High Court can interfere.²

In a Calcutta case,³ it has been held that the Court has no jurisdiction to add a person as a party who is neither a necessary, nor a proper, party³.

B. Court's power to transpose parties : The provisions of O. 1, r. 10, C. P. Code are sufficiently wide to permit transposition of plaintiff to defence side and *vice versa*.⁴

(a) **Transposition of defendants :** Defendants may be transferred to the category of plaintiffs in any of the following cases :

- (i) Where a necessary co-plaintiff who is joined as a defendant and who has not done any act which precludes him from being a plaintiff wants to be added as co-plaintiff⁵ and the original plaintiff does not object to such joinder.
- (ii) Where a necessary co-plaintiff who is joined as a defendant wants to continue the suit after the death of the plaintiff⁶ ;
- (iii) Where it appears that the right to sue is in a co-defendant and not in the plaintiff,⁷

1. *Kishori Lal v. Tek Chand*, A.I.R. 1934 Lah. 737.
2. *Kunja Behari v. Chintamani*, A.I.R. 1934 Pat. 425.
3. *Baikuntha Kumar Shil v. Sarat Chandra*, A.I.R. 1925 Cal. 1257.
4. *Brojendra Kumar v. Gobinda Mohan*, (1915-16) 20 C.W.N. 752.
5. *Peari Mohun v. Kedarnath*, (1899) I.L.R. 26 Cal. 409 at 413.
6. *Saminath v. Rajagopala*, A.I.R. 1921 Mad. 124.
7. *Mool Chand v. Bhoo Singh*, (1928) I.L.R. 3 Luck. 241.

- (iv) Where it is necessary for a complete adjudication upon the questions involved in the suit and to avoid multiplicity of proceedings.¹

But on no account should an order transferring a defendant to the category of plaintiffs be made if it results in changing the character of the suit, or if it gives rise to conflicting interests between him and the original plaintiff.²

(b) **Transposition of plaintiffs :** As to transferring a plaintiff to the category of defendants, an order can be made (a) whenever there is a difference or conflict of interest between co-plaintiffs,³ (b) when a co-plaintiff wants to withdraw from the suit.⁴ But such an order will be made only on security for the original defendant's costs being given by the remaining co-plaintiffs. As the case is really one of amendment, ordinarily security for past costs, that is, up to the date of making of the order should be ordered. Security for future costs should not be ordered in the absence of special circumstances.⁵

Limits on the exercise of the Court's power: The power of the Court under O. I, r. 10 C. P. Code is discretionary and can be exercised under circumstances specified in the same rule. But, there are certain general considerations which ought to guide the Courts exercising the said power. Thus, in the following cases the said power ought not to be exercised :

(i) A person who claims adversely to both the plaintiff and the the defendant cannot be added either as a plaintiff or as a defendant. The reason of the rule is—if joinder of plaintiffs or defendants is impossible under rules 1 & 2 of O. I, of the C. P. Code, it does not become possible under O. I, r. 10⁶.

(ii) No person can be added or substituted as plaintiff without his consent,⁷ and no person can be added as a plaintiff without the consent of the existing plaintiff.⁸

1. *Bhupendra v. Rajeswar*, (1931) L.R. 58 I.A. 228.

2. *Jagabandhu v. Haris*, (1922) 36 C. L. J. 92.

3. In re : *Mathews, Oates v. Money*, (1905) 2 Ch. 460.

4. *Brown v. Sawyer*, (1841) 3 Beav. 598.

5. *Bhairabendra v. Uday Narain*, (1923) I.L.R. 50 Cal. 853.

6. *Chidambaram v. Subramanian*, A.I.R. 1927 Mad. 834.

7. *Shital Chandra v. Manik Chandra*, (1908-09) 13 C.W.N. 509, 511.

8. *Prarat Chandra v. Amulya Chandra*, (1927) 45 C. L. J. 146. Cf. O. XVI, r. 11, R. S. C.

(iii) No new plaintiff will be allowed to be added or substituted if the matters in dispute between him and the defendant would not be the same as those in dispute between the original plaintiff and the defendant¹.

(iv) No person can be added as a plaintiff if that would give rise to conflicting interest between the co-plaintiffs².

(v) A plaintiff on record cannot be given a good cause of action (where he has none) by the addition subsequently of a person as a plaintiff who has a good cause of action³.

(vi) No person can be added as plaintiff to a suit, if thereby a defence under the Statute of Limitations would be defeated⁴. This rule will not apply to a case where a party is added or substituted owing to an assignment or devolution of interest during the pendency of a suit or where a plaintiff is made a defendant or a defendant is made a plaintiff⁵.

(vii) The same person cannot appear as a plaintiff and a defendant in the same action⁶.

(viii) A defendant cannot be the next friend of a plaintiff under disability⁷.

Limitation—where there is addition, substitution or transposition of parties : Section 22 of the Limitation Act provides as follows :—

“(1) Where, after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party.”

1. *John Boisogomoff v. Manmatha*, (1931) I. L. R. 58 Cal. 561 ; *Mukhi Jeramdas v. Tikamal*, A. I. R. 1935 Sind 194 ; *Pravat Chandra v. Amulya Chandra*, (1927) 45 C. L. J. 146.
2. *Jagabandhu v. Harish Chandra*, (1922) 36 C. L. J. 92.
3. *Jannadas v. Damodardas*, (1927) 29 Bom. L. R. 418 ; *Clowes v. Hilliard*, 4 Ch. D. 413 (a case where the original plaintiffs had no sufficient interest in law to entitle them to sue).
4. Sec. 22 (1) of the Limitation Act.
5. Sec. 22 (2) of the Limitation Act ; *Krishnaji v. Hanmaraddi*, (1934) I. L. R. 58 Bom. 536.
6. *Premji Ludha v. Dossa Doongersey*, (1886) I. L. R. 10 Bom. 358, 361 ; *Ellis v. Kerr*, (1910) 1 Ch. 529. In England a person who represents various interests, e. g. a public trustee, is not allowed to be both plaintiff and defendant ; In re : *Phillips, Public Trustee v. Meyer*, (1931) 101 L. J. Ch. 101.
7. This result will follow from O. XXXII, r. 4, C. P. C.

“(2) Nothing in sub-section (1) shall apply to a case where a party is added or substituted owing to an assignment or devolution of any interest during the pendency of a suit or where a plaintiff is made a defendant or a defendant is made a plaintiff.”

The above section shall apply only in the case of a new plaintiff or defendant who is a necessary party.

Therefore, it shall not apply in the following cases :—

(i) If fresh parties are merely joined for the purpose of safeguarding the right subsisting as between them and others claiming generally in the same interest. Thus in a suit brought by the managing members of a joint Hindu family an objection being taken by defendant, the other members of the family were joined as plaintiffs, but after the period of limitation prescribed for the suit, *Held*, by the Judicial Committee, that the suit as originally brought was properly constituted; that the members of the family subsequently added were unnecessary parties and that the suit was consequently not barred¹.

(ii) Where the amendment is merely the correction of a misdescription of a party. In such cases “there is complete power in the Court to give the appropriate reliefs to the plaintiff without any regard to the terms of Section 22, Limitation Act².”

(iii) Where the amendment does not alter the character of the suit and no new defendant is brought on the record³.

1. *Kishan Prasad v. Har Narain*, (1911) I. L. R. 33 All. 272 (P. C.) followed in *Banwari Singh v. Sakhray Singh*, A. I. R. 1931 All. 585. Cf. *Gururayya Gouda v. Dattatraya*, (1903) I. L. R. 28 Bom. 11.
2. *Per Das J.*, in *E. I. Ry. Co. v. Ram Lakhan*, (1924) I. L. R. 3 Pat. 230, 233; cf. *Seodoyal Khemka v. Joharmull Manmull*, (1923) I. L. R. 50 Cal. 549, 557, 558, 559, (In determining whether a party intended to be sued has been misdescribed, the Court ought not to be guided by the barest technicality, for “orders and rules framed for procedure in suits and actions were created for the purpose of being the handmaid and not the mistress of the law”); *Manni v. Crooke*, (1879) I. L. R. 2 All. 296, referred to in *Nistarini v. Sarat Chandra*, (1915-16) 20 C. W. N. 49; *Saraspur Mfg. Co. v. B. B. & C. I. Ry. Co.*, (1923) I. L. R. 47 Bom. 785; *Gopiram v. Agents, E. I. Ry. and O. & R. Ry.*, 1925-26) 30 C. W. N. 209; *Anukul Chandra v. Chairman, Dacca Dist. Board*, (1927-28) 32 C. W. N. 396.
3. *Peary Mohun Mukerjee v. Narendra*, (1910) I. L. R. 37 Cal. 229, 234 (The object of the amendment was to determine judicially which of the living descendants of the original testator, all of whom were already parties to the suit, was to be considered sebit),

(iv) Where a party sues or is sued in one capacity and the amendment is made by adding him in another capacity also. Thus, where the plaintiff originally sued in his personal capacity, but later on after the expiry of the period of limitation amended the plaint by adding himself in his capacity as administrator also, *Held*, that as the amendment made a change of form only and not of substance, the suit was not barred by limitation¹.

CHAPTER IX

CLASSES OF PERSONS.

Adatia : See "Pakka and Katcha Adatias", *infra*.

Administrator : See "Executors and Administrators", *infra*.

Administrator-General : The Administrator-General is a corporation sole by the name of the Administrator-General of the Presidency for which he is appointed and, as such, Administrator-General shall have perpetual succession and an official seal, and may sue and be sued in his corporate name².

Nothing in Sec. 80, C. P. Code, shall apply to any suit against the Administrator-General in which no relief is claimed against him personally³.

Agent : The right of the agent to sue the principal, and his liability to be sued by the principal, depend upon their duties and obligations towards each other and do not need much exposition. The point that needs consideration is the agent's, and, conversely, the principal's, rights and liabilities in relation to third parties and the classes of suits in connection therewith. The said suits are classified under the following heads :

1. When principal may sue.
2. When principal may be sued.
3. When principal cannot be sued.
4. When a person who contracts as agent may sue as principal.

1. *Naba Kumar v. Higheazany*, (1924) I. L. R. 51 Cal. 845.

2. Sec. 5, Adm.-Gen. Act (III of 1913).

3. Sec. 41, *Ibid*.

5. When agent may sue or be sued.
6. When agent cannot sue or be sued.
7. When pretended agent may be sued.
8. When both principal and agent or either of them may sue.
9. When both principal and agent or either of them may be sued.

Note: The special incidents attaching to special classes of agents such as brokers, factors, auctioneers, etc., are dealt with separately under different heads.

1. *When principal may sue*: When a contract is made by an agent as such, in other words, where the principal is disclosed, the principal is entitled to sue thereon. The agent cannot sue unless he has a beneficial interest¹.

When a contract is made with an agent in his own name for an undisclosed principal, either the agent or the principal may sue upon it². But "if the principal has interfered and has required or has obtained completion of the contract with himself personally, the agent's right of action thereon ceases³". In a suit by an undisclosed principal, the other contracting party, however, shall have as against the principal the same rights as he would have had as against the agent if the agent had been principal⁴. And if the principal discloses himself before the contract is completed, the

1. *Williams v. Millington*, (1733) 1 Hy. Bl. 81 (action by auctioneer who has a lien or special property in the goods); *Durga Prasad v. Caunpore Flour Mills*, A. I. R. 1929 Oudh 417; *Coorla Spinning etc. v. Vallabhdas*, 27 Bom. L. R. 1168.
2. *Langton v. Waite*, (1868) L. R. 6 Eq. 165; *Duke of Norfolk v. Worthy*, (1808) 1 Camp 337 (case of simple contract not under seal: In this case, money of D, an undisclosed principal, was paid through an agent for the purchase of an estate. Held, upon a breach of condition of sale on the part of the vendor, D is entitled to sue to recover back the deposit); *Phelps v. Prothero*, (1855) 5 M. & S. 383, 394 (case of simple contract not under seal: the undisclosed principal can sue if the contract is for and on behalf and for the benefit of the principal notwithstanding that the agent may for the purposes of the agreement find and provide money out of his own pocket); *Ladhomal v. Chandumal*, A. I. R. 1931 Sind 4; *Makhanlal v. Basudharanjan*, (1934) I. L. R. 61 Cal. 504; *Dulab Das v. Mawin*, 59 I. C. 965.
3. Chitty on Contracts, 19th Edn., p. 460.
4. Secs. 231, 232 Ind. Cont. Act; *E. I. Ry. Coy. v. Baldeo*, 92 I. C. 100 (principal can sue for loss of consignment in transit although receipt was granted in the name of agent); *Ladhomal v. Chandumal*, A. I. R. 1931 Sind. 4.

other contracting party may refuse to fulfil the contract, if he can show that, if he had known who was the principal in the contract, or if he had known that the agent was not a principal, he would not have entered into the contract¹.

The English rule that no person who is not a party to a deed can sue or be sued upon a contract contained in a deed has no operation in India, and hence, in India, the principal may sue and be sued upon a deed even though it may not have been executed in his name².

2. *When principal may be sued* : "No rule of law is better ascertained or stands upon a stronger foundation, than this, that when an agent names his principal, the principal is responsible, not the agent³".

Where the principal is undisclosed, he is nevertheless liable to be sued.⁴ In either case, the principal is liable only for acts done and obligations incurred by the agent in the course of his employment and within the scope of his authority⁵. The principal is not liable for the acts done and obligations incurred by the agent, without authority, unless the principal (a) has ratified the unauthorised acts of the agent⁶, or (b) has by his words or conduct induced third persons to believe that the acts done or obligations incurred by the

1. Secs. 231, Ind. Cont. Act. The disclosure must be by the principal himself and not by another person; *Lakshmandas v. Anna*, (1908) I. L. R. 32 Bom. 356; *Grenon v. Lachmi*, (1896) I. L. R. 24 Cal. 8; *Kapurji v. Pannaji*, (1929) I. L. R. 53 Bom. 110.
2. *Chinnaramanuja v. Padmanabha*, (1896) I. L. R. 19 Mad. 471, 476; cf. *Harrison v. The Delhi and London Bank*, (1908) I. L. R. 31 M. 206; *Hiru Chand v. Jaya Gopal*, (1925) I. L. R. 49 Bom. 215, 258. For application of the English rule, see *Berkham v. Drake*, (1841) 9 M. & W. 79; *Torrington v. Lowe*, (1868) L. R. 4 C. P. 26; *Sims v. Bowl*, (1833) 5 B. & Ad. 389.
3. *Per Lord Erskine, C.*, in *Exparte Hartop*, (1806) 12 Ves. 349; *Kimber Coal Co. v. Stone*, (1926) A. C. 414.
4. *Glenester v. Hunter*, (1831) 5 C. & P. 62 (If goods are obtained by an agent and it is afterwards found that he had a principal the tradesman may sue the principal); *Somasundaram v. Subramanian*, A.I.R. 1926 P.C. 136.
5. *Hambro v. Burnard*, (1904) 2 K.B. 10 (principal liable for fraud of his agent); *Lloyds Bank v. Chartered Bank of India*, (1929) 1 K.B. 40, 56; *Jag Mohon v. Firm of Sampallal Mulchand*, A.I.R. 1932 Nag. 27; cf. Sec. 238 Ind. Cont. Act; *Fazal Ilahi v. E. I. Ry. Coy.*, (1921) I.L.R. 43 All. 623 (liability of Railway Company for mistake of a parcel clerk); *Dina Bandhu v. Abdul Latif*, (1922) I.L.R. 50 Cal 258.
6. Sec. 235, Ind. Cont. Act.

agent to such third persons were within the scope of the agent's authority.¹ But he will be liable for benefits received, though it turns out that the act of the agent was not authorised, or ratified or adopted by him².

3. *When principal cannot be sued*: The principal cannot be sued in the following cases :

- (a) Where the agent is a party to a Bill of Exchange or Promissory Note and the name of the principal is not disclosed in such a way that on any fair interpretation of the instrument his name is the real name of the person liable on the Bill³.
- (b) Where the contract is made by agent, on behalf of a foreign principal⁴.
- (c) Where the contract is made by an agent on behalf of a prince or chief and any ambassador or envoy of a foreign state, and such prince etc., cannot be sued in British Indian Court by reason of Sec. 86 C. P. Code⁵.
- (d) Where the contract provides that the agent alone shall be liable⁶.
- (e) Where the person contracting with the agent has elected to sue the agent and has proceeded to judgment, in a case where he could sue either the principal or the agent or both alternatively⁷.

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1. Sec. 237, Ind. Cont. Act ; *Gobindram v. Partabsing*, A.I.R. 1937 Sind. 151 ; *Darbari v. Sharif*, A.I.R. 1929 Lah. 822. (where the owner of a house induced a third person to believe that the auction sale was within the scope of the auctioneer's authority.)
 2. *Kusam v. Narayan*, A.I.R. 1930 Nag. 42.
 3. *Sadasuk v. Sir Kishen Pershad*, (1918-19) L.R. 46 I.A. 33 ; *Sitaram v. Ohimandas*, (1928) I.L.R. 52 Bom. 640 ; *Sreelal v. The Lister Antiseptic Dressing Co. Ltd.*, (1925) I.L.R. 52 Cal. 802 ; *Dhirendra v. Nutbehary*, (1932-33) 37 C.W.N. 296 ; cf. *Bank of Behar Ltd., v. Madhusudanlal*, A.I.R. 1937 Pat. 428.
 4. *Firm S. Nasir-ud-Din v. Firm Durga Prashad*, A.I.R. 1937 Lah. 607 ; *Tutika Basavaraju v. Parry & Co.*, (1903) I.L.R. 27 Mad. 315 ; *Deoki Nandan & Sons v. Ram Lal*, A.I.R. 1923 Lah. 296 ; *Universal Steam Navigation Co. v. James McKelvin & Co.*, (1923) A.C. 492, followed in *Ganpat v. Forbes*, 32 Bom. L.R. 1336.
 5. *Ramechand v. Ismael*, A.I.R. 1928 Sind 189.
 6. Sec. 230, Ind. Cont. Act.
 7. *Shivlal v. Birdichand*, (1917) 19 Bom. L. R. 370 ; *Moselles Solomon v. Martin & Co.*, (1934-35) 39 C. W. N. 461. Cf. *Pootheri v. Kallil Appa*, (1926) I.L.R. 49 Mad. 900.

- (f) Where a person who has made a contract with an agent induced the principal to act upon the belief that the agent alone will be held liable¹.

4. *When a person who contracts as agent, may sue as principal:* Whatever may be the law in England,² in India, a person with whom a contract has been entered into in the character of agent is not entitled to require the performance of it if he was in reality acting, not as agent, but on his own account³.

5. *When agent may sue or be sued :*

(a) The agent may sue in the following cases :—

- (i) Where it is a term of the contract, express or implied that the agent alone shall sue upon it⁴.
- (ii) Where the agent contracts personally in his own name, so that the contract is made with him, although it is made for the benefit of the principal. The principal also may sue in such a case.
- (iii) Where the agency is coupled with interest, as is the case with a factor or auctioneer. In such a case, the agent, even though he has contracted for an avowed principal, can sue in his own name⁵.
- (iv) Where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad, and the terms of the contract do not make the foreign principal a party thereto⁶.

1. Sec. 234, Ind. Cont. Act. .
2. For law in England, see Bowstead on Agency, 8th Edn., p. 432, Chitty on Contracts, 19th Edn. p. 461.
3. Sec. 236, Ind. Cont. Act; *Sewdutt Roy v. Nahapiet*, (1907) 1 L.R. 34 Cal. 628; *Nanda Lal Roy v. Gurupada Halder*, (1924) 1 L.R. 51 Cal. 588.
4. Sec. 230, Ind. Cont. Act; *Lakeman v. Mountstephen*, (1874) L.R. 7 H.L. 17; *Harton v. Herron*, (1825) 1 C. & P. 648 (case of an agreement to grant a lease, where the agent was described as making it on behalf of the principal, but it was provided that the agent would execute the lease).
5. *Williams v. Millington*, (1788) 1 Hy. Bl. 81 (action by an auctioneer against buyer for goods sold and delivered); *Durga Prasad v. Caenpore Flour Mills*, A.I.R. (1929) Oudh 417; *Coorla Spinning Etc., v. Vallabhdas*, 27 Bom. L.R. 1168; *Subrahmania v. Narayanan*, (1900) I. L. R. 24 Mad. 130.
6. Sec. 230 (1), Ind. Cont. Act. The fact that the principal is a foreigner gives rise to a presumption that the agent has entered into the contract personally and that the foreign principal is not a party to the contract, but the presumption may be rebutted by indication of an intention to

- (b) *Where agent may be sued* : The agent may be sued in any of the following cases :
- (i) Where the agent signs a contract in his own name without qualification.
 - (ii) Where by the custom of a particular trade, the agent contracting "for principals" is personally liable¹.
 - (iii) Where the agent does not disclose the name of the principal. In such a case the presumption is that there is a contract to the effect that the agent is personally bound by the contract. But no such presumption would arise if the other party knows that the agent is contracting for a third person whose name he also knows, the knowledge being in such a case equivalent to disclosure².
 - (iv) Where the agent is a party to a Bill of Exchange or Promissory Note and the name of the principal is not disclosed in such a way that on any fair interpretation of the instrument his name is the real name of the person liable on the Bill³.
 - (v) Where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad, and the terms of the contract do not make the foreign principal a party to the contract⁴.
 - (vi) Where an agent enters into a contract on behalf of a prince or chief, and any ambassador or envoy of a foreign

the contrary : *Elbinger Actien-Gesellschaft v. Claye*, (1873) L. R. 8 Q. B. 313 (where a foreign company who entered into negotiations through their London commission agents for the supply by the defendant of certain railway wheels and axles sued for breach of contract and were non-suited). Cf. *Firm S. Nasir-ud-Din v. Firm Durga Prashad*, A.I.R. 1937 Lah. 607 ; *Tutika Basavaraju v. Parry & Co.*, (1903) I. L. R. 27 Mad. 315 ; *Deoki Nandan & Sons v. Ram Lal*, A. I. R. 1923 Lah. 296.

1. *Joy Lal & Co. v. Monmatha* (1915-16) 20 C. W. N. 365 ; *Provincial Insurance Co. of Canada v. Joel Leduc*, (1874) L.R. 6 P.C. 224.
2. *Mackinnon v. Lang*, (1881) I. L. R. 5 Bom 584 ; *Lyallpur Sugar Company v. Mul Raj*, 65 I. C. 473 (Lah).
3. *Sadasuk v. Sir Kishen Pershad*, (1918-19) L. R. 46 I. A. 33, followed in *Sitaram v. Chimandas*, (1928) I.L.R. 52 Bom. 640, followed in *Sreelal v. The Lister Antiseptic Dressing Co. Ltd.* (1925) I. L. R. 52 Cal. 802 and *Dhirendra v. Nutbehary*, (1932-33) 37 C.W.N. 296.
4. *Firm S. Nasir-ud-Din v. Firm Durga Prashad*, A. I. R. 1937 Lah. 607 ; *Tutika Basavaraju v. Parry & Co.*, (1904) I. L. R. 27 Mad. 315 ; *Deoki Nandan & Sons v. Ram Lal*, A.I.R. 1923 Lah. 296.

state, and such prince etc., cannot be sued in a British Indian Court by reason of Sec. 86, C. P. Code. In such a case the agent alone can be sued¹.

6. *When agent cannot sue or be sued* : In the absence of any contract to the contrary, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them². The three cases mentioned in section 230 of the Indian Contract Act in which contract to that effect may be presumed to exist are by no means exhaustive³. See the cases discussed under heading "When an agent may sue or be sued."

An agent who enters into a contract on behalf of his principal who is not undisclosed, and who is a minor and hence incompetent to contract, is not liable under the contract⁴.

7. *When pretended agent may be sued* : A person untruly representing himself to be the authorised agent of another, and thereby inducing a third person to deal with him as such agent, is liable, if his alleged employer does not ratify his acts, to make compensation to the other in respect of any loss or damage which he has incurred by so dealing⁵.

8. *When both principal and agent or either of them may sue* : In a case where it is doubtful in whom the right to sue exists, the principal and the agent may and ought to join as co-plaintiffs. Either the principal or the agent may sue in any of the following cases :

- (a) Where a contract is made by an agent for an undisclosed principal⁶ ;
- (b) Where an agent pays money on his principal's behalf under a mistake of fact, or in respect of a consideration which fails, or in consequence of some fraud or wrongful

1. *Ram Chand v. Ismail*, A. I. R. 1928 Sind 189 (With reference to S. 86, C. P. Code, it was held, that where none of the conditions for permission to institute a suit against a foreign state exists, no suit would lie against the prince etc., even if permission were applied for and granted by the Governor-General in Council).

2. Sec. 230, Ind. Cont. Act.

3. *Durga Prasad v. Cawnpore Flour Mills*, A. I. R. 1929 Oudh 417.

4. *Gouri Shankar v. Jwala Prasad*, A. I. R. 1930 Oudh 312.

5. Sec. 235, Ind. Cont. Act ; *Venkatacharyulu v. Ram Krishna*, A. I. R. 1930 Mad. 439.

6. See (note) under heading "When principal may sue", supra.

act of the payee or otherwise under such circumstances, as the payee is liable to repay the money¹.

9. *When both principal and agent or either of them may be sued :*
In the following cases both principal and agent or either of them may be sued :

- (a) Where the agent is personally liable on the contract².
- (b) Where the agent has committed a tort in the course of his employment³.

1. *Stevenson v. Mortimar*, (1778) Cowp. 805 (action by the owners of a boat employed in carrying chalk and lime to recover sums of money paid by the master of the boat who was the plaintiff's servant to a Customs House officer, as his fees, on the ground that the defendant had taken exorbitant fees); *Halt v. Ely*, (1853) 1 E. & B. 795; *Steam Saw Mills v. Baring & Co.*, (1922) 1 Ch. 244 (action to recover money under mistake of fact, and also on failure of consideration); *Colonial Bank v. Exchange Bank*, (1885) 11 A. C. 84 (action by an agent to recover money paid by mistake). See Bowstead on Agency, 9th Edn., p. 320.
2. Sec. 233, Ind. Cont. Act. In a Madras case, Coutts—Trotter C. J., in construing the section, held, "What the section means is that the person dealing with the principal through the agent may at his election sue either or he may sue both of them alternatively in a case where he is not sure whom his exact remedy is against; he cannot sue both of them jointly for the amount sued for. That would be to turn a liability which is mutually exclusive into a joint liability": *Kutti Krishna v. Kallil Appa*, (1920) I. L. R. 49 Mad. 900. The correctness of this decision was doubted by a division bench of the Madras High Court in a later case where their Lordships observed, "It seems to us open to question whether in face of the clear language of Sec. 233, Contract Act, we can apply the rule of alternative liability in this country": *Paboodan Goolabchand v. M. J. V. Millar*, A. I. R. 1938 Mad. 966, 971. In a still later case, the same High Court held that Sec. 233, cannot be construed as meaning only that a person might sue principal and agent in the alternative, but he cannot get judgment against both of them jointly for the amount sued for: *Muhammad Shamsuddin v. Shaw Wallace & Co.*, I. L. R. (1939) Mad. 282. The Lahore High Court has held that where by any unauthorised act of the agent the money or property of a third person comes to the hands of the principal or is applied for his benefit, the principal is liable jointly and severally with the agent: *Rohim Ullah Khan v. Chuni Lal*, A. I. R. 1937 Lah. 570. But the principle is well settled that when once the creditor has elected to sue the agent and has obtained judgment, he cannot sue the principal: *Shivlal v. Birdhichand*, (1917) 19 Bom. L. R. 370; *Moselles Solomon v. Martin & Co.*, (1934-35) 39 C. W. N. 461. This will be so even although the judgment does not result in satisfaction of the debt: *Somasundara v. Subrammanian*, A. I. R. 1926 P. C. 136.
3. *Sherjan Khan v. Alamuddi*, (1916) I. L. R. 43 Cal. 511 (But a judgement

Alliens : Alien enemies residing in British India, with the permission of the Central Government, and alien friends, may sue in the Courts of British India, as if they were subjects of His Majesty. No alien enemy residing in British India without such permission or residing in a foreign country shall sue in any of such courts¹. A British subject voluntarily residing or carrying on business in enemy country is an alien enemy and cannot sue in British India². The test to determine whether a person is an alien enemy is his place of residence or the place where he carries on business and not his nationality³. No matter whether the cause of action arose before or after war, an alien enemy can be sued in British Indian Courts and has every right to present his case before the courts in accordance with the laws of procedure. The fact that he has been interned makes no difference⁴.

Ambassadors and Envoys : Any ambassador or envoy of a foreign state may, with the consent of the Central Government, certified by the signature of a Secretary to the Government, that Government, but not without such consent, be sued in any competent Court⁵.

Associations : An association is a combination of persons associated together for the promotion of a common purpose. Associations, broadly speaking, may be divided into two classes, (1) Incorporated association and (2) Unincorporated association.

Incorporation of an association means the formation of a legal body with the quality of perpetual existence and succession except as limited by the Royal charter or statute effecting the incorporation⁶. Among incorporated associations or bodies may be mentioned, the Co-operative Societies, Registered Companies, Registered Trade Unions, Medical Council, Red-Cross Societies, Universities, Bar Councils, Cantonment authority, Imperial Bank of India, Insurance Companies, Municipalities, District Boards, etc.

against the agent, though unsatisfied, is, however, a bar to any action against the principal in respect of the same wrong) ; cf. *Goldrei v. Sinclair*, (1918) 1 K. B. 180.

1. Sec. 83, C. P. Code, also Explanation, as amended by the Ad. Or.

2. *Haji Ali Jan v. Abdul Jalil*, (1920) 1 L. R. 1 Lah. 276.

3. *S. S. Karadenitz Socrates etc.* (1920) 1 L. R. 44 Bom. 61.

4. *Abdul Quader v. Fritz Kapp*, (1917) 1 L. R. 43 Cal. 1140, following *Halsey v. Lovensfeld*, (1916) 2 K. B. 707.

5. Sec. 86, C. P. Code, as amended by the Ad. Or.

6. Wharton's Law Lexicon, 14th Edn., p. 501.

For parties to suits by or against an incorporated association, see 'Corporations', 'Companies' and 'Trade Unions', *infra*.

For parties to suits as regards unincorporated associations—see heading 'Unincorporated associations', *infra*.

Auctioneer : An auctioneer is a person who sells goods or other property by auction. An auctioneer when selling as agent is the agent of the vendor only.¹ For the purpose of signing the contract or a memorandum of the contract, he is also the agent of the purchaser.² In the absence of special agreement, the auctioneer receives the deposit as the stake-holder of the vendor and the purchaser.³ Auctioneers have a lien, 'by the custom of their business, on goods entrusted to them for sale and on the deposit and purchase money for their charges and remuneration.'⁴ The vendor is bound to indemnify the auctioneer for any expenses incurred or damage sustained by the auctioneer in the ordinary course of employment and as a natural consequence of the contract of agency.⁵

The result which follows the above principles has bearing on the following classes of suits :—

- (a) Suit by vendor against auctioneer.
- (b) Suit by auctioneer against vendor.
- (c) Suit by purchaser against auctioneer.
- (d) Suit by auctioneer against purchaser.
- (e) Suit by auctioneer against third parties.
- (f) Suit by third parties against auctioneer.
- (g) Interpleader suit by auctioneer.

(a) *Suit by vendor against auctioneer :* The vendor can sue the auctioneer in damages for breach of any duty resulting in loss

1. *Kenaram v. Kailas*, (1913) 18 C. L. J. 53, 56.
2. Hals. Laws of Eng., 2nd. Edn. Vol. 1, Arts. 1143 & 1150; *Emerson v. Heelis*, (1809) 2 Taunt. 38 (Action to recover the auction duty paid by the auctioneer who entered the name of the buyer in his book. *Held*, it was just the same thing as if the buyer had written his own name), followed in *White v. Proctor*, (1811) 4 Taunt. 209; *Pollock and Mulla's Ind. Cont. Act*. 6th. Edn. p. 570.
3. *Harrington v. Hogart*, (1830) 1 B & Ad. 577 (Note the distinction pointed out by Lord Tenterden C.J., between the character of an agent and that of stake-holder).
4. Hals. Laws of Eng., 2nd. Edn., Vol. 1, Art. 1182; *Kharas v. Bawanji*, A. I. R. 1926 Sind 6.
5. Hals. Laws of Eng., 2nd. Edn., Vol. 1, Art. 1183.

sustained through the negligence of the auctioneer or of persons employed by him.¹

(b) *Suit by auctioneer against vendor* : An auctioneer can sue the vendor for remuneration agreed upon, and in the absence of express agreement, for customary remuneration, or failing custom for a fair and reasonable remuneration.²

(c) *Suit by purchaser against auctioneer* : The purchaser can sue the auctioneer on the contract where the latter sells for an undisclosed principal.³ An auctioneer selling on behalf of a disclosed principal is in general not liable on the contract unless by its terms he contracts personally. The purchaser may sue auctioneer in damages if he omits to sign a binding contract. If the auctioneer sells property without, or in excess of his authority, he is liable to the purchaser for breach of warranty of authority.⁴ The purchaser is entitled to sue the auctioneer personally, for any fraud to which the auctioneer is privy, e.g., if the sale is held in contravention of the provisions of sub-sections (3) and (4) of the Indian Sale of Goods Act (Act III of 1930)⁵.

(d) *Suit by auctioneer against purchaser* : An auctioneer may, by his lien on, or special property in goods, maintain an action in his own name for the price of goods sold and delivered by him to the purchaser, even where he sells as agent for a disclosed principal.⁶ To this rule there is this exception : The auctioneer cannot maintain an action for price where the goods sold are not the property of the vendor, and the true owner of the goods claims them

1. *Parker v. Farebrother*, (1853) 21 L. T. O. S. 128 (negligence in preparing particulars of sale).
2. Cf. *Browne v. Nairne*, (1839) C. & P. 204.
3. *Hanson v. Roberdeau*, (1792) Peake 163 ; *Frankly v. Lamond*, (1817) 4 C.B. 637 ; *Evans v. Evans*, (1835) 3 A. & B. 132.
4. *Anderson Croall & Sons Ltd.*, (1904) 6 F. (Ct. of Sess) 153.
5. *Healley v. Newton*, (1881) 19 Ch. D. 326 (action by buyer against the vendors and the auctioneers to have the contract rescinded, the deposit repaid etc., it being alleged that all or nearly all the biddings previous to that of the plaintiff were fictitious) ; *Thornett v. Haines*, (1846) 15 M. & W. 367.
6. *Williams v. Millington*, (1788) 1 Hy. Bl. 81 ; *Manley & Sons, Ltd. v. Berket*, (1912) 2 K. B. 329, 333 ; cf. *Freeman v. Farrow*, (1886) 2 T. L. R. 547. But he cannot in the absence of special contract sue for the purchase money for land if he sells as agent for disclosed principal ; *Cherry v. Anderson*, (1876) 10 Ir. R. C. L. 204 ; *Kharas v. Bawanji*, A. I. R. 1926 Sind 6.

from buyer, even if the buyer has expressly promised to pay on being allowed to take away the goods which he bid.¹

(e) *Suit by auctioneer against third parties* : An auctioneer by virtue of his lien and special property in the goods may maintain an action of trespass or trover against persons wrongfully interfering with or converting goods.²

(f) *Suit by third persons against auctioneer* : An auctioneer who has notice of the adverse claim of the true owner is liable to the latter not only for goods sold by him, but of those unsold by him and returned to his principal.³ He is liable to a third person in damages for conversion when he sells goods which in fact belong to the third person without that person's authority, and is so guilty when he delivers the goods with intent to pass property in them to buyer.⁴ It has been held that if an auctioneer intermeddles with the estate of a deceased person without the authority of a properly constituted executor he may render himself liable as an executor *de son tort*⁵.

(g) *Interpleader suit by auctioneer* : An auctioneer is the agent as well of the purchaser as of the vendor. Therefore, if the vendor files a suit against him for the recovery of the deposit he may interplead for the purpose of ascertaining to whom the deposit belongs⁶. But, he is not entitled to interplead after a suit has been brought against him for the recovery of a deposit, if he insists on retaining either his commission or his duty⁷.

Bailor and Bailee : It is necessary to consider under this head the meaning of the word 'bailment', the different classes of bailment and lastly the joinder of parties to suits regarding bailment.

1. *Dickenson v. Naul*, (1833) 4 B & Ad. 638 (In this case, an auctioneer employed by a supposed executrix, sold goods of the testator, but before payment, the real executrix claimed the money from the buyer).
2. Hals. Laws of Eng. Vol. 1, Art. 1066 ; *Williams v. Millington*, (1788) 1 Hy. BL. 81, 85 ; *Khara v. Bawanyt*, A.I.R. 1926 Sind 6.
3. *Davies v. Artingstall*, (1880) 49 L. J. C. H. 609 ; Hals. Laws of Eng., Vol. 1, Art. 1068.
4. *Consolidated & Co. v. Curtis*, (1892) 1 Q. B. 495. ; Pollock & Mulla's Sale of Goods Act, p. 349.
5. Hals. Laws of Eng., Vol., 1, Art. 1069.
6. *Fairbrother v. Prattent*, (1818) Dan. 64.
7. *Mitchell v. Hayne*, (1824) 2 Sim. & St. 63, apprvd. in *Bignold v. Audland* (1840) 11 Sind. 23.

*Bailment defined*¹ : Bailment is delivery² of goods³ by one person called the 'bailor' to another person called the 'bailee' for some purpose, upon a contract⁴ that they⁵ shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the persons delivering them.

In case of delivery of goods as security for the payment of a debt, the bailment is called a 'pledge' and the bailor is called the 'pawnor' and the bailee, the 'pawnee'⁶.

Classes of bailment : Bailment are of two kinds, voluntary and involuntary⁷. Voluntary bailments may be

- (a) for reward ;
- (b) without reward⁸ ;
- (c) in pledge ; .
- (d) by way of hire or hire-purchase ; or
- (e) for carriage.

The Indian Contract Act deals with bailments in pledge in particular and generally with the other classes of bailment. Instances of involuntary bailments are seen in cases (a) of finder of goods⁹, (b) of goods delivered to a wrong person, (c) of goods delivered to the right person but in excess of the quantity ordered, or (d) where the goods deposited pass into the hands of the legal representatives of the depositor on the latter's death¹⁰.

1. Sec. 148 Ind. Cont. Act, 1872. There may be in particular cases a bailment without an enforceable obligation : *R. v. McDonald*, (1885) 15 Q. B. D. 323, 328.
2. Sec. 149 Ind. Cont. Act, 1872. Delivery implies change of possession, and not mere change of custody. It may be actual, constructive, symbolic, antecedent, simultaneous or subsequent to the contract. A person already in possession of goods may contract to hold them as bailee : *Explan. to Sec. 148 Ind. Cont. Act, 1872*.
3. Bailment is confined to goods and personal chattels and does not apply to immovable property or incorporeal rights.
4. The contract may be express or implied : *Chaturgu v. Shahzady*, A. I. R. 1930 Oudh 395.
5. That is, the identical goods in their original or altered form : *South Australian Insurance Co. v. Randell*, (1869) 3 L. R. P. C. 101.
6. Sec. 172 Ind. Cont. Act., 1872.
7. *Promotho v. Prodymano*, (1921-22) 26 O. W. N. 672, 779.
8. Cf. Secs. 158 and 162 Ind. Cont. Act, 1872.
9. Cf. Secs. 71 and 168 Ind. Cont. Act.
10. *Promotho v. Prodymano*, *supra*, at 779 (which says that for the purpose of the Limitation Act, involuntary bailors are to be regarded as depositors and in their cases Art. 145 of the Limitation Act shall apply).

Parties to suits: The subject of parties to suits in connection with bailment for carriage is dealt with separately under the head 'Carriers' infra. Parties to suits relating to other classes of bailment may be considered under the following heads:

- I. Suits between the bailor and the bailee.
- II. Suits by or against third parties.
- III. Suits between owners of goods and persons claiming as pledgees thereof from persons other than the owners.

I. *Suits between bailor and bailee:* The different classes of suits that may be instituted between the bailor and the bailee are provided for in Sections 150 to 181 of the Indian Contract Act, 1872, and the question of parties as to them presents no difficulty in cases where there is a single bailor and a single bailee both alive.

Where there are joint bailors or joint bailees, unless a contrary intention appears from the contract, the right of suit is with them jointly, and after the death of any of them, with the representatives of such deceased person jointly with the survivor or survivors, and, after the death of the last survivor, with the representatives of all jointly¹. In the absence of an express agreement to the contrary the liability of bailors or bailees, as in the case of all joint promisors, is joint and several. Where the liability is joint and several, either all or any of the persons liable may be sued. Thus, if the contract is unenforceable against one of the parties, say on the ground of minority, the other party is not absolved from liability², nor the death of one exonerates the others from liability³.

II. *Suits by or against third parties:*

(a) *In cases of assignment:* Where the bailor or the bailee, as the case may be, assigns his rights to a third person, such assignee may sue for the enforcement of such rights. But since there cannot be any assignment of the burden of a contract, the bailor or the bailee, as the case may be, cannot be compelled to sue such assignee, unless there is novation. It should be noted that there cannot be any assignment of personal contracts involving the exercise of individual skill¹. Contracts which do not depend

1. Sec. 45, Ind. Cont. Act, 1872.

2. *Sethuram v. Vasanta*, (1911) I. L. R. 34 Mad. 314, 319.

3. *Joy Gobind v. Monmotha*, (1906) I. L. R. 33 Cal. 580, followed in *Krishnadas Roy v. Kali Tara Chowdhurani*, (1917-18) 22 C. W. N. 289, 292.

1. *Robson v. Drummond*, (1831) 2 B & Ad. 303 (assignment of contract by bailor), considered in *British Waggon Co. v. Lea*, (1880) 5 Q. B. D. 149.

upon personal qualifications may be rendered non-assignable by inserting an express stipulation to that effect¹.

In case of assignment by operation of law, by the insolvency of either the bailor or the bailee, the Official Assignee or the Receiver in insolvency may sue or be sued as the case may be.

In case of hire-purchase agreements, where, before making any default, the hirer, for valuable consideration, assigns his interest to a third party, such third party acquires all the interest which his assignor possessed plus a right in equity to compel his assignor to pay any outstanding instalments to the original owner of the property².

(b) *In cases where a third person wrongfully deprives the bailee of his possession* : If a third person wrongfully deprives the bailee of the use or possession of the goods bailed, or does them any injury, either the bailor or the bailee may bring a suit against the third person for such deprivation or injury, the former by reason of his property, the latter by virtue of his possession³.

Thus, the bailee of a car under a hire-purchase agreement (although he has not paid all the instalments), can maintain a suit against a wrong-doer, subject to the rights of the bailor to adjust the amount of damages when recovered⁴. Even the bailee of a chattel who is under no liability in respect thereof to the bailor can maintain an action against a stranger by whose action the chattel has been lost or injured and he is entitled to recover the full value of the chattel in the one case or the whole amount of the damage in the other. The reason of the rule is, that the wrong-doer who is not defending under the title of the bailor is quite unconcerned with what the rights are between the bailor or the bailee and must treat the possessor as the owner of the goods for all purposes quite irrespective of the rights and obligations as between the bailee and the bailor. Again the right of the bailee to recover rests upon possession and not upon the ground that he is liable over to the bailor for the loss of the goods converted or destroyed. But the bailee having recovered the full amount of the damage must account to the bailor for his proportion thereof. In

1. *Brice v. Bannister*, (1878) 3 Q. B. D. 569.

2. *Whiteley v. Hill*, (1918) 2 K. B. 808.

3. Sec. 180 Ind. Cont. Act, 1872. *Ramnath v. Pilambar*, (1916) I. L. R. 43 Cal. 733, 741, 742, following *Manders v. Williams*, (1849) 4 Exch. 339, 344.

4. *Pauline D' Souza v. Cassamalli*, (1933) 35 Bom. L. R. 1007, 1012.

other words, what the bailor has received above his own interest, he has received to the use of the bailor ; and the wrongdoer having paid those damages to the bailee has an answer to any action by the bailor¹.

(c) *In cases where a third person wrongfully deprives the involuntary bailee of his possession* : The right of suit based on possession has been held to apply to the case of a finder of goods who may sue the wrongdoer for recovery of the full value of the thing converted. The extent of the liability of the finder to the true owner is not relevant to the discussion between him and wrongdoer. To hold otherwise will be to permit a wrongdoer to set up a *jus tertii* under which he cannot claim². On principle, the same rule shall apply to other involuntary bailees.

III. *Suits between owners of goods and persons claiming as pledgees thereof from persons other than the owners* : It often happens that persons having merely the custody or qualified possession of the goods, with no interest or having only a limited interest, in the goods purport to pledge them with third persons without the consent of the true owner or without any authority to do so. If, in a given case, the pledge is not binding on the true owner or does not affect the right of lien or priority which any person may have over the goods, the true owner or such person may sue the person who claims the goods as the pledgee thereof for recovery of the goods or their value or for a declaration of lien or priority, as the case may be.

As a rule a person who has only a bare custody of, and has no interest in, the goods cannot pledge the goods, without the consent of the true owner or without any authority from him. Thus, it has

2. *The Winkfield*, (1902) 50 W. R. 246 (The case arose out of a collision between the steamship Mexican and the Steamship Winkfield, which resulted in the loss of the former with a portion of the mails which she was carrying at the time. The Owners of the Winkfield under a decree limiting their liability to a certain amount paid the same into Court. The claim was by the Postmaster-General to recover out of that sum the value of the parcels, letters, etc. No objection was taken below that the Postmaster-General was not himself in actual occupation of the thing bailed at the time of the loss and the case was dealt with as a claim by a bailee who was under no liability to the bailor for the loss in question). Cf. Sec. 181 Ind. Cont. Act, 1872. See *Eastern Construction Co. Ltd v. National Trust Co.*, (1914) A. C. 197.

1. *The Winkfield*, *supra*.

been held that a pledge by a servant,¹ a wife,² a husband,³ a hirer of goods⁴ or a gratuitous bailee⁵ is not binding on the true owner who can sue the pledgee for recovery of the goods or their value.

The cases in which and the circumstances under which valid pledges may be created by persons other than the true owners of the goods are considered under the following heads :

(a) *Pledge by mercantile agent* : Where a mercantile agent is, with the consent of the owner, in possession of goods or the documents of title to goods⁶, any pledge made by him, when acting in the ordinary course of business of a mercantile agent, shall be valid as if he were expressly authorised by the owner of goods to make the same, and the owner of goods can sue the pawnee only when the pawnee has not acted in good faith and had at the time of the pledge notice that the pawnor had not authority to pledge⁷.

(b) *Pledge by seller of goods* : Where a person, having sold goods continues or is in possession of the goods or documents of title to the goods, the delivery or transfer

1. *Biddomoye Dabee v. Sittaram*, (1879) I.L.R. 4 Cal. 497; *Shankar v. Lakshmi Bai*, A.I.R. 1928 Bom. 225; *Roopchand Jankidas v. National Bank of India*, (1919) I.L.R. 46 Cal. 342.
2. *Seager v. Hukma Kessa*, (1900) I.L.R. 24 Bom. 458.
3. *Benares Bank v. Prem & Co.*, A.I.R. 1937 All. 255.
4. *Naganada v. Bappu*, (1903) I.L.R. 27 Mad. 424.
5. *Nanu Ram Pokharmal v. Moulvi Hedayet Ali*, (1935-36) 40 C.W.N. 307 (The possession of a gratuitous bailee is possession for a specified and limited purpose, that is, for safe custody and if he delivers his goods to his creditor by way of security, there is no valid pledge); *Ramaswami Gupta v. Kamalammal*, (1921) I.L.R. 45 Mad. 173.
6. Sec. 27, Ind. Sale of Goods Act, 1930.
7. Sec. 178, Ind. Cont. Act, 1872, as amended by the Ind. Cont. (Amendment) Act, 1930, which repealed the old Sec. 178 and substituted in its place the new Secs. 178 and 178A. See also Sec. 30 of Ind. Sale of Goods Act, 1930. Note that the principles of the cases decided under Sec. 178 before its amendment are no longer good law. See *Sulaiman v. Ma Ywet*, A.I.R. 1934 Rang. 198; *Ah San v. Maung Ba Thit*, A.I.R. 1937 Rang. 146; *Ah Cheung v. Ah Wain*, A.I.R. 1938 Rang. 243 (Sec. 178 of the Ind. Cont. Act, 1872, has been enacted to protect those persons who in good faith deal with persons whom they knew to be mercantile agents and not persons whom they did not know to be agents at all and who therefore cannot have any reason to suppose that such persons have any power to pledge).

by that person or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge or other disposition thereof to any person receiving the same in good faith and without notice of the previous sale shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same¹. In such cases therefore the buyer is entitled to sue the person who claims as the pledgee of the goods, only if the said person has not acted in good faith and had notice of the previous sale.

(c) *Pledge by buyer in possession of goods*: Where a person having bought or agreed to buy goods, obtains with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge or other disposition thereof of any persons receiving the same in good faith and without notice of any lien or other right of the original owner in respect of the goods shall have effect as if, such lien or right did not exist². In such a case the seller can sue the person who claims to be the pledgee, only if the latter had received the goods not in good faith and with notice of the lien or other right of the seller in respect of the goods³.

(d) *Pledge by the mortgagor in possession of goods*: A mortgages certain goods to B but does not give possession of the goods to B, and afterwards pledges the goods with C. The pledge to C is valid and C gets priority over A⁴.

1. Sec. 30 (1) Ind. Sale of Goods Act, 1930 ; *Rahimbux v. Central Bank of India Ltd.*, (1928) I. L. R. 56 Cal. 367.
2. Sec. 30 (2) Ind. Sale of Goods Act, 1930.
3. *Belsize Motor Supply Co. v. Cox*, (1914) 1 K. B. 244.
4. *Shrish Chandra Roy v. Mungri Bewa*, (1904-05) 9 C. W. N. 14 ; *Co-operative Hindusthan Bank v. Surendra Nath*, (1932) I. L. R. 59 Cal. 667 ; *Narasiah v. Venkataramiah*, (1918) I. L. R. 42 Mad. 59 ; *Backer Khorasane v. Ahmed Esmail*, (1928) I. L. R. 5 Rang. 633 ; see also *Abdul Habib v. Maung Tun Kyaing*, (1931) I. L. R. 9 Rang. 182.

- (e) *Pledge by person in possession under voidable contract*: When the pawner has obtained possession of the goods pledged by him under a contract voidable on the ground of fraud, misrepresentation or undue influence, but the contract has not been rescinded at the time of the pledge, the pawnee acquires a good title to the goods and is not liable to be sued by the lawful owner unless in a case where the pawnee has not acted in good faith and had notice of the pawner's defect of title¹.
- (f) In a case where a person pledges goods in which he has only a limited interest, the pledge will be valid to the extent of the limited interest only, and subject to this, 'the invalidating conditions falling under Secs. 178 and 178(A) of the Ind. Cont. Act, 1872, shall apply².

Note: In all the above cases, it may be necessary to sue both the pledgor and the pledgee. If there is collusion between the pledgor and the pledgee, the same reliefs may be claimed against both. The plaintiff may sue the pledgor alone for recovery of the value of the goods. But if he chooses to claim against the pledgee alone, the pledgor should be added as a proper party to the suit.

Banian—See "Del credere agent"

Benamdar: A benamdar is a trustee for the real owner and represents him in judicial proceedings. He can sue and be sued in his own name without the real owner being added as a party. In a proceeding by or against the benamdar, the person beneficially entitled is fully affected by the rules of *res-judicata*. It is open to the latter, however, to apply to be joined in the action³. No suit is maintainable by the beneficial owner against a certified purchaser on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims⁴. But a suit may be brought by a third party as

1. Sec. 178A, Ind. Cont. Act, 1872. See also Sec. 29, Ind. Sale of Goods Act, 1930.

2. See Sec. 179, Ind. Cont. Act, 1872; *Lakhamsey Ladha & Co. v. Lakhamchand Padamsey*, (1918) I. L. R. 42 Bom. 205, commented on, in *Rahimbux v. Central Bank*, (1929) I. L. R. 56 Cal. 367.

3. *Gur Narayan v. Sheo Lal Singh*, (1919) L. R. 46 I. A. 1.

4. Sec. 66 (1), C. P. Code. Even a suit by beneficial owner in possession for declaration of title will be barred: *Keshri Mull v. Sukan Ram*,

plaintiff against the certified purchaser as a defendant for a declaration that the property though ostensibly sold to the certified purchaser is liable to satisfy a claim of such third party against the beneficial owner¹. A third party may sue the auction purchaser for enforcement of an agreement entered into between him and the auction purchaser after, not before, the purchase².

Broker: A broker is an agent employed to buy and sell. "Primarily and for same purposes he is the agent of the party by whom he was originally employed." He is also generally the agent of the two parties for whom he negotiates. The engagement of a broker is like that of an ordinary agent, but with this difference, that the broker being employed by persons who have opposite interests, he is as it were agent for both the one and the other to negotiate the commerce or affair in which he concerns himself"³.

Unlike the factor, he is not entrusted with the custody and apparent ownership of the goods, nor has he authority to contract in his own name or to receive payment. He is a mere negotiator to effect business and is paid for his services a commission⁴.

It is necessary to examine the following classes of suits :

1. When broker cannot sue or be sued.
2. When broker may sue or be sued.
3. If broker who is himself the principal may sue.

1. *When broker cannot sue or be sued* : A broker signing as broker for a named principal, is presumptively not a contracting party and cannot sue or be sued personally⁵.

(1933) I. L. R. 12 Pat. 616; *Umashashi v. Akrur*, (1926) I. L. R. 53 Cal. 297. Note : Although the beneficial owner cannot maintain a suit, but if he is actually in possession and a suit is brought by the certified purchaser against him for possession or for rent he may defend the suit on the ground that the certified purchaser was only a benamdar.

1. Sec. 66 (2), C. P. Code.
2. *Harendra v. Ram Kumar*, (1930-31) 35 C. W. N. 940.
3. *Per Woodroffe J. in Patiram v. Kanknarrah Co. Ltd.*, (1915) I. L. R. 42 Cal. 1050, quoted in *Nanda Lal Roy v. Gurupada Haldar*, (1924) I. L. R. 51 Cal. 588, 605.
4. *Leake on Contract*, 8th Edn., p. 373; *Sushil Chandar v. Gauri Shankar*, (1917) I. L. R. 39 All. 81.
5. *Fawkes v. Lamb*, (1862) 31 L. J. Q. B. 98 (where the sale-note was in the following form : "I have this day bought in my own name for your account of A.K.T."); *Fairlie v. Fenton*, (1870) L. R. 5 Ex. 169 (where the bought-note was in the following form : "I have this day sold you on account of T. etc.—signed E.F. broker").

2. *When broker may sue or be sued* : In case of an undisclosed principal, "Indian law differs from English law in that in this country there is a presumption that the agent for an undisclosed principal is liable and may enforce liability, whereas in England it must be shown that he intended to be personally bound".¹ Thus, in India, if the principal is undisclosed, the broker saying, "bought of you for my principal" is liable.²

A broker may be made personally liable, by the express terms of the contract, or of his employment,³ or by the usage of trade not inconsistent with the written contract⁴. Evidence of usage of

1. *Per Buckland J. in Nanda Lal Roy v. Gurupada Haldar* (1924) I. L. R. 51 Cal. 588, 599. Sec. 230, Ind. Cont. Act.
2. *Per Jenkins C. J., in Paliram v. Kanknarrah Co. Ltd.*, (1915) I.L.R. 42 Cal. 1059, 1064. *For application of the English rule, see *Sharman v. Brandt*, (1871) L. R. 6 Q. B. 720 (There the contract-note was in the following form : "Bought for.....of our principals 200 tons of hemp"—signed W. S. & Co., brokers. In an action by the brokers, *held*, the plaintiffs could not maintain action on the ground that the contract in writing was with an undisclosed principal as seller).
3. *Jones v. Littledale*, (1837) 6 A. & E. 486, 490 (L. and Co., brokers at Liverpool, sold hemp by auction and gave an invoice describing the goods as bought of L. and Co., according to a custom of brokers at Liverpool, to secure the passing of the purchase money through their hands. The brokers received part of the price but failed to deliver the goods. *Held*, L. and Co. had made themselves responsible as sellers by the invoice); *Per Jenkins C. J. in Putiram v. Kanknarrah Co. Ltd.*, (1915) I. L. R. 42 Cal. 1050, 1063, 1064. (There is a material difference between the words 'Sold for you to my principals' and 'bought of you for my principals.' The rule of law, no doubt, is that if the principal is undisclosed, the broker saying "bought of you for my principals" is liable; but if the contract says "sold for you to my principals," he is not liable).
4. *Joy Lall & Co. v. Monmotha*, (1915-16) 20 C. W. N. 365, following *Fleet v. Murton*, (1871) L. R. 7 Q. B. 126, *Mollet v. Robinson*, (1870) L.R. 5 C. P. 646; *Hutchinson v. Tatham*, (1873) L.R. 8 C. P. 482. Read the observations of Lord Atkinson in *Produce Broker's Co. v. Olympia Oil and Cake Co.*, (1916) 1 A. C. 314, 324 ('The language expressing a trade custom is taken to be imported into the language used by the contracting parties, whether written or verbal, because it is presumed that they had the usage in their minds when they made their contract, made it in reference to that usage and intended that the usage or custom should form part of it. If they have used language in their contract inconsistent with the custom, that is one of the most effectual ways of negotiating this presumption, excluding the custom that their contract is unaffected by it); *Nanda Lal Roy v. Gurupada Haldar*, (1924) I.L.R. 51 Cal. 588, 602.

trade applicable to the contract, which the parties making it knew, or may reasonably be presumed to have known, is admissible for the purpose of importing terms into the contract respecting which the instrument itself is silent.¹ A custom, if sought to be enforced against a person in fact ignorant of it, is unreasonable, contrary to law and void, but it is not so if in fact it is not unjust as against principals ignorant of it. A person dealing in a market of the customs of which he is ignorant, is not bound to inquire into a usage by which a broker is not in fact a broker.² To what is known as "principal contracts", according to which the name of the buyer, is kept off from the seller and the name of the seller is kept off from the buyer, on the face of the contract, is attached a custom of the market, as to liability for performance of the contract resting upon the brokers and a right in them to enforce the contract, even although the names of the principals are in fact disclosed.³

A broker can sue for brokerage or commission if the relation of buyer and seller is really brought about by him, although the actual sale has not been effected by him. To make the other side liable to pay him brokerage it must be shown that he has been employed by such party to act for him or that in the contract he has agreed to pay brokerage.⁴ Authority given to a broker to procure a buyer does not amount to an authority to sell the property to whoever may be brought into touch with the vendor by the broker. In such a case a suit for specific performance by the buyer after communication to the intending seller of the offer made by him to the broker for sale of his property does not lie.⁵

1. *Joy Lull & Co v. Monmotha*, (1915-16) 20 C.W.N. 365.

2. *Robinson v. Mollett*, (1875) L. R. 7 H. L. 802, followed in *Nanda Lal Roy v. Gurupada Haldar*, (1924) I.L.R. 51 Cal. 598, 602.

3. *Per Rankin J. in Jitmull v. Ram Gopal*, (1922) I.L.R. 50 Cal. 12, 16.

4. *The Municipal Corporation of Bombay v. Ooverji*, (1896) I. L. R. 20 Bom. 124, followed in *Roopji & Sons v. Dyer Meaken & Co. Ltd.* A. I. R. 1930 All. 545; *Burchell v. Gowie* (1910) A. C. 614; *Pundit Raghunandan v. Madan Mohan*, (1923) 38 C.L.J. 139. (Authority given to a broker to get a lessee agreeing to obtain a lease upon certain terms. Held, broker entitled to brokerage although the lease could not be put through owing to the inability on the part of the defendant to make out a title to the property); cf. *Ayyannath Chetty v. Subramania*, A.I.R. 1924 Mad. 212.

5. *Purna Chandra v. Indra Chandra*, A.I.R. 1922 Cal. 397.

3. *If broker who is himself the principal may sue* : In a case¹ where N. R., a dealer and broker in stocks and shares, gave a sold-note to G. H. in the following form : "Sold this day by order and for account of G. H. to selves for principal" and signed as brokers, and sued G. H. for failure to deliver the shares, alleging a custom and usage of the stock and share market in Calcutta by which in all contracts for sale and purchase of shares the names of the buyers and sellers are not disclosed and the broker is taken to contract as principal and is entitled to require performance as principal, Buckland J. held as follows :

- (a) The alleged custom (assuming it to be a valid one) has not been proved, at any rate the defendant was not aware of it.
- (b) Though the plaintiff entered into the contract in the character of agent he was in reality acting not as agent but on his own account and his suit must fail on that ground by virtue of Section 235 of the Ind. Contract Act.

Carriers : In India, we have the following classes of carriers :

- (1) *Common Carriers (of goods)*², whose rights and obligations are governed by the English common law with such modifications as are prescribed by legislative enactments³. Thus among common carriers may be classed, Carriers (excepting Government) of goods by land or inland navigation,⁴ and Carriers of goods by sea⁵.
- (2) *Statutory Carriers of goods and passengers' luggages*, whose rights and obligations are not governed by the English common law but by statutes. Thus Railway

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- 1. *Nanda Lal Roy v. Gurupada Haldar*, (1924) I L.R. 51 Cal. 585, 610.
 - 2. The expression 'Common Carriers' is by the ancient custom and common law of England limited to carriers of goods only. For definition, see *Bennet v. P. & O. S. Co.*, (1846) 6 C. B. 775, 787.
 - 3. *B. and F. M. I. Co. Ltd. v. I. G. N. and Ry. Co.*, (1911) I. L. R. 38 Cal. 28 ; *River Steam Navigation Co. v. Jamunadas*, (1932) I. L. R. 39 Cal. 472.
 - 4. To whom the common law of England as modified by the Carriers Act (III of 1865) applies.
 - 5. To whom the common law of England as modified by Carriage of Goods by Sea Act (XXVI of 1925) and the Merchant Shipping Act, 1894, apply.

Companies or Railway Administrations¹, and Carriers by air² are statutory carriers.

(3) *Statutory carriers of Postal articles and telegrams*³.

(4) *Statutory carriers of animals or passengers* : The most important carriers of this class are the Railway Companies, Steamship Companies, and Carriers by air.

(5) *Private Carriers*, whose rights and obligations are governed by the law of contract.

The subject of parties to suits in respect of carriers may be considered under the following heads :—

1. Suits by or against common and statutory carriers of goods and passengers' luggages.
2. Suits by or against carriers of passengers.
3. Suits by or against private carriers of goods or passengers.
4. Suits by or against Post and Telegraph authorities as carriers.
5. Interpleader suits by carriers.
7. When notification of claim and/or notice to sue necessary.
6. Suits by or against State Railways.

1. *Suits by or against common and statutory carriers of goods and passengers' luggage* :

A. In suits against common and statutory carriers of goods and passengers' luggages, it is necessary to bear in mind the limitations of and exceptions from liability of carriers under the following Acts :

(i) Carriers Act (III of 1865)⁴-which applies to carriers of

1. Ind. Railways Act (IX of 1890).
2. Carriage by Air Act (XX of 1934).
3. Ind. Post Office Act (VI of 1898) and Ind. Tel. Act (XIII of 1885).
4. For liability, for loss of scheduled goods, Secs. 3 and 5 ; for loss of goods other than scheduled goods, Sec. 6 ; for limitation of liability, (a) where the carrier is the owner of a rail road or tram road, Secs. 7 & 9 ; (b) where he is not the owner of a rail road or tram road, Secs. 6 & 9 ; for loss of packages containing scheduled and unscheduled articles : *River Steam Navigation Co. Ltd. v. Jamunadas*, (1932) I. L. R. 52 Cal. 472. Cf. *British and Foreign M. I. Co. v. I. G. N. & Ry. Co.*, (1911) I. L. R. 38 Cal. 28 ; *Gunyon v. S. E. Ry. Co.*, (1915) 2 K. B. 370 (Protection afforded by special contract may cease by deviation from ordinary route).

goods (other than Government) by land¹ or inland navigation.

(ii) Carriage of Goods by Sea Act (XXVI of 1925)² and the Merchant Shipping Act (1890)³.

(iii) Carriage by Air Act (XX of 1934)⁴.

(iv) The Indian Railways Act (IX of 1890)⁵.

In the absence of any special contract, and subject to the limita-

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1. Carriers Act has no application to carriage by railways to which the Ind. Railways Act (IX of 1890) applies.
 2. For protection of carrier, by express contract, from liability for the negligence of himself or his servants, see, *Bombay Steam Navigation Co. Ltd. v. Vasudev*, (1928) I. L. R. 52 Bom. 37. For liability for unseaworthiness, see Sec. 3 of the Act. For liabilities of all kinds, see Arts. III, IV, V, VII & VIII.
 3. For liability under the Merchant Shipping Act of 1894, cf. Secs. 446 to 450 of the said Act relating to shipment of "dangerous goods", and Sec. 502 (respecting liability of the owner of a British sea-going ship, where goods are lost or damaged by fire on board the ship or where gold, silver, diamonds etc. put upon board the ship without declaration in the bills of lading or otherwise in writing of the true nature or value thereof are lost or damaged by reason of any robbery, embezzlement, making away with or secreting thereof), and Sec. 503 (which limits the pecuniary liability of the owners of a ship, British or Foreign, to £8/- for each ton of the ship's tonnage in respect of loss or damage to goods where any of occurrences, specified in the Section takes place with the owners' actual fault or privity).
 4. For liability of the carrier where goods are accepted without any air consignment note or where the air consignment note does not contain the requisite particulars, see Sec. 9. For liability of carriers for loss or damage to goods, rule 18 of Sch. I; for damage caused by delay in carriage, rule 19; For exemption from liability, rule 20 (1); for negligent pilotage or negligence in the handling of the aircraft, rule 20(2).
 5. This Act repealed the Ind. Railways Act IV of 1879 and also Sections 7 and 10 of the Carriers Act of 1865 in their application to Railways. For liability of a railway administration as bailees for loss, destruction or deterioration of goods and further limitation of that liability by agreement in writing in the form of "Risknotes", Sec. 72; for conditions of liability as carriers of passengers' luggages, Sec. 74, and as carriers of articles of special value, Sec. 75; for exoneration from responsibility in case of goods falsely described, Sec. 78; for cases where no suit for compensation shall lie against a railway administration, Sec. 10; for bar of jurisdiction of ordinary Courts in certain matters cognizable by Railway Commission, Sec. 41; for non liability to be sued for felling a tree, Sec. 15 (5); for terminal charges, Secs 45, 46.

tions and exceptions applicable to a particular case, common and statutory carriers may be sued in the following cases :—

- (a) for damages for wrongfully refusing to carry¹.
- (b) for attempting to make unreasonable charges or imposing unreasonable conditions².
- (c) for not conveying or delivering the goods to the person entitled to delivery—(i) where goods are carried under a bill of lading to the consignee or his assigns, or, in the absence of notice of assignment, to the holder of the “first” bill of lading,³ (ii) where goods are carried by a railway, to the endorsee or holder of the railway receipt⁴, or (iii) where goods are carried by air, to the consignor under rule 12, or to the consignee, under rule 13, or to a third person under rule 15, Chap. II, Schedule I, of the Carriage by Air Act (XX of 1934), as the case may be.
- (d) for delivering goods to a wrong person⁵.
- (e) for loss of or injury to goods, including conversion for refusing to deliver,⁶ conversion for misdelivery⁷, conversion, where a valid notice of an unpaid vendor of stoppage in *transitu* has not been obeyed⁸.

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1. Chitty on Contracts, 19th Edn., p. 668. Cf. r. 33, Chap V, First Sch., to the Carriage of Goods by Air Act (XX) of 1934 which runs as follows, “Nothing contained in this Schedule shall prevent the carrier refusing to enter into any contract of carriage.”
 2. *Per Parke, J., in Carr v. L. & Y. Ry.* (1852) 7 Exch. 707, 712 (refusal to carry after tender of the goods with a reasonable sum for the carriage); *Great Western Ry. v. Sutton*, (1869) L.R. 4 H.L. 226; *Secretary of State v. Nandalal*, A.I.R. 1928 Nag. 52 (excess freight charged by Railway Co. liable to be refunded); *Pickford v. Grand Junction Ry.*, (1841) 8 M. & W. 372. Cf. *Ohhagalal v. Secy. of State*, A.I.R. 1933 Nag. 261.
 3. Chitty on Contracts, 19th Edn., p. 675; The Ind. Bills of Lading Act (IX of 1856).
 4. *Madan Gopal v. Kameswara*, A.I.R. 1936 Mad. 25; *Firm Peare Lal v. The E. I. Ry. Co.*, (1924) I.L.R. 46 All. 691.
 5. *Heugh v. L. & N. W. Ry.*, (1870) L.R. 5 Exch. 51 (Case of a carrier delivering goods to a wrong person after refusal of the goods at the consignee's address).
 6. *E.I. Ry. Co. v. Babu Ram*, (1929) I.L.R. 10 Lah. 414.
 7. *Youl v. Harbottle*, (1791) 1 Penke N.P.C. 68.
 8. *Dutton v. Solomonson*, (1803) 3 B. & P. 582, 584; *Brown v. Hodgson*, (1809) 2 Camp. 36; *N. P. Dawes v. Peck*, (1799) 8 Term. Rep. 330. Cf. *Santdas v. Secy. of State*, A.I.R. 1929 Sind 220 & Sec. 57 of the Ind. Railways Act. 1890.

(f) in conversion for sale by the carrier of goods entrusted to him, although no real necessity exists for such sale,¹ or where the sale is by the Railway Company of the goods consigned before the expiry of six months from the date of consignment.²

(g) for deterioration of goods during transit,³ for delay and shortage in weight,⁴ for short delivery.⁵

Who to sue: consignor or consignee: This depends upon special contracts and the passing of property in the goods. As a general rule, delivery of goods to a carrier will, unless the seller reserves the right of disposal, pass the property in the goods to the buyer,⁶ and, upon such delivery, the carrier becomes the buyer's agent, and the buyer alone may sue the carrier for damages for the loss or non-delivery of, or injury done to, the goods.⁷ If the consignor of goods deliver them to a particular carrier, by the order of the consignee, and they are afterwards lost, the consignee and not the consignor is entitled to maintain an action against the carrier for the loss, although the consignor paid for booking the goods.⁸

The above *prima facie* rule may be modified by a contract with the carrier, in which case the consignor may maintain the action⁹.

1. *Sundarji v. Secy. of State*, (1934) I.L.R. 13 Pat. 752.
2. *B. & N. W. Ry. Co. v. Matru Ram*, (1927) I.L.R. 49 All. 300.
3. *Secretary of State v. Devi Ditta*, 148 I.C. 489; *Laduram v. Hiratal*, (1934) 59 C.L.J. 467; *E. I. Ry. Co. v. Behari Lal*, A.I.R. 1926 Lah. 512; *Secretary of State v. Firn Har Kishen* (1926) I.L.R. 7 Lah. 370.
4. *B. N. Ry. Co. v. Sheikh Dillu*, A.I.R. 1925 Nag. 350; *E. I. Ry. Co. v. Krishna*, (1924) I.L.R. 45 All. 534; *Secretary of State v. Kesho Prasad*, A.I.R. 1932 All. 584 (delay caused by diversion from ordinary route).
5. *Secretary of State v. Raghubar*, A.I.R. 1933 All. 595; cf. *Firm of Chaitsing v. Secy. of State*, A.I.R. 1926 Sind 102.
6. Secs. 23 (2) and 25, Ind. Sale of Goods Act (III of 1930).
7. *Dutton v. Solomonson*, (1803) 3 B. & P. 582, 584 (the moment the goods are delivered to a carrier, it operates as delivery to the purchaser); *Brown v. Hodgson*, (1809) 2 Camp. 36 (Goods consigned to a merchant in a foreign country are stated in the bill of lading to be shipped by order and on account of the consignee. Held, the property vested in the consignee the moment they were put on board the ship).
8. *Dawes v. Peck*, (1799) 8 Term Rep. 330 cf. *Leake v. Loveday*, (1842) Man. & G. 972.
9. *Dunlop v. Lambert* (1839) 6 Cl. & F. 600 (If the consignor makes a contract with the carrier, such contract supersedes the necessity of showing the ownership in the goods and the consignor may maintain the action though the goods be the property of the consignee); *Sadasook*

The consignor, and not the consignee, will have the right of action against the carrier, where goods are sent to the consignee for sale on approval,¹ or where goods were delivered to the carrier at the risk of the consignor,² or for delivery for the consignor and in his name to the consignee,³ or if the consignee procured the goods to be consigned to him by fraud on the consignor so that he obtained no property in them.⁴

In the case of carriage of goods by sea the following special rules relating to passing of property in the goods shall apply :—

- (i) in c. i. f. contracts—the property in the goods does not pass until the shipping documents have been taken up by the buyer and they are in such form that the buyer may be in a position to obtain possession of the goods on arrival and also to recover according to their terms from the carrier for loss of or damage to the goods during the course of transit.⁵ Again under Sec. 25 of the Indian Sale of Goods Act (III of 1930) the property does not pass unless the conditions imposed by the seller are fulfilled⁶.
- (ii) In f. o. b. contracts—the buyer names a ship upon which goods are to be delivered. The goods when placed

Kothari v. Chaitram, (1924-25) 29 C. W. N. 808, 812, 813 (Where in a contract for sale the place of delivery is indicated, the carrier is the agent of the seller until actual delivery of the goods at the place of destination).

1. *Sivain v. Shepherd*, (1832) 1 Moo. & Reb. 223. Cf. *Phiroxshah v. Emperor*, (1934) I. L. R. 58 Bom. 646.
2. *Dunlop v. Lambert*, *supra*.
3. *Sargent v. Morris*, (1820) 3 B. & Ald. 277 (By a Bill of lading the captain was to deliver the goods for the consignor and in his name to the consignee. At the time of shipment the consignee had no property in the goods, *Held*, the action for damage done to the goods must be brought in the name of the consignor, although the consignee had insured the goods).
4. *Stephenson v. Hart*, (1823) 4 Bing. 484, 486.
5. *Finlay & Co. v. Kweja Hoo Tong*, (1929) 1 K. B. 400 C. A. Cf. The Ind. Bills of Lading Act (IX of 1856).
6. *M. R. Mehta & Co. v. Joseph*, (1924) I. L. R. 48 Bom. 531 (where documents sent to a bank were to be delivered on acceptance of the draft); *Bank of Morvi Ltd. v. Boerlein Bros.*, (1924) I. L. R. 48 Bom. 374 (where bill of lading was endorsed in blank with instructions to agent not to hand over the same to the buyer until goods paid for).

on board the ship are at the risk of the buyer and he is to pay the freight, and subject to the seller reserving the right of disposal, the property in the goods passes to the buyer.¹

- (iii) In ex-ship contracts—In the case of a sale 'ex ship' the seller is under an obligation to cause delivery to be made to the buyer from a ship which has arrived at the port of delivery. The seller has to pay the fare or otherwise to release the ship-owner's lien. The goods are not at the buyer's risk during the voyage.²

In the case of carriage of goods by air, except in the circumstances set out in rule 12, Chap. II, Schedule I of the Act, the consignee on payment of the charges and on compliance of the conditions of carriage set out in the air consignment note may sue the carrier for refusal to deliver the goods. The consignor and the consignee can respectively enforce all the rights given them by rules 12 and 13 each in his own name whether he is acting in his own interest or in the interest of another, provided he carries out the obligations imposed by the contract. The mutual relations of the consignor and the consignee with each other or the mutual relations of third parties whose rights are derived either from the consignor or by the consignee are not affected by the above rules.³

When goods are booked for transit over the lines of several carriers, question may arise as to who, the consignor or the consignee, as the case may be, may sue. The rule, subject to special provisions, is that if the contract is made with the first carrier without a parallel series of contract with the other carriers, the first carrier alone is responsible for the goods for the whole journey unless he limits his liability by special agreement. No inference can be drawn from the mere fact that goods have to be carried over the lines of several carriers that the consignor has made a contract with each of the other carriers for their own part of the transit⁴. But if the other carriers happen to be common carriers, they would

1. *Browne v. Hare*, (1858) 3 H. & N. 484.

2. *Yangtze I. A. Ltd. v. Lukmanjee*, (1918) A. C. 585 (P. C.).

3. Rules 11, 13, 14 and 15, Chap. II, Sch. I of the Act.

4. *I. G. N. & Ry. Co. Ltd. v. Girdharilal*, (1927) I. L. R. 54 Cal. 430, 439 following *Muschamp v. The L. & P. J. Ry. Coy.*, (1841) 8 M. & W. 421. Cf. Sec. 6 Carriers Act; *Dekhari Tea Co. Ltd. v. Assam Bengal Ry.*, (1920) I. L. R. 47 Cal. 6.

be liable to consignor for breach of common law obligation independent of contract. There is no question of the suit against such carriers being defeated merely by reason of the absence of privity of contract or of privity of contract of insurance¹.

Under Sec. 80 of the Indian Railways Act (IX of 1890), in cases where goods are booked through over the railways of two or more railway administrations, a suit for compensation for loss or injury to goods may be brought either against the railway administration to which the goods were delivered by the consignor, or against the railway administration on whose railway, the loss, injury, destruction or deterioration occurs, notwithstanding any agreement to the contrary with the receiving railway administration².

When a Railway administration contracts to carry goods partly by railway and partly by sea, it shall be responsible for loss of or injury to the goods which may happen during the carriage by sea to the extent to which it would be responsible under the Merchant Shipping Act, 1854, and the Merchant Shipping (Amendment) Act, 1862, if the ship were registered under the former of those Acts and the railway administration were owner of the ship, and not to any greater extent.³

When goods are carried by successive air carriers, the carriage is deemed to be one undivided carriage if it has been regarded by the parties as a single operation, whether it has been agreed upon under the form of a single contract or of a series of contracts,⁴ and in such a case each carrier who accepts luggage or goods is deemed to be one of the contracting parties to the contract of carriage in so far as the contract deals with that part of the carriage which is performed under his supervision. And as regards luggage or goods, the passenger or consignor will have a right of action against the first carriers, and the passenger or consignee who is entitled to delivery

1. *K. O. Dhar v. Ahmed Bux*, (1933) I. L. R. 60 Cal. 879, following *Irrawaddy Flotilla Co. v. Bugwandas* (1890-91) L. R. 18 I. A. 121; *Dekhari Tea Co. Ltd. v. Assam Bengal Ry. Ltd.*, supra, affirmed by the Judicial Committee in *I. G. N. & Ry. Co. Ltd. v. The Dekhari Tea Co. Ltd.*, (1923-24) L. R. 51 I. A. 28, followed in *Madura Co. Ltd. v. P. O. Xavier* A. I. R. 1931 Mad. 115.

2. There is no corresponding section in the Carriers Act (III of 1865).

3. Sec. 82, Ind. Railways Act (IX of 1890).

4. Rule 4, Chap. I, First Schedule to the Act.

will have a right of action against the last carrier, and further, each may take action against the carrier who performed the carriage during which the destruction, loss or damage took place. These carriers will be jointly and severally liable to the passenger or to the consignor or consignee.¹ In the case of combined carriage performed partly by air and partly by any other mode of carriage, the provisions of the schedule to the Act apply only to the carriage by air.²

B. *When common and statutory carriers of goods may sue :*

(I) In the case of carriage of goods by sea.

(a) *In respect of freight*³, the right to sue is in the (i) *the Ship-owner*, in the absence of an express stipulation in the charterparty or bill of lading,⁴ (ii) *the Master*, where the express contract was made with him,⁵ (iii) *the Charterer*, who under the charter is in possession and control of the ship, or where the bill of lading is signed by the charterer, or by the captain as agent expressly for the charterer⁶, (iv) *the Assignee of ship or freight*,⁷ (v) *the Mortgagee of ship or freight*, who takes actual or constructive possession,⁸ or (vi) *a Third person* to whom freight is made payable by the charter party or the bill of lading.⁹

Such right of suit is against (i) *the Shipper*, in the absence of an express contract in the bill of lading, or where the master delivers

1. Rule 30, Chap. III, First Sch. to the Act.
2. Rule 31, Chap. IV, First Sch. to the Act.
3. For full freight, lump freight, back freight, pro-rata freight, time-freight, as the case may be, see Scrutton on Charterparties, 13th Edn., pp. 389-407.
4. *Per* Lord Ellenborough C.J., in *Smith v. Plumer*, (1818) 1 B. & A. 575, 581 (The master may have a right to receive the freight from the consignees of the goods, but that will depend upon the question whether he has a lien upon the freight).
5. *Seeger v. Duthie*, (1860) 8 C. B. N. S. 45, 56 (In this case, the captain of the ship was a part owner with whom and in whose name the contract was made); *Brouncker v. Scott*, (1811) 4 Taunt 1, 4.
6. *Gilkison v. Middleton*, (1857) 2 C. B. N. S. 134; *Harrison v. Huddersfield S. Co.*, (1903) 19 T.L.R. 386.
7. *Leslie v. Guthrie*, (1835) 1 Bing. N. C. 697, 710 (assignment of freight); *Lindsay v. Gibbs*, (1856) 22 Beav. 522 (assignment of a share in a ship passes the corresponding share in the freight).
8. *Keith v. Burrows*, (1877) 2 A. C. 636, 645, 646.
9. *Kirchner v. Venus*, (1859) 12 Moore, P.C. 361, 398.

a bill of lading with an indorsement freeing the shipper¹, (ii) *the Consignee*, named in the bill of lading to whom by the consignment the property in the goods passes, (iii) *the Indorsee of a bill of lading*,² to whom by the endorsement the property in the goods has passed, or who has completed his proprietary rights by taking delivery of the goods under the indorsed bill of lading, (iv) *Vendor who stops in transitu*.³

(b) The carrier may sue for failure to furnish and load cargo,⁴ for loading dangerous goods,⁵ for demurrage for undue detention,⁶ for indemnity against loss, damage or expenses resulting from misstatements in the bill of lading,⁷ for expenses incurred for protecting the goods against extraordinary perils.

(II). *In the case of carriage of goods by railways*, the Railway Company or Railway administration may sue

(i) *for any rate, terminal and other charges* on failure of the person liable to pay the same on demand. Where the Railway administration have in the exercise of their lien sold the goods by public auction, they can appropriate the sale proceeds towards their dues, and if the sale proceeds are insufficient, they may sue for the balance.⁸ The Railway Company cannot recover any excessive charges.⁹ If they demand any excess charges,

1. *Lewis v. M'Kee*, (1868) L.R. 4 Ex. 58.

2. *Swell v. Burdick*, (1884) 10 A. C. 74 (the mere indorsement and delivery of a bill of lading by way of a pledge for a loan does not pass "the property in the goods" within the meaning of the Bills of Lading Act (18 and 19 Vict. C. III). Cf. Sec. 2, The Ind. Bills of Lading Act (IX of 1856)

3. *Booth v. Cargo Fleet Co.*, (1916) 2 K. B. 570 (Vendor is liable for the freight not only to the place at which the goods are in fact carried, but also to the ultimate destination).

4. *Beyts Craig & Co. v. Otto Martin*, (1892) 1 L.R. 16 Bom. 389; *Wilson v. Hicks*, (1857) 26 L. J. Ex. 242.

5. Rule 6, Art. IV., Sch. to the Carriage of Goods by Sea Act (XXVI of 1925).

6. *Aktieselskabet Reidar v. Arcos Ltd.*, (1927) 1 K.B. 352, 362.

7. Rule 5, Art. III, Sch. to the Carriage of Goods by Sea Act (XXVI of 1925).

8. Sec. 55 Ind. Railways Act (IX of 1890).

9. *Gulab v. G. I. P. Ry. Co.*, (1926) 1 L. R. 49 All. 217 (Railway Company cannot charge any rate higher than the contract rate); *Chunilal v. N.G.S. Ry.*, (1907) 1 L. R. 29 All. 228 F. B. (Wagon rate cannot be converted into maund rate).

the consignor or the consignee must take delivery and pay the excess charge and then sue for recovery of excess.¹ The Railway Company may in a proper case recover from the consignor an undercharge², or an *extra* charge on discovery that the description of the goods was materially false³.

- (ii) for demurrage for not discharging goods in time.⁴
 - (iii) for cost of detention and examination of the goods where it appears from the examination that the description of the goods is materially false.⁵
 - (iv) for damage caused by any dangerous or offensive goods placed upon a railway, where the real nature of the goods is not disclosed⁶.
 - (v) for expenses for preservation of goods from extraordinary perils.⁷
- (III). *In the case of carriage of luggages and goods by air,*
- (i) the consignor is liable for all damages suffered by the carrier or any other person by reason of the irregularity, incorrectness or incompleteness of the particulars and statements inserted in the air consignment note⁸.
 - (ii) the consignor is liable for any damage which may be caused to any person who is the holder of that part of the air consignment note which was delivered to the consignor, in a case where the carrier under orders of the consignor has disposed of the goods without

1. *Chhogatal v. Secy of State*, A I.R. 1933 Nag. 261.

2. *Cf. Shahdara Saharanpur Light Ry. v. Pratapsing*, A. I. R. 1931 Lah. 511,

3. Sec. 58 Ind. Ry. Act (IX of 1890).

4. *E. I. Ry. Co. v. Bhagwandas*, (1922) I. L. R. 1 Pat. 15 (Demurrage cannot however be claimed for the period during which investigation into the consignee's claim to receive the goods was being made).

5. Sec. 58 (5) Ind. Railways Act (IX of 1890) which enables the Railway administration to sue the person who delivered the account, or, if that person is not the owner of the goods, then, that person and the owner jointly and severally.

6. Sec. 59 Ind. Ry. Act. (IX of 1890); *Lyell v. Ganga*, (1876-78) I. L. R. 1 All. 60 F. B. (case of damage caused by an explosion).

7. *G. N. Ry. Co. v. Swaffield*, (1874) L. R. 9 Ex. 132.

8. R. 10, Chap II, First Sch. to the Carriage by Air Act (XX of 1934). *Cf.* R. 11, Chap II, First Sch. to the Act.

requiring the production of the said part of the air consignment note¹.

- (iii) the consignor is liable to be sued for any damage occasioned by the absence, insufficiency or irregularity of any information or documents attached to the air consignment note which are necessary to meet the formalities of customs, octroi or police, in a case where such information must be furnished and such documents must be attached before the goods can be delivered to the consignee².

Suits by or against carriers of passengers : Carriers of passengers undertake to carry passengers safely but are liable only for negligence and not as insurers of their safety³. They are not only liable for the negligence of themselves and their servants but also for the negligence of independent contractors. Thus they are liable for injuries to passengers caused by the negligent construction of a railway bridge, a railway embankment or a railway stock⁴. Their liability for safe carriage is in substance based upon tort⁵. They may however relieve themselves from the ordinary liability by special conditions⁶. They may be liable to invitees and even to licensees⁷.

They owe no duty to a trespasser⁸ or to a child *en ventre sa mere*,

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1. R. 12 (3), First Sch. to the Act.
 2. R. 16, First Sch. to the Act.
 3. *E. I. Ry. Co. v. Kalidas*, (1900-01) L. R. 28 I. A. 144, 149; *Readhead v. Midland Ry.*, (1867) L. R. 2 Q. B. 412, 417; *Newberry v. Bristol Tramway Co.*, (1912) 107 L. T. 801. Special rules apply to carriers of passengers by air.
 4. *Grote v. Chester & Holyhead Ry.*, (1848) 2 Exch. 251 (case of breaking down of a bridge).
 5. *Lyles v. Southend-on-Sea (Crop.)*, (1905) 2 K. B. 1, 19.
 6. *Gallin v. L. & N. W. Ry.*, (1875) L. R. 10 Q. B. 212 (stipulation that the passenger shall travel "at his own risk"). Notice of the existence of the conditions is sufficient: *Thompson v. L. M. & S. Ry.*, (1930) 1 K. B. 41, 51 C. A.; *Penton v. Southern Ry.*, (1931) 2 K. B. 103; *Hood v. The Anchor Line*, (1918) A. C. 837. When issuing free passes or tickets at a reduced rate, Railway Companies usually exempt themselves wholly or partially from liability by special conditions: *The Stella*, (1900) P. 161.
 7. Chitty on Contracts, 19th. Edn., pp. 736-737; *Jayamal v. The M. & S. M. Ry. Co.*, (1926) I. L. R. 46 Mad. 929 (licensee).
 8. *Lygo v. Newbold*, (1854) 9 Exch. 302; *Grand Trunk Ry. v. Barnett*, (1911) A. C. 361.

so that the trespasser, or the child when born, cannot bring an action for personal injuries¹.

They are not liable for robbery of a passenger by his fellow passengers² or for assault by fellow passengers³, or for injury caused by the wilful acts of strangers⁴ or fellow passengers⁵.

When a railway administration contracts to carry passengers over another line as well as their own, or when it contracts to carry passengers partly by railway and partly by sea, the same rule applies as in the case of carriage of goods⁶. The succeeding carriers when sought to be made liable can avail themselves of the exceptions from liability contained in the first company's contract⁷.

When carriers of passengers notify their hours of arrival and departure, they are, apart from special conditions⁸, liable for unreasonable delay⁹, (but not for unavoidable delay¹⁰), or unreasonable detention¹¹, or for starting before time¹².

A passenger can sue the carrier for refund of fare, if the carrier cannot provide any accommodation or fails to complete the journey.

1. *Walker v. Great Northern Ry.*, (1891) 28 L. R. Ir. 69.
2. *Cobb v. Great Western Ry.*, (1894) A. C. 419 (In this case the Railway company was held not liable even when the station master refused to detain the train to permit the plaintiff to give the men into custody and have them searched).
3. *Pounder v. N. S. Ry. Co.*, (1892) 1 Q. B. 385.
4. *Latch v. Rumner Ry. Co.*, (1858) 27 L. J. Exch. 155 (case of a stranger putting an obstruction on the line causing the train to get off the line).
5. *E. I. Ry. Co. v. Kalidas*, (1900—01) L. R. 28 I. A. 144, 149.
6. See Secs. 80 and 82 Ind. Ry. Act (IX of 1890).
7. *Hall v. North Eastern Ry.*, (1875) L. R. 10 Q. B. 437.
8. Railway companies do not warrant that trains shall start or arrive punctually. See *Hurst v. Great Western Ry.*, (1865) 19 C. B. (N. G.) 310.
9. *Cooke v. Midland Ry.*, (1892) 9 T. L. R. 147..
10. *Fitzgerald v. Midland Ry.*, (1876) 34 L. T. 771.
11. *Great Northern Ry. v. Hawcroft*, (1852) 21 L. J. Q. B. 178 (where a passenger was held entitled to reasonable expenses of hiring a conveyance to finish the journey); *Halim v. Great Northern Ry.*, (1856) 1 H. N. 408 (expenses incurred by a passenger for staying the night in a hotel).
12. *Great Western Ry. v. Lowenfeld*, (1892) 8 T. L. R. 230. For remoteness of damage, see *Buckmaster v. Great Eastern Ry.*, (1870) 23 L. T. 471.

Carriers may sue passengers for breach of contract and in tort. So far as Railway companies are concerned, penalties have been provided in the Indian Railways Act (IX of 1890) relating to various matters, which obviate the necessity of bringing suits in respect of them.

Special rules relating to carriage of passengers by air : Under the Carriage by Air Act (XX of 1934), carriers by air may refuse to enter into any contract of carriage and cannot be sued for such refusal¹. They are liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger if the accident which caused the damage so sustained took place on board the air craft or in the course of any of the operations of embarking or disembarking². The carrier is liable for damage occasioned by delay in the carriage by air³.

The carrier shall not be entitled to avail himself of the provisions of First Schedule to the Act which exclude or limit his liability if the damage is caused by the wilful misconduct of himself or his agent acting within the scope of his employment⁴.

In the case of the death of the person liable an action for damages lies against those legally representing his estate⁵.

In the event of the death of a passenger, the liability shall be enforceable for the benefit of such of the members of the passenger's family as sustained damage by reason of his death⁶. An action to enforce the liability may be brought by the personal representative

1. Rule 33, Chap. V. *First Sch.*
2. Rule 17, Chap. III, *First Sch.* The carrier is not liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures : Rule 20 (1), Chap. III, *First Sch.* If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person, the Court may exonerate the carrier wholly or partly from his liability : R. 21, Chap. III, *First Sch.* For limits of liability, see R. 22, Chap. III, *First Sch.*
3. Rule 19, Chap. III, *First Sch.*
4. Rule 25, Chap. III, *First Sch.*
5. Rule 27, Chap. III, *First Sch.*
6. Rule 1, *Second Sch.* In this rule the expression "member of a family" means wife or husband, parent, step-parent, grand-parent, brother, sister, half-brother half-sister, child, step-child, grand-child. In deducing the relationship, any illegitimate person and any adopted person shall be treated as being, or as having been, the legitimate child of his mother and reputed father or, as the case may be, of his adopters.

of the passenger or by any person for whose benefit the liability is enforceable, but only one action shall be brought in British India in respect of the death of any one passenger, and every such action by whomsoever brought shall be for the benefit of all such persons so entitled as aforesaid as either are domiciled in British India, or, not being domiciled there, express a desire to take the benefits of the action¹.

In the case of carriage to be performed by various successive carriers and in the case of combined carriage, partly by air and partly by any other mode of carriage, the same rule applies as in the case of carriage of luggage or goods².

3. *Suits by or against private carriers of goods or passengers*: A private carrier is a bailee of goods and the general laws relating to the rights and liabilities of a bailee apply to him³. He is liable for negligence of himself or his servant⁴. As carrier of passengers he is not liable unless negligence is proved⁵.

4. *Suits by or against Post and Telegraph authorities as carriers*: The rights and liabilities of Post and Telegraph authorities as carriers are defined by statutes⁶. Subject to such conditions and restrictions as the Central Government may by rule prescribe, the Central Government shall be liable to pay compensation not exceeding the amount for which the postal article has been insured, to the sender thereof, for the loss of the postal article or its contents or for any damage caused to it in the course of transmission by post⁷. The Central Government is also liable for non-payment to the sender in respect of a value-payable postal article the amount recovered from the addressee⁸, for delivering

1. Rules 2, 3 and 4, Second Sch.

2. Rules 30, 31, First Sch.

3. See Chap. IX, The Ind. Contract Act, (IX of 1872). The degree of care required in the case of a gratuitous carrier is different from that of a carrier for hire or reward: *Coggs v. Bernard*, (1703) 2 Ld. Raym 909; *Ross v. Hill*, (1846) 2 O. B. 877.

4. *Powles v. Hider*, (1856) 6 E. & B. 207 (The proprietor of a cab is responsible for the negligence of his driver).

5. *Crofts v. Waterhouse*, (1825) 3 Bing. 319.

6. Ind. Post Office Act, VI of 1898, and Ind. Tel. Act, XIII of 1885.

7. Sec. 33 of the Ind. Post Office Act. By Ad. Or. the words "Central Government" have been substituted for the words "Secretary of state etc".

8. Sec. 34 of the said Act. Cf. Secs. 35 (4) and 6. of the said Act. See *Secretary of State v. Radhelal*, (1924), I. L. R. 46 All. 649. Note:

a value-payable article without collecting the money,¹ for loss of contents of a registered envelope,² for loss of an article by reason of the label having been torn making delivery to the addressee impossible.³

Subject to the exceptions contained in Secs. 6 and 48 of the Indian Post Office Act (VI of 1898), the Crown,⁴ is liable for loss, misdelivery, delay or damage of a postal article, or loss or misdelivery of a money order.

With regard to telegraphic messages, Sec. 9 of the Indian Telegraph Act, XIII of 1885, provides that "the Crown⁵ shall not be responsible for any loss or damage which may occur in consequence of any telegraph-officer failing in his duty with respect to the receipt, transmission or delivery of any message; and no such officer shall be responsible for any loss or damage, unless he causes the same negligently, maliciously or fraudulently."

5. *Interpleader suits by carriers*: Where goods are entrusted to a carrier and the real owner of the goods demands them from the carrier, the latter may interplead, but if he does not interplead but when sued by the real owners, sets up the title of the bailor, he must prove such title or be liable to the real owner for the value of the goods⁶.

6. *When notification of claim and/or notice to sue necessary*: There are statutory provisions relating to notifications of claims and notices to sue without which no suit is maintainable. The following are such statutory provisions:

(a) *Suits against Railway Companies*: No suit is maintainable unless notification of claim to the refund of over

After the passing of the Government of India Act, 1935, such suits must be instituted against the Federation of India under Sec. 176, or against the Federation or the Secy. of State, at the option of the person by whom proceedings are brought, under Sec. 179 of the Act.

1. *Mothi Rangiah Chetty v. Secy. of State*, (1905) I. L. R. 28 Mad. 213, referred to in *Secretary of State v. Garapati* (1926) 51 M. L. J. 440.
2. *Secretary of State v. Gulab Sahu*, 15 R. D. 172 (the sender and not the addressee is entitled to sue). See Post Office manual, Vol. V. rule 29.
3. *Secretary of State v. Radhelal*, (1924) I. L. R. 46 All. 649.
4. The word "Crown" is substituted for "Secretary of State for India in Council," by the Ad. Or.
5. "Crown" is substituted for "Secretary of State for India in Council," by the Ad. Or.
6. *Nippon Yusen Kaisha v. Mahaliram* (1930) 52 C.L.J. 365, 399.

charges in respect of animals or goods or to compensation for loss, destruction or deterioration of animals or goods has been preferred in writing to the railway administration within six months from the date of delivery of the animals or goods for carriage by railway.¹

Such notice may be served in the case of a railway administered by the Government or Native State, on the Manager and, in the case of a railway administered by railway company, on the Agent in India of the railway company.²

(b) *Suits against carriers governed by the carriers Act (III of 1865)*: Under Section 10 of this Act, "No suit shall be instituted against a common carrier for the loss of, or injury to goods entrusted to him for carriage unless notice in writing of the loss or injury has been given to him before the institution of the suit and within six months of the time when the loss or injury first came to the knowledge of the plaintiff."³

(c) *Suits against Carriers of goods by sea*: Article III, Sec. 6, Schedule to the Carriage of Goods by Sea Act (XXVI of 1925) provides that "unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, or, if the loss or damage be not apparent, within three days, such removal shall be *prima facie* evidence of the delivery by the carrier of the goods as described in the bill of lading. Notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection. In any event the carrier and the ship shall be discharged from all liability in respect of all loss or damage unless suit is brought

1. Sec. 77 Ind. Railways Act (IX of 1890); *Dunichand v. Secy. of State* (1930-31) 35 C.W.N. 338 (Non-delivery of goods amounts to loss within the meaning of Sec. 77). No notice is necessary for an action based on tort: *Sundarji v. Secy. of State*, (1934) I.L.R. 13 Pat. 752.
2. Sec. 140 Ind. Railways Act (IX of 1890) *Cf. B. & N. W. Ry. Co. v. Kameshwar*, (1933) I.L.R. 12 Pat. 67.
3. Sec. 2 of the Ind. Carriers Act, 1899 (Act X of 1899).

within one year after delivery of the goods or the date on which the goods should have been delivered."

(d) *Suits against carriers by air*: Chapter III, rule 26 of the First Schedule to the Carriage by Air Act (XX of 1934) provides as follows:—

"In the case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within three days from the date of receipt in the case of luggage and seven days from the date of receipt in the case of goods. In the case of delay the complaint must be made at the latest within fourteen days from the date on which the luggage or goods have been placed at his disposal. Every complaint must be in writing upon the document of carriage or by separate notice in writing despatched within the time aforesaid. Failing complaint within the times aforesaid, no action shall lie against the carrier save in the case of fraud on his part."

Rule 29 of the said Chapter provides as follows:—

"The right of damages shall be extinguished if an action is not brought within two years, reckoned from the date of arrival at the destination, or from the date on which the air craft ought to have arrived, or from the date on which the carriage stopped."

7. *Suits by or against State Railways*: Before the Government of India Act, 1935, "the Secretary of State for India in Council" was held entitled to sue or be sued in respect of railways administered by Government.¹ Now under Section 179 of the said Act, in the case of any liability arising before the commencement of Part III of the Act or arising under any contract (which expression shall include any contract declared by the terms hereof to be supplemental to such contract) or statute made or passed before that date proceedings may be instituted against the Federation or a Province, according to the subject matter of the proceedings, or, at the option of the person by whom the proceedings are brought, by the Secretary of State. Under Section 185 (2) of the Act, contracts made by or on behalf of the Federal Railway Authority shall be enforceable by or against the Federation, and, subject to any provision which may hereafter be made by Act of the Federal Legislature, the Authority may sue or be sued in the like

1. *Shaik Elahi v. E. I. Ry. Administration*, (1931) I, L. R. 10 Pat. 466.

manner and in the like cases as a company operating a railway may sue or be sued¹.

A notice under Section 77 of the Indian Railways Act (IX of 1890) would not dispense with a notice under Section 80 of the C. P. Code when the Secretary of State is the defendant².

Clubs : See "Unincorporated Associations," *infra*.

Common Manager : It is necessary to consider the following cases :

1. Suits by or against common manager appointed under Sec. 95 of the Bengal Tenancy Act.

2. Suits by or against common manager appointed under Sec. 93 or 94 of the Bengal Tenancy Act.

3. When notice under Sec. 80 C. P. Code to sue common manager is necessary.

1. *Suits by or against common manager appointed under Sec. 95 of the Bengal Tenancy Act :* Where a common manager is appointed by the Court under Sec. 95 of the Act, the management of the estate is really in the hands of the Court which has appointed the manager, and in the management a common manager acts as the agent of the Court and not as the agent of any of the co-owners. His position is therefore the same as that of a receiver³. Thus a common manager can sue and be sued on behalf of the co-owners⁴. Co-owners cannot sue the common manager for accounts⁵ or for recovery of specific sums alleged to have been misappropriated by him,⁶ except with the leave of the Court. A co-owner, however, is not debarred from bringing a suit against a common manager for acts of misconduct or misappropriation done outside the limits of his authority as common manager.⁷

2. *Suits by or against common manager appointed under Sec. 93 or 94 of the Bengal Tenancy Act :* A common manager may be

1. See Proviso to Sec. 185 and r. 1, Eighth Sch. to the Act.

2. *Secretary of State v. Fazaluddin*, A. I. R. 1933 All. 53 ; *Balakram-Atma Ram v. Secy. of State*, A. I. R. 1935 All. 900.

3. *Nabakishore v. Atul* (1913) I. L. R. 40 Cal. 150, 160. Cf. Sec. 98 of the B. T. Act.

4. *Sibo Sundari v. Raj Mohun*, (1903-04) 8 C. W. N. 214 (suit by common manager) ; *Kirtibash v. Umesh*, (1911-12) 16 C.W.N. 96 (suit against common manager).

5. *Brindaban v. Atul*, (1935-36) 40 C.W.N. 92, 94.

6. *Nabakishore v. Atul*, *supra*.

7. *Nabakishore v. Atul*, *supra*.

appointed by the co-owners themselves under these sections. When such is the case the common manager's right of suit and his liability to be sued will depend upon his terms of his appointment¹. He is the agent of the co-owners and can be sued by the co-owners for accounts or for recovery of sums alleged to have been misappropriated by him and this without the leave of the Court.

3. *When notice under Sec. 80 C. P. Code to sue a common manager is necessary* : A common manager appointed under Sec. 95 of the B. T. Act is a public officer and cannot be sued without a previous notice under Sec. 80 of the C. P. Code in respect of acts done by him in his capacity as a public officer.² No such notice is necessary in the case of a common manager appointed under Sec. 93 or Sec. 94 of the Act.

Company-registered : The subject of parties to suits by or against a registered company or the members thereof may be considered under the following heads :

1. The general rule : Suits in the name of the Company.
2. Exception : Shareholder's right to sue.
3. Shareholder's right to sue in the Company's name.
4. Cause title in suits instituted by a shareholder for himself and on behalf of the others.

1. *General rule : Suits in the name of the Company* : As a general rule, suits by or against a company must be instituted in the name of the company. The rules laid down in *Foss v. Harbottle*³ and *Mozley v. Alston*⁴ which have been followed in numerous cases both in England and in India are—(i) "where there is a corporate body capable of filing a bill for itself to recover property either from its directors or officers, or from any other person, that corporate body is the proper plaintiff, and the only proper plaintiff",⁵ and (ii) "the Court will not interfere with the internal management of

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1. The power of the High Court to make rules regarding the powers of the common manager whether appointed under Secs. 93, 94 or 95 B. T. Act has now been limited to common managers under Secs. 95 to 98 by the new Sec. 100 of the B. T. Act.
 2. *Beni Madhab v. Deb Narayan*, (1919-20) 24 C.W.N. 138 ; *Jatindra v. Rebati*, (1932) I.L.R. 59 Cal. 961, on appeal, (1934) L. R. 61 I.A. 171.
 3. (1843) 2 Ha. 461.
 4. (1847) 1 Ph. 790.
 5. *Per James L. J. in Gray v. Lewis*, (1873) L. R. 8 Ch. App. 1035, 1050, 1051.

companies acting within their powers, and in fact has no jurisdiction to do so".¹

In the absence of any special provision in the constitution or articles of a company or in the Act itself, it is the right of a majority of members (which expression includes a major part of those who are present at a regular meeting of the company) to commence proceedings in names of the company.

Illustrations :

(a) A single shareholder instituted an action complaining of breach of the articles. *Mellish L.J. held*, that the litigation ought to have been in the name of the company, because "if the thing complained of is a thing which, in substance the majority of the company are entitled to do, or if something has been done irregularly that the majority of members are entitled to do regularly, or if something has been done illegally which a majority of the company are entitled to do legally, there can be no use in having litigation about it. The ultimate end, no doubt, is that a meeting has to be called, and then the majority gets its wishes". *Mac Dougall v. Gardiner*, (1875) 1 Ch. D. 13.

(b) The Directors of a company had bought for an excessive price certain lands from themselves as private individuals, and to find money for the purchase had mortgaged the company's property in a manner unauthorised by the Act of Incorporation. Two members of the company sued not in their individual character only, but on behalf of themselves and the other shareholders (except a few who were made defendants) alleging malversation against the corporate officers. *Wigram V. C., held*, that the acts complained of were capable of confirmation by the majority of the members who may defeat the decree by lawfully resolving upon the confirmation of the very acts which are the subject of the suit, and that it was for the defendant in its corporate character to sue : *Foss v. Harbottle*, (1843) 2 Hare. 461.

(c) Two persons describing themselves as shareholders of a Railway company filed a bill against the Corporation and twelve other members praying an injunction to the effect that the twelve persons who are originally appointed directors of the company may be restrained from voting or acting as Directors, in as much as those persons ought to have ballotted out four of their number in order that four others might be elected in their stead, and it appeared that a large majority of share-holders supported the plaintiffs and it did not appear that the plaintiffs had not the means of putting the company in motion, *Held*, that the company could in those circumstances file a bill in its corporate character to remedy the evil complained of : *Moxley v. Alston*, (1817) 1 Ph. 790.

Even where a minority of shareholders are alleged to have been overdone by the vote of the majority, the plaintiff cannot complain of acts which are valid if done with the approval of the majority of shareholders or are capable of being confirmed by the majority,

1. *Burland v. Earle*, (1902) A. C. 83, 93.

mere irregularity or informality which can be remedied by the majority being insufficient.¹

2. *Exceptions : Shareholder's right to sue* : The rule that where there is a corporate body capable of filing a suit for itself to redress a wrong done to the company or to recover moneys or damages alleged to be due to the company, the action should *prima facie* be brought by the company itself,² is a rule subject to exceptions, and the exceptions depend very much on the necessity of the case, that is, the necessity for the Court doing justice. The following are among the exceptions to the rule :—

(a) *Where the act complained of is a fraud on the minority :*

Where the majority of a company propose to benefit themselves at the expense of the minority, the Court may interfere to protect the minority. In such a case the bill is rightly filed by one shareholder on behalf of himself and the others against the company.³ Such an action is far preferable to an action in the name of the company and then a fight to use its name.⁴

(b) *Where the act complained of is ultra vires the Company :*

Where an act which is *ultra vires* the company has been sanctioned by all the Directors and by a large majority of the shareholders, any single shareholder has a right to resist it and it is not necessary for him to sue

1. *Bhajekar v. Shinkar*, A. I. R. 1934 Bom. 243; *Ramkumar v. Sholapur Spinning & Weaving Co. Ltd.* (1935) I. L. R. 59 Bom. 218. Cf. *Srinivasan v. Subramania*, A. I. R. 1932 Mad. 100, 105.
2. *Burland v. Earle*, (1902) A. C. 83, 93; *Gray v. Lewis*, (1873) L. R. 8 Ch. 1035, 1050, followed in *Russell v. Wakefield Waterworks Co.* (1875) L. R. 20 Eq. 474, 479, 482.
3. *Menier v. Hooper's Telegraph Works*, (1874) L. R. 9 Ch. App. 350.
4. *Alexander v. Automatic Telephone Co.*, (1900) 2 Ch. 56, 69. Cf. *Russell v. Wakefield Waterworks Co.*, (1875) *supra*, at p. 482 (In such a case it is not necessary that the Corporation should absolutely refuse by vote at the general meeting if it can be shown either that the wrong-doer had command of the majority of votes so that it would be absurd to call the meeting; or if it can be shown that there has been a general meeting substantially approving of what has been done or if it can be shown from the acts of the Corporation as a Corporation distinguished from the mere acts of the Directors of it that they have approved of what has been done, and have allowed a long time to elapse without interfering, so that they do not intend and were not willing to sue); *Nariman v. Municipal Corporation of Bombay*, (1923) I. L. R. 47 Bom. 809, 837, 838.

on behalf of himself and other shareholders. If the subject matter of the suit is an agreement between the corporators acting by its directors or managers and some other corporation or some other person stranger to the corporation, it is quite proper and quite usual to make that other corporation or person a defendant to the suit¹. Where there is no third party interested, among the defendants must appear personally or by representation all the parties concerned in objecting to the suit. Consequently there must be joined in the first place, the corporation itself; secondly, the governing body, or at least those of them who are implicated in the objectionable proceedings²,

- (c) *Where there is an infringement of the individual right of a shareholder*: If a shareholder is denied his legal right to exercise his vote an action can be maintained by him in respect of his said right.³
- (d) *Where there is infringement of the rights of all shareholders*: In such cases, actions can be maintained by individual shareholders on behalf of themselves and the others⁴.

1. *Simpson v. Westminster Palace Hotel, Co.* (1860) 8 H.L.C. 712, 717, followed in *Russell v. Wakefield Waterworks Co.*, (1875) L. R. 20 Eq. 474, 481; *Srinivasan v. Subramania*, A. I. R. 1932 Mad. 100, 104; *Hoole v. Great Western Railway Co.*, (1867) 3 Ch. App. 262 (Case of illegal issue of additional shares. Sir John Holt L. J., held, that in such a case, there is as a general rule no necessity for any other shareholders being present.), followed in *Srinivasan v. Subramania*, supra, at p. 105.
2. *Bharat Insurance Co. Ltd. v. Kanhaya Lal*, A. I. R. 1935 Lah. 792, 794.
3. *Pender v. Lushington*, (1877) 6 Ch. D. 70 (In deciding that such an action could be maintained, Jessel M. R. observed: "He is a member of the company and whether he votes with the majority or minority, he is entitled to have his vote recorded, an individual right in respect of which he has right to sue"), followed in *Srinivasan v. Subramania*, supra, at p. 104 (Case where individual shareholders asked for a declaration that the appointment of persons to fill the vacancies by co-optation was illegal and for a declaration that they and the other shareholders were entitled to elect five shareholders, directors).
4. *Mosely v. Koffyfontein Mines Ltd.*, (1910) 1 Ch. D. 73 (Action by an individual shareholder on behalf of himself and other shareholders against the Company and Directors to restrain the unauthorised issue of capital, which was a matter affecting the shareholders as a body: Fletcher Moulton L. J., observed, "It must be the right of a share-

(e). *Where the act complained of involves a question of law which can be disposed of only by a Court of law*: It has been held that where the question involved relates to validity of votes¹, or the interpretation of a certain clause in the Memorandum of Association relating to the application of the assets of the Company², a single member may maintain a suit.

3. *Shareholder's right to sue in the name of the company*: In cases not falling within the exception, if a shareholder desired to complain of a wrong done to the company, he can sue in the company's name. But if it appears that the majority do not support the action, the name of the company as the plaintiff will be struck out. If there is a dispute as to the views of the majority, the Court would 'ascertain which party it is, the plaintiff's or the defendant's, which really represents the majority of the company', that is to say, the Court may direct a meeting to be called and, ought in the meantime, to grant an injunction to keep things *in status quo*³. If an action is brought in the name of the company without authority, the solicitor responsible may be ordered to pay the costs⁴.

4. *Cause-title in suits by a shareholder for himself and on behalf*

holder by reason of his being a shareholder to bring an action to stop such a proceeding"), referred to in *Srinivasan v. Subramanija*, A. I. R. 1932 Mad. 100,104.

1. *Young v. South African Syndicate*, (1896) 2 Ch. 268; *Arnot v. United African Lands Ltd.*, (1901) 1 Ch. 518; *Nariman v. Municipal Corporation of Bombay*, (1923) I. L. R. 47 Bom. 809, 839. (Questions as to validity of votes are not questions relating to the internal management of a corporation, nor the fact that councillors disqualified from voting at a meeting of the corporation is an injury to the corporation. They are questions of law that can be disposed of only by Court of law. Suits relating to validity of votes cannot be brought in the name of the corporation); *Parshuram v. Tata Industrial Bank*, A. I. R. 1925 Bom. 49 (Suit by the appellants for a declaration that the proceedings of certain meetings of the Tata Bank in which the amalgamation of the Bank with Central Bank was determined upon, were null and void).
2. *Bharat Insurance Co. Ltd., v. Kanhaya Lal*, A. I. R. 1935 Lah. 792.
3. Per Lord Justice James in *Mac Dougall v. Gardiner*, (1875), 1 Ch.D. 13, followed in *Pender v. Lushington*, (1877) I. L. R. 6 Ch. D 70, 79, 80 (Action by a shareholder on behalf of himself and other shareholders making the company a co-plaintiff).
4. *La Campagne de Mayville v. Whiteley*, (1896) 1 Ch. 788.

of the others : In a suit by a shareholder for himself and on behalf of the others, the cause-title should be as follows :

A. B., a shareholder, for himself and on behalf of the other shareholders (except the defendants).

—: Versus :—

1. The Company.
2. The Directors.

Company in Liquidation : The subject of parties to suits by or against companies in liquidation may be considered under the following heads :

1. Name in which to sue or be sued.
2. Leave of Court, if and when necessary.
3. Consequence of institution of proceedings without leave.

1. *Name in which to sue or be sued* : In the case of a company wound up by Court or under the supervision of the Court, the Official Liquidator¹, and in the case of a voluntary winding up, the Voluntary Liquidator², shall have power to institute or defend any suit or other legal proceeding in the name and on behalf of the Company. The Official Liquidator is only entitled to exercise any of the powers with the sanction of the Court³. But the Court may provide by any order that the Official Liquidator may exercise any of the powers conferred by Sec. 179 without sanction or intervention of the Court. In the case of a Voluntary Liquidator no such leave is necessary but if the matter involved is considerable, the Voluntary Liquidator may apply under Sec. 315 for sanction of the Court.

The Official Liquidator shall be described by the style of the Official Liquidator of the particular company in respect of which he is appointed, and not by his individual name⁴. The title of the action should be—

“A. B. Company Limited (in liquidation) by the Official Liquidator”..... Plaintiffs.

1. Sec. 179 (a), Ind. Companies Act.
2. Sec. 179 (a), Ind. Companies Act read with Sec. 207 (iv).
3. Sec. 179 (a), Ind. Companies Act.
4. Sec. 177 Ind. Companies Act.

In a suit in which the plaint was headed—

“ The Official Liquidator, Himalaya Bank Ltd.,

(In liquidation).....Plaintiff,”

It was held that the description was bad, but leave to amend was given.¹

2. *Leave of Court, if and when necessary* : The leave of the Court is the leave of the winding up Court. When a winding up order has been made or a provisional liquidator has been appointed, no suit or other legal proceeding shall be proceeded with or commenced against the company except by leave of the Court, and subject to such terms as the Court may impose.² In the case of a compulsory liquidation the creditor must show special grounds for granting leave to proceed by way of action. In the case of a voluntary liquidation the onus is on the liquidator to show that an order should be made staying an action brought against the company.³ Where a suit is instituted without leave subsequent to the winding up order, according to the Calcutta High Court, the Court has no jurisdiction to give the plaintiff leave to continue the suit; and leave to proceed with a pending legal proceeding can only be granted where the proceeding has been instituted prior to the winding up order.⁴ According to the Allahabad and Lahore High Courts, when leave has been granted in a pending suit, the leave is not to be treated as a nullity and the dismissal of the suit would be a pure technicality and would serve no useful purpose in a case where a fresh suit might be commenced and no plea of limitation can be successfully taken against such suit⁵.

Leave in case of defensive proceedings : Where a decree is obtained in a suit by the company in liquidation no leave is necessary for the appellants defending themselves against consequences of the judgment by the ordinary means of an appeal; in other words there

1. *Muhammad Yusuf v. The Himalaya Bank Ltd.*, (1896) I.L.R. 18 All. 198.
2. Sec. 171, Ind. Companies Act.
3. Sec. 171, read with Sec. 215, Ind. Companies Act; *Jyoti Prosad v. Patmohana Collieries Ltd.*, (1931) I.L.R. 58 Calcutta 913; *Buta Singh & Sons Ltd. v. Peoples' Bank of Northern India Ltd.*, (1931) 131 I. C. 379 (Lah.).
4. *Re: Steel Construction Co. Ltd.*, (1935-36) 40. C W. N. 312.
5. *People's Industrial Bank Ltd. v. Ramchander*, (1930) I. L. R. 52 All. 430; *People's Bank of Northern India Ltd. v. Fateh Chand & Co.*, A. I. R. 1936 Lah. 401.

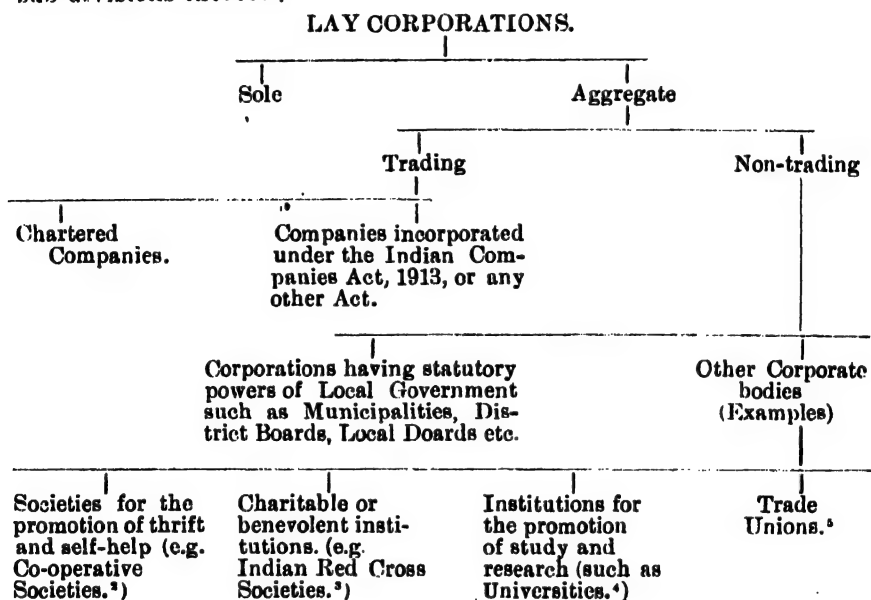
is no necessity for the defence in the action to obtain leave for any other defensive proceedings on their behalf.¹

Corporations : Broadly speaking Corporations are of two kinds :

(a) Corporations Sole.

(b) Corporations Aggregate.

In England these Corporations are dealt with under two heads : (1) Lay, (2) Ecclesiastical. In India, for practical purposes, we need only consider the Lay Corporations, and adopt the under-mentioned sub-divisions thereof :



Name in which to sue or be sued:—

(i) *Corporation Sole* : A corporation sole is a body politic having perpetual succession, constituted in a single person.⁶ In England, the Crown, the Postmaster

1. *Humber v. John Griffiths Cycle Co.*, (1901) 85 L. T. 141, H. L., followed in *Jiwan Dass v. People's Bank of Northern India Ltd.*, A. I. R. 1937 Lah. 926.
2. Cf. Sec. 18, The Co-operative Societies Act (II of 1912).
3. Cf. Sec. 4, Ind. Red Cross Society Act (XV of 1920).
4. Cf. Sec. 3, Ind. Universities Act (VIII of 1904).
5. Cf. Sec. 13, Ind. Trade Unions Act (XVI of 1926).
6. There may however, be "periods in the duration of a corporation sole, in which there is a vacancy, or no one is in existence in whom the corporation resides and is visibly represented": Grant, Law of Corporations (1850), p. 626 ; Hals. Laws of England, Vol. 8, p. 302.

General, the Treasury Solicitor, the Public Trustee, are Corporations Sole.¹ In India, the Administrator-General² and the Official Trustee³ are among Corporations sole having perpetual succession and a common seal, and have the right to sue and be sued in the corporate name. A corporation sole must sue in respect of matters pertaining to the corporation in his corporate capacity or at least show clearly that he sues in his corporate capacity.⁴

(ii) *Corporation Aggregate*: A corporation aggregate is "a collection of many individuals united into one body under a special denomination, having perpetual succession (except where a corporation is created for a limited period by the Crown) under an artificial form, and vested by the policy of the law with the capacity of acting in several respects as an individual."⁵

A corporation aggregate must sue in its corporate name unless it is specially authorised by statute to sue in some other name.⁶ Similarly a corporation aggregate should be sued in its corporate name unless it is specially authorised by statute to be sued in some other name.⁷ In some cases the Act of Incorporation may expressly provide that the body corporate shall sue or be sued in the corporate name⁸. Upon general principles, suits in the corporate name can be maintained where there is no express provision to that effect.

Corporation's right to sue: Where it is competent for a corporation to commence legal proceedings, such proceedings cannot be commenced by one or more of its individual members.⁹ For cases

1. Hals. Laws of England, Vol. VIII, p. 305.
2. Administrator-General's Act (III of 1913), Sec. 5.
3. The Official Trustees Act (II of 1913), Sec. 6.
4. Hals. Laws of England, Vol. VIII, p. 392.
5. Hals. Laws of England, Vol. VIII, p. 301. See Lindley on Partnership, 10th Edn., p. 22.
6. Hals. Laws of England, Vol. VIII, pp. 307, 392. For illustration, see Sec. 6 of the Societies Registration Act.
7. Hals. Laws of England, Vol. VIII, p. 393, Art. 862.
8. Cf. Sec. 4, Ind. Red Cross Society Act (XV of 1920); Sec. 18, The Co-operative Societies Act (II of 1912); Sec. 32, The Madras Hindu Religious Endowment Act (II of 1927).
9. The rule in *Foss v. Harbottle*, (1843) 2 Ha. 461 and *Moxley v. Alston*, (1847) 1 Ph. 790 discussed under heading "Companies registered".

where an individual member can sue on his own behalf alone or on behalf of himself and all other members of the corporation or in the name of the corporation, see heading, "Company Registered—Exceptions to the Rule:" and the cases referred to under that heading.

Foreign Corporations: In England a foreign corporation may sue or be sued in that country in its corporate name or by the name by which it is generally known in business in that country, but the fact of incorporation must be proved to the satisfaction of the jury¹. The same rule has been followed in India². In a Lahore case where it was not shown that a foreign bank was incorporated in the foreign state, it was held that a suit by the said bank in its corporate name in British India is not maintainable³.

Bodies which are not Corporations: There are many associations and societies that are not corporations. They are dealt with under the heading "Un-incorporated Associations".

Crown—See Government, *infra*.

Del Credere Agent: A *del credere* agent⁴ is a mercantile agent who, in consideration of extra remuneration called a *del credere* commission, undertakes that persons with whom he enters into contracts on the principal's behalf will be in a position to perform their duties. He is a mere surety liable only to his principal in case the purchaser makes default in payment either through insolvency or something that makes it as impossible to recover as in the case of insolvency⁵.

The liability of a *del credere* agent is a contingent pecuniary

1. Hals. Laws of England, Vol. VIII, p. 393, Art. 863.
2. *Singer Manufacturing Co. v. Bajnath*, (1903) I. L. R. 30 Cal. 103.
3. *Bachan v. Dharam Arth Bank*, A. I. R. 1933 Lah. 456, 457 (Suit by a State Bank of Nabha).
4. A banian is a *del credere* agent: *Peacock v. Byjnauth*, (1890-91) I. L. R. 18 I. A. 78; so in a *dubash* in southern India: *South Indian Industrials Ltd. v. Mindi Ram*, (1915) 27 M. L. T. 501. The certified brokers of the Bombay Native Stock and Share Brokers' Association are *del credere* agents of their constituents: *Fazal v. Mangaldas*, (1922) I. L. R. 46 Bom. 489. As to the analogous position of a *pucca adatia*, see 'Adatia', *supra*.
5. *Morris v. Cleasby*, (1816) 4 M. & S 566; *Hornby v. Lacy*, (1817) 6 M. & S. 166; *Gabriel (Thomas) & Sons v. Churchill & Sim*, (1914) 3 K. B. 1272, followed in *Pariyamianna v. Banians & Co.*, (1926) I. L. R. 49 Mad. 156.

liability not a liability to perform the contract. The liability does not therefore extend to make him the person with whom the seller is entitled if he wishes to litigate any disputes that arise out of the contract and ascertain what is due upon it. Thus, where a vendor sued the *del credere* agent to recover the amount claimed by him under a contract as to which there were disputes between the vendor and the purchaser who refused payment on the ground that the seller did not duly perform his part of the contract, it was held by Pickford J., that the seller was not entitled to call upon the *del credere* agent to litigate those disputes, taking upon himself all the obligations of the buyer, and taking to himself all the defences of the buyer.¹ The *del credere* agent does not become responsible to the buyer for the due performance of the seller's contract², nor can he litigate the disputes as between the vendor and the buyer in respect of the contract.³

A *del credere* agency may be inferred from a course of conduct between the parties⁴. But an agreement between stockbrokers by which one party agreed in consideration of receiving half commission on business introduced by him and to bear half of any loss sustained by the other in connection with such business has been held to be a contract of indemnity and not a *del credere* agency.⁵

Executors and Administrators : The joinder of executors and administrators as parties to suits is based upon certain fundamental rules of law. These rules may briefly be stated as follows :—

- (i) The executor or administrator* as the case may be, of a deceased person, is his *legal representative for all purposes* save that when a deceased was a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, nothing contained in the Indian Succession Act, 1925, shall vest in an executor or administrator any property of the deceased person which would otherwise, have passed by survivorship to some other person⁶.

1. *Gabriel (Thomas) & Son v. Churchill & Sim*, supra.
2. *Churchill v. Goddard*, (1937) 1 K. B. 92.
3. *Periyamianna v. Banians & Co.*, (1926) I.L.R. 49 Mad. 156. (Note the distinction between a contract of indemnity and a contract of guarantee in India).
4. *Shaw v. Woodcock*, (1827) 7 B. & C. 73.
5. *Montagu Stanley & Co. v. Solomon*, (1932) 2 K. B. 287.
6. Sec. 211, Ind. Suc. Act, 1925; *Veerappa Chetty v. Arunachala*, (1910) I. L. R. 33 Mad. 423 (On the death of an undivided coparcener, the

- (ii) The executor derives his title from the will and represents the estate from the date of the testator's death¹. An administrator derives his title from the grant before which the estate does not vest in him².
- (iii) Except in the case of a Hindu, Muhammadan, Buddhist, Sikh, Jaina or Indian Christian, no right to any part of the property of a person who has died intestate can be established in any Court of Justice unless Letters of Administration have first been granted by a Court of competent jurisdiction³.
- (iv) A person claiming by succession (not by survivorship) to the effects of a deceased person cannot obtain a decree against a debtor of a deceased person except on production of a probate or letters of administration, or a Succession Certificate⁴.
- (v) A grant of probate or letters of administration shall be deemed to supersede any certificate of succession previously granted, and in any pending suit or proceeding by or against the holder of the certificate, the person to whom the grant has been made is entitled to be substituted⁵.
- (vi) In the case of wills made by any Hindu, Buddhist, Sikh or Jaina (where such wills are of the classes specified in Clauses (a) and (b) of section 57 of the Indian Succession Act, 1925), no right as executor or legatee can be established in any Court of justice, unless a Court of competent jurisdiction in British India has granted probate of the will under which the right is claimed, or has granted letters of administration with the will or an authenticated copy of the will annexed⁶.

estate vests in the survivors and there is no estate belonging to a deceased person).

1. *Meghraj v. Krishna Chandra*, (1924) I. L. R. 46 All. 286.

2. Cf. Sec. 212, Ind. Suc. Act, 1925.

3. Sec. 212, Ind. Suc. Act, 1925.

4. Sec. 214, Ind. Suc. Act, 1925.

5. Sec. 215, Ind. Suc. Act, 1925.

6. Sec. 213, Ind. Suc. Act, 1925. (This section shall not apply in the case of wills made by Muhammedans and in the case of wills made by any Hindu, Buddhist, Sikh, or Jaina where such wills are of the classes not specified in clauses (a) and (b) of Sec. 57 of the Act). Note : Although

- (vii) After any grant of probate or letters of administration, no other than the person to whom the same may have been granted shall have power to sue or prosecute any suit, until such probate or letters of administration has or have been recalled or revoked¹.
- (viii) Probate cannot be granted to any person who is a minor or is of unsound mind, nor to any association of individuals, unless it is a company which satisfies the conditions prescribed by rules to be made by the Governor-General in Council in this behalf².
- (ix) In India, executor of executor is not the derivative executor of the original testator³. Under the English law, on the death the sole executor or the sole surviving executor who has proved his will, his executor on taking out probate becomes *ipso facto* executor not only of that will but also of the will of whom the other was the sole or surviving executor⁴.
- (x) The appointment of an executor may be either absolute or qualified⁵. It may also be conditional, as where the will provides that the executors should furnish security 'to pay the legacies and in general to perform the will', or that A. is appointed executor provided he proved the will within a certain time⁶. The limitations in the probate follow the limitations on the powers of the executors in the will⁷, and consequently qualify the executor's

probate is not obligatory in the case of a Mahomedan will, there is no bar to obtaining probate: *Syed Abdul v. Badaruddin*, (1923-24) 28 C. W. N. 295, 298. Probate is not necessary where the assets do not exceed Rs. 2000/-, *vide* Sec. 31, Administrator General's Act (III of 1913).

1. Sec. 216, Ind. Suc. Act, 1925. For revocation of probate, see Sec. 225 of the Act.
2. Sec. 223, Ind. Suc. Act., 1925. Cf. Secs. 244, 245, of the Act.
3. *Nathuram v. Alliance Bank of Simla*, A. I. R. 1929 Lah. 546.
4. Adm. E. Act, 1925, Sec. 7 (English Act); Williams on Executors, 12th Edn., p. 591.
5. The appointment may be qualified by limitations, (a) in point of time (that is, when the executor shall begin, or when he shall cease, to execute his office). (b) as to the place wherein the right is to be exercised. (c) as to the subject matter whereon the right is to be exercised.
6. Williams on Executors, 12th Edn., pp. 147-151,
7. *Ramji v. Bujan*, 60 I. C. 352.

right to sue and his liability to be sued. The Indian Succession Act, 1925, does not expressly deal with limited grants following the limitation on the powers of the executors in the will, except as regards grants of probate for special purposes¹. The provision for grant subject to exceptions² is wide enough to cover a case where irrespective of the will, the court can make a limited grant whenever the circumstances of the case require it.

Joinder of Executors and Administrators as parties: The subject may be considered under the following heads:—

(a) *When executors and administrators as such can sue and be sued:* Executors and Administrators as such can sue and be sued in following cases:—

- (i) In cases where the right to sue or to defend survives the deceased.³ In such cases, the death of a plaintiff or defendant shall not cause the suit to abate.⁴ Thus executors or administrators are entitled to continue suits commenced by the testator or intestate.
- (ii) In all cases where the cause of action accrued during, or after the death of the testator or intestate (as where a contract was made with the executor or administrator⁵ and in many cases where a 'right to sue on a cause of action accrues to the executor or administrator in his own time upon a contract made with the deceased in his life time,'⁶ and also in cases where 'a right to sue which never existed in the testator or intestate, accrues to the executor or administrator in remainder'⁷ and also where 'contingent and executory interests and possibilities coupled with an interest in chattel real are trans-

1. Sec. 248, Ind. Suc. Act, 1925.

2. Sec. 255, Ind. Suc. Act, 1925.

3. See Ind. Suc. Act, 1925, Sec. 306; Ind. Cont. Act, 1872, Sec. 37; Fatal Accidents Act, 1855; The Legal Representatives' Suits Act, 1855.

4. O. XXII, r. 1, C. P. Code.

5. Williams on Executors, 12th Edn., pp. 529, 531, 532; *Webster v. Spencer*, (1820) 3 B. & A. 360, (Suit by a personal representative as such for money lent by him as personal representative); *Cowell v. Watts*, (1805) 6 East. 405, (Suit by personal representative as such to recover price of goods sold and delivered after the death of the deceased).

6. Williams on Executors, 12th Edn., pp. 532, 533.

7. Williams on Executors, 12th Edn., p. 533.

missible to the personal representative of a person dying before the contingency upon which they depend takes effect'.¹

(b) *When executors or administrators will ordinarily represent the estate:* The general rule is—"Trustees, executors and administrators may sue and be sued on behalf of and representing the property or estate of which they are trustees or representatives without joining any of the persons beneficially interested in the trust or estate, and shall be considered as representing such persons; but the court or a judge may, at any stage of the proceedings, order any of such persons to be made parties, either in addition to or in lieu of the previously existing parties²." Thus the executors are the proper persons to sue to recover assets belonging to the testator's estate or otherwise act as representatives of the deceased, throughout the province in which the same may have been granted, until probate or letters of administration has or have been recalled or revoked.³ But if there are special circumstances, persons interested in the estate not being legal personal representative will be allowed to sue to recover the assets of the testator.⁴

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1. Williams on Executors, 12th Edn., pp. 534, 535. 'Chattels real' include all leases, terms of land, tenements, and hereditaments which issue out of or are annexed to the real estate.
 2. O. XVI, r. 8. R.S.C.; Cf. O. XXXI, r. 1.C.P. Code where the words "Where the contention is between the persons beneficially interested in such property and a third person" occur. The language of the English rule has been adopted by the Mad. High Court (O. S.) rule I, Order VII.
 3. Sec. 216, Ind. Suc. Act, 1925; *Walker v. Walker*, (1871) 25 L. T. 481; (In a bill filed by residuary legatees to recover a certain fund alleged to belong to the testator's estate, a demurrer was allowed with costs and leave to amend was refused).
 4. *Beckley v. Dorrington*, 2 Eq. Cas. Abr. 253, (A bill by a residuary legatee against the executor, the other residuary legatee and debtor, suggesting no collusion, negligence of executor or some special case: *Held*, action not maintainable), considered in *Alsager v. Rowley*, (1802) 6 Ves. 748, ("If the general principle will not allow you to bring a bill against both the executor and debtor in a given case, the same principle will apply to the case where you will bring a bill against an executor and a creditor improperly paid by the executor"); *Stainton v. Carron Co.* (1854) 18 Beav. 146, considered in *Yeatman v. Yeatman*, (1878) 7 Ch. D. 210,

(c) *When executors or administrators can sue and be sued personally*: Where the cause of action accrues after the death of testator or intestate, the executor or administrator can sue and be sued in his representative capacity as well as in his own name.¹ Again, claims by or against an executor or administrator may be joined with claims by or against him personally, provided the last mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor or administrator or are such as he was entitled to or liable for, jointly with the deceased person whom he represents.² Unless the claims by the plaintiff personally arise with reference to the estate of which he was executor, they cannot be joined in the same action. Where a personal claim is not in reference to the estate, the plaintiff should elect which claim he should proceed with, and failing such election the proceedings in the action should be stayed³. The English doctrine as to the admission of assets, in its unqualified form, is no part of the law in India. Therefore the old English rule that a promise by an executor to pay interest, differing in any particular from the testator's own obligation, involves admission of assets and renders the executor personally liable for the principal also, does not apply to India⁴.

(d) *Where the executor is out of jurisdiction*: The subject is to be considered from two aspects:—

(i) *Where the executor named is out of jurisdiction*: Where an executor is absent from the province in which application is made and there is no executor within the province willing to act, letters of administration, with the will annexed, may be granted to the attorney or agent of the absent executor, for the use and benefit of

1. Williams on Executors, 12th Edn., pp. 529, 530.

2. O. II, r. 5, C. P. Code (Order XVIII, r. 5, R. S. O); Williams on Executors, 12th Edn., p. 532; *Petrie v. Hannay* (1790) 3 Term. Rep. 659, (Account for money had and received by defendant to the use of executor, as such, may be joined to account for money had and received to the use of testator but account for a debt due to the executor in his own right cannot).

3. *Tredegar (Lord) v. Roberts*, (1914) 2 K. B. 283.

4. *Jamshedji v. Sorabji*, (1939-40) 44 C. W. N. 653 P. C.

his principal, limited until he has obtained probate or letters of administration.¹ On the death of the executor, the grant to his attorney comes to an end. But the death of one of two or more executors would not have this effect.²

- (ii) *Where the executor appointed is out of jurisdiction*: If at the expiration of twelve months from the date of any probate or letters of administration, the executor or administrator to whom the same has or have been granted is absent from the province within which the court which has granted the probate or letters of administration exercises jurisdiction, the court may grant to any person whom it may think fit, letters of administration limited to the purpose of becoming or being made a party to a suit to be brought against the executor or administrator, and carrying the decree which may be made therein into effect³. The Indian Statute does not provide, as the English Statute does⁴, as to the effect of the executor or administrator returning while any legal proceedings to which such executor or administrator is a party are pending. But on principle, on the absent executor or administrator returning while any legal proceedings to which such executor or administrator is a party are pending, the said executor or administrator shall be made a party to the legal proceedings⁵. In England every grant made under Sec. 164 of the Judicature Act, 1925, is limited "until further order of the court".⁶ This rule ought to be adopted in India.

1. Sec. 241, Ind. Suc. Act, 1925. Williams on Executors, 12th Edn., pp. 296, 338, 358.
2. Williams on Executors, 12th Edn., p. 358n.
3. Sec. 252, Ind. Suc. Act, 1925. Cf. Sec. 164, Jud. Act, 1925, which says that such special administration may be granted on the application of any creditor or person interested in the estate of the deceased.
4. Sec. 164 (3) of the Jud. Act, 1925, provides, "If the personal representative capable of acting as such returns to or resides within the jurisdiction of the High Court, while any legal proceedings to which a special administrator is a party are pending, that personal representative shall be made a party to the legal proceedings".
5. *Rainsford v. Tayton*, 7 Ves. 466.
6. Williams on Executors, 12th Edn., p. 361.

- (e) *Where the estate is insolvent* : "An estate is insolvent if the assets are not sufficient to pay all funeral expenses as well as all the debts of the deceased."¹ There are provisions for the administration in insolvency of the estates of persons dying insolvent.² The order which is made by the insolvency court is not an order of adjudication but for administration in insolvency of the estate of the deceased.³ The provisions relating to the estate of a deceased insolvent do not apply to any case in which probate or letters of administration to the estate of a deceased debtor has or have been granted to an Administrator-General.⁴ Upon an order for administration of a deceased debtor's estate under sec. 108 of the Presidency Towns Insolvency Act, the property of the debtor shall vest in the Official Assignee of the Court and he shall forthwith proceed to realize and distribute the same in accordance with the provisions of the Act.⁵ A creditor of a deceased may present a petition in the prescribed form for the administration of the estate of a deceased debtor.⁶ No petition can be presented by the legal representative of the deceased as may be done under the English law.⁷ When an order for administration of the estate of a deceased insolvent is made the same rules shall be observed as to the respective rights of secured and unsecured creditors and as to the debts and liabilities provable and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being, within the local limits of

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1. Williams on Executors, 12th. Edn., p. 637.
 2. For summary administration in small insolvencies, see Sec. 106, Pres.-t. Ins. Act and Sec. 74, Prov. Ins. Act, and the Rules under the Pres.-t. Ins. Act : Calcutta Rules 157-158 ; Bombay Rules 160-160A ; Madras Rules 99-106 ; Rangoon Rule 224. For administration of estates other than administration in small insolvencies there are provisions in the Pres.-t. Ins. Act (Secs. 108-110) and in the following rules : Calcutta Rules 159-165, Bombay Rules 161-167, Madras Rules 107-113, Rangoon Rules 225-228.
 3. *Hastuck v. Clark* (1899) 1 Q. B. 699.
 4. Sec. 111, Pres.-t. Ins. Act.
 5. Sec. 109, Pres.-t. Ins. Act.
 6. Sec. 108, Pres.-t. Ins. Act.
 7. Mulla's Law of Insolvency, p. 511.

the court in which the administration is pending with respect to the estates of the persons adjudged or declared insolvent ; and all persons who in any such case would be entitled to be paid out of such property, may come in under the preliminary decree, and make such claims against the same as they may respectively be entitled to by virtue of the Code.¹

(f) *Where the executor was or becomes an insolvent* : The court must grant probate to an executor appointed by the will.² It follows therefore that if a person appointed executor by the will is an insolvent, probate cannot be refused to him. Nor can a grant of probate to a person who becomes insolvent after the grant be revoked on the ground of his insolvency.³ In England, the Prerogative Court could not refuse to grant probate to a person appointed executor by the will on account of his insolvency ; nor could it revoke the probate where the executor who had obtained probate became bankrupt. "The Court of Chancery, therefore, was forced to assume a new jurisdiction ; and that Court restrained an insolvent or bankrupt executor and appointed a receiver. If it was necessary to bring actions at law to recover part of the effects, since that must be in the name of the executor, the Court compelled him to allow his name to be used."⁴ If one of two executors is bankrupt and the other executor is willing to act, the Court will not appoint a receiver.⁵

(g) *Where the executor appointed is a minor* : Where an executor appointed by the will is a minor probate cannot be granted to him⁶ but letters of administration with the will annexed may be granted, if the minor is sole

1. O. XX, r. 13, C. P. Code.

2. Sec. 222, Ind. Suc. Act, 1925.

3. Sec. 263, Ind. Suc. Act, 1925 : Note that the cases set forth as constituting 'just cause' in the section are exhaustive and not illustrative : *Annada v. Kali*, (1897) I. L. R. 24 Cal. 95 ; *Balgangadhar v. Sakwarbai*, (1902) I.L.R. 26 Bom. 792, 798 ; *Subroya Chetty v. Ragammall*, (1905) I.L.R. 28 Mad. 161, 164.

4. Williams on Executors, 12th Edn., p. 135.

5. *Bowen v. Phillips*, (1897) 1 Ch. 174.

6. Ind. Suc. Act., 1925, Sec. 223.

executor or sole residuary legatee, to the legal guardian of such minor or to such other person as the court thinks fit, until the minor has attained his majority at which period and not before, probate of the will shall be granted to him.¹ The administrator so appointed is a person capable of suing for or recovering the debts of the deceased and is liable to be sued by a creditor of the estate. When the minor comes of age the powers of the administrator shall cease and the minor after obtaining probate on attainment of majority will be made a party to all pending suits and proceedings in the usual course. No grant of administration will however be made where there is a competent executor willing to take probate.²

- (h) *When executors or administrators can sue or continue a suit in forma pauperis* : In England, the established rule is, that "a personal representative cannot, save when he is also a beneficiary, and even then only under special order, sue in his representative capacity as a poor person."³ In India, it has been held that a legal representative can be substituted in place of a deceased pauper plaintiff.⁴ But where there is only an application to sue in *forma pauperis* and no suit is pending in Court, and the applicant dies before leave is granted, the right to sue as a pauper being a personal right, cannot survive in the legal representative of the deceased applicant. If the right to sue survives in him, the legal representative may present a fresh application for leave to sue in *forma pauperis* or may institute a suit for the same relief.⁵ In a Bombay case, Davar J. held, that the legal representative of a pauper plaintiff who is not himself a pauper cannot be allowed to continue the

1. Ind. Suc. Act, 1925, sec. 244.

2. *Walker v. Woollaston*, 2 P. W. 576.

3. Williams on Executors, 12th Edn. p. 1223; *Per* Lord Hardwick in *Paradise v. Sheppard*, (1745) 6 Beav. 586n ; The indulgence enabling poor persons not of ability to sue for their rights in *forma pauperis* extends only to persons suing in their own right and not as executor or administrator. Cf. *Oldfield v. Cobbett*, 1 Ph. 613.

4. *In re : Bell*, (1887) I. L. R. 7 Mad. 390.

5. *Lalit Mohan v. Satish Ohandra*, (1906) I. L. R. 33 Cal. 1163, followed in *Kavuri Subbiah v. Yabursu Bala*, (1928) I. L. R. 51 Mad. 697.

suit as a pauper, though he may be allowed to be substituted as a legal representative of the deceased pauper plaintiff and continue the suit upon payment of court fees.¹ In a Madras case, Aiyangar J. dissented from the above view of Davar J. and held that a legal representative can continue the suit of a deceased pauper plaintiff as a pauper even though he himself is not a pauper. The fact that the legal representative has the means in his private capacity cannot justify his being dispauperised. He is only liable to be dispauperised if it is shown that in his capacity as executor he has sufficient means.² In special cases, a legal representative may claim to be allowed to file a suit in *forma pauperis* even where the estate is not a pauper.³ The result of the above decisions is that in the absence of special circumstances, where the assets are sufficient, a legal representative cannot institute or defend a suit or continue a suit as a pauper.

- (i) *When all legal personal representatives must be joined* : As a general rule, where there are two or more executors or administrators they should all be joined as parties. *Exceptions* : Executors who have not proved their testator's wills, and trustees, executors and administrators outside British India, need not be made parties⁴. A renouncing executor is also not a necessary party, nor *semble*, an absconding executor.⁵ But an executor who

1. *Manjai Rajuji v. Khandoo Baloo*, (1912) I. L. R. 36 Bom. 279.
2. *Sivagami v. T. S. Gopalaswami*, A. I. R. (1925) Mad. 765.
3. *Sundarathammal v. Paramaswami*, A. I. R. 1933 Mad. 881 (An application by a Hindu widow to allow her to file a suit in *forma pauperis*, although she was in possession of valuable assets left by her husband, was allowed on the ground that her possession was only that of persons with a life interest on which it would be almost impossible to borrow any money).
4. O. XXXI, r. 1, C. P. Code ; Sec. 311, Ind. Suc. Act, 1925. Although the executor who has proved is alone entitled to sue, an action by two executors and probate by one was held to be good ; *Brooks v. Stroud*, (1702) 7 Mad. Rep. 39 ; *Scott v. Briant*, (1836) 2 Har. & W. 54.
5. *Drage v. Hartopp*, (1835) 28 C. D. 414 (A foreclosure action by one of two executors against borrower, the other executors who had lent money belonging to the testator's estate on the security of a charge on real estate having absconded out of jurisdiction and it was not known where he was. *Held*, the action was not bad for nonjoinder of absconding executor).

has intermeddled with the assets although he has not proved should be made party.¹ Where there are two executors, one under age, the other proves the will and hath administration *durante minore*, the latter may sue solely².

- (j) *When one or more of several executors or administrators dies :* Upon the death of one or more of several executors or administrators the powers of the office become vested in the survivors or survivor in the absence of any direction to the contrary in the will or grant of letters of administration. Thus in the absence of any direction to the contrary in the will, upon the death of one of several executors, the surviving executors can sue and be sued, and where a suit by or against executors or administrators is pending there is no abatement of the suit upon the death of any one of them³.

But where the will provides that A and B are appointed executors, but in the case of death of A, C should be appointed executor in place of A, upon the death of A, powers of the office which include the right of suit will vest in B and C and not in B alone⁴,

- (k) *"When an executor or administrator can sue by making his co-executor or co-administrator party defendant :* If any one of the several executors or administrators who ought to but refuse to join in an action as co-plaintiff or has an interest in the subject-matter inconsistent with his position as plaintiff or resides outside the jurisdiction of the Court, the others may sue making him a defendant along with other necessary defendants.⁵

1. *Per Malins V. C., In re. Lovett, Ambler v. Lindsay*, (1876) 3 Ch. D. 198 (The true criterion of the executor's position is whether he is appointed executor and whether he has meddled with the estate. If he has, then he can be sued without more.).
2. *Colborne v. Wright*, (1678) 2 Lev. 239.
3. O. XXII, r. 2, C. P. Code; *Sekhara v. Narayanan*, (1930) I. L. R. 53 Mad. 790. Cf. Sec. 226, Ind. Suc. Act, 1925; *Barada v. Gajendra*, (1908-09) 13 C. W. N. 557 (where the will conferred on the executors right to perform certain religious ceremonies).
4. *Hara Coomar v. Doorgamoni*, (1894) I. L. R. 21 Cal. 195, 199 (where it was held that C was entitled to grant of probate on the death of A).
5. *Luke v. South Kensington Hotel*, (1879) 11 Ch. D. 121 C. A. at 126, 128 (suit by one of three trustees to foreclose a mortgage); *Soudamini v. Teniram*, 54 I. C. 755 (case of an executor residing outside the juris-

- (l) *When all executors or administrators refuse or are unable to sue*: If all executors or administrators refuse or are unable to sue, a residuary legatee may himself sue making the legal executors or administrators defendants in addition to other necessary parties. In such a suit the court may require other beneficiaries to be added¹. "But the mere refusal of a personal representative to sue for recovery of outstanding assets is not, in the absence of special circumstances, sufficient to justify a beneficiary in suing the representatives and the alleged debtor to the estate².

Such special circumstances will be deemed to exist (a) where the executors or administrators refuse to recover the assets which are the only assets³; (b) where there are assets which, but for the suit, would be lost to the estate⁴; (c) where the relation between the executors and the debtor to the estate is such as to present a substantial impediment to the preservation by the executors of the rights of the parties interested in the estate or where there is collusion between the debtor and the executors⁵. Where a beneficiary can sue in his own right making the legal personal representative a defendant, his only claim would be for an order for transfer of the assets to the legal personal representative⁶.

- (m) *When the estate has been fully administered*: When the estate has been fully administered and distribution has been made, the executor is not a proper party in any proceeding by the creditor. The unpaid creditor of the testator may sue the residuary legatees who have received their legacies for refund of so much of the

diction of the court); *Nazir Ahamad v. Ragbat Ali*, 53 I. C. 478 (case of an administrator).

1. *Gandy v. Gandy*, (1885) 30 Ch. D. 57 C. A.; *Howden v. Yorkshire Miners' Association*, (1903) 1 K. B. 308 C. A. at 341, 345.
2. *Williams on Executors*, 12th Edn., p. 1286; *Yeatman v. Yeatman*, (1878) 7 C. D. 210, 214, 215.
3. *Lancaster v. Evors*, 4 Beav. 158.
4. *Stainton v. Carron Co.*, 18 Beav. 146, considered in *Yeatman v. Yeatman*, *supra*; *Oriental Bank v. Gobin Lall*, (1884) 1 L. R. 10 Cal. 713.
5. *Travis v. Miln*, 9 Hare. 141 (case of executors of a deceased partner).
6. *Tuan Man v. Che Som*, A. I. R. 1932 P. C. 146, 151.

amounts paid to them as may be requisite to satisfy his claim¹. If the executor is not liable to pay he ought not to be sued².

(n) *Where the sole executor or the sole surviving executor dies before the estate has been fully administered* : On the death of a sole executor or the sole surviving executor the executorship is not transmitted but comes to an end³. and letters of administration with a copy of the will annexed should be obtained⁴, and thereafter such administrator may apply to be made a party in any pending suit or proceeding. In England, in case of the executor dying intestate, the proper course seems to be that 'some person ought to take general administration to the original testator, or if the former executor had proved and made a will appointing an executor capable of acting, such executor should obtain probate, so as to represent the original testator'⁵. In India, executor of an executor is not the derivative executor of the original testator and therefore, not liable to be sued unless he intermeddles with the estate.

(o) *Where there is no administrator appointed of an intestate's estate* : Under Sec. 212, Ind. Suc. Act, 1924, except in the case of the intestacy of a Hindu, Muhammadan, Buddhist, Sikh, Jaina, or Indian Christian, no right to any part of the property of a person who has died intestate can be established in any Court of justice unless letters of administration have first been granted by a Court of competent jurisdiction⁶. Therefore, a person, who is not a Hindu, Muhammadan etc., who wants to establish his right to any part of the property of a person who has died intestate cannot do so unless the estate is represented by an administrator. But an excep-

1. *Gillespie v. Alexander*, (1826) 3 Russ. 130.

2. *Hunter v. Young*, (1879) 4 Ex. D. 256, 261. *Dadson v. Sammuell*, (1861) L. J. Ch. 799.

3. *De Souza v. Secy. of State for India*, 12 B. L. R. 423 ; *Ramanatham v. Ragammal*, 27 I. C. 849.

4. Sec. 232, Ind. Suc. Act, 1925 ; *Ranjit v. Jagannath*, (1886) I. L. R. 12 Cal. 375. *Ramnatham v. Ragammal*, *supra*.

5. *Williams on Executors*, 12th Edn., p. 361.

6. Sec. 212, Ind. Suc. Act, 1925.

tion to this seems to have been made by Fawcett and *Palkar J.J.* in a Bombay case, where in a suit by a mortgagee on a mortgage executed by a Parsee who died intestate against his legal heirs, it was held that the suit would have been bad if any of the defendants had taken out letters of administration. But if in fact there is no legal administrator and it is not shown that any of the defendants was ever willing or unwilling to act as administrator, the heirs of the deceased mortgagor would sufficiently represent the estate. If the creditor himself applied for being appointed as an administrator, in that event he would have to sue himself which he could not have done, because a person cannot be a plaintiff and a defendant at the same time¹.

- (p) *Where the deceased left a will without appointing any executor* : If there has been an appointment of executor either expressly or by necessary implication in the will, then the person so appointed would be the legal representative of the testator, but if no such appointment is made, the mere fact that there are certain dispositions of property and legacies in the will has not the effect of making the legatees the legal representatives. Thus in a Madras Case², it appears that a testator died leaving a will but without appointing an executor. A creditor of the deceased sued the legal heir *ab intestato* of the deceased and obtained a decree and in execution of the decree brought certain properties to sale. One of the legatees under the will thereafter brought a suit for a declaration that the decree and the sale were not binding upon the estate and for recovery of possession of certain items of property sold : *Held*, the decree was properly obtained in the suit in which the estate was properly represented, the plaintiff in that suit having acted *bonafide* and there being no fraud or collusion between him and the defendants of such a character as to vitiate the decree entirely and so as not to make it binding on the estate. Where no

1. *Ratanbai v. Narayandas*, (1927) I. L. R. 51 Bom. 771.

2. *Kolaremathu v. Madhavi*, A. I. R. 1928 Mad. 243, applied in *Mt. Karam Kaur v. Matwal*, A. I. R. 1933 Lah. 380.

executor is appointed and the residuary legatee is a minor, administration limited to his minority may be granted¹.

- (q) *Where suit instituted before, and decree obtained after, probate* : Where a creditor of a deceased sues his legal heirs *ab intestato* being unaware of the existence of any will left by the deceased and without objection and obtains a decree and the execution of the decree is opposed by the executors who obtained a grant of probate or even an order for grant of probate before the decree, the remedy of the decree-holder is either (1) to have the decree vacated, the suit restored, the executors brought on the record and a new decree made against them, or (2) to institute a suit on the judgment and obtain a decree thereon against the executors². But where no executor was named in the will and no letters of administration with a copy of the will annexed was applied for, and the plaintiff sued the legal heir *ab intestato* of the deceased debtor, the decree obtained by the plaintiff in such a suit can be executed against the estate of the deceased in the absence of any fraud or collusion between him and the defendant and if the plaintiff was ignorant of or had no means of knowing who the proper legal representatives were³.

- (r) *Joinder of husband of married executrix and administratrix* : In India, unless the deceased was a Hindu, Mahommedan, Buddhist, Sikh, or Jaina, probate⁴ or let-

1. Sec. 244, Ind. Suc. Act, 1925.

2. *Kali Charan v. Sukhada*, (1915-16) 20 C. W. N. 58, 60 (case where a defendant died testate during the pendency of a suit and the plaintiff being unaware of the existence of any will left by the deceased, substituted the persons who were the legal heirs *ab intestato* of the deceased on the record without objection and obtained a decree and the execution of the decree was opposed by the executors who had obtained a grant of probate before the decree). Cf. *Ramanand v. Jai Ram*, (1921) I. L. R. 43 All. 170, 176, where it was pointed out that the remarks in 20 C. W. N. 58 were purely *obiter dicta*. Cf. *Ramaswami v. Muttiah Chetti*, A. I. R. 1925 Mad. 279, 281, where it was pointed out that in 20 C. W. N. 58 execution against judgment-debtor was useless and it was sought to obtain a judgment against another person for substantially the same relief.

3. *Mt. Karam Kaur v. Mutwal*, A. I. R., 1933 Lah. 380,

4. Sec. 223, Ind. Suc. Act, 1925.

ters of administration¹ cannot be granted to a married woman without the previous consent of her husband. But when a grant of a probate or letters of administration has been made to a married woman, she has all the powers of an ordinary executor or administrator². And unless the Court otherwise directs, the husband of the executrix or administratrix shall not as such be a party to a suit by or against her³. The husband is not liable for his wife's *devastavit* and cannot be joined as a party unless he has acted and intermeddled in the administration⁴.

(s) *When beneficiaries may or ought to be added as parties :*

Even in a case where the contention is between persons beneficially interested in property vested in a trustee, executor or administrator and a third person, the Court may, if it thinks fit, order the beneficiaries or any of them to be made parties.⁵ *Examples:* Beneficiaries may intervene or be added as parties (a) where the executors or administrators have an interest hostile to that of the beneficiaries,⁶ (b) where the relation between them and the debtor to the estate is such as to present a substantial impediment to the preservation by the executors of the rights of the parties interested in the estate, or where there is collusion between the debtors and the executors or administrators,⁷ (c) when the executors or administrators have fully administered and are wholly uninterested in the estate⁸, (d) generally, where the presence of the beneficiaries is necessary for the protection of their interests,⁹ (e) where the beneficiaries are

1. Sec. 236, Ind. Suc. Act, 1925.

2. Sec. 315, Ind. Suc. Act, 1925.

3. O. XXXI, r. 3, C. P. Code.

4. Williams on Executors, 12th Edn., p. 1235.

5. Or. XXXI r. 1, C. P. Code.

6. *Beresford v. Ramasubba*, (1890) 1 L. R. 13 Mad. 197, 202.

7. *Yeatman v. Yeatman*, (1878) 7 Ch. D. 210, 214.

8. *Beresford v. Ramasubba*, *supra*; see *Hunter v. Young*, (1879) 4 Ex. D. 256, 261.

9. *Merry v. Pownall*, (1898) 1 Ch. 306, (action by trustee in bankruptcy of settlor for setting aside certain limitations in the settlement); *Gas Light & Co. v. Towse*, (1887) 35 L. D. 519, (action against trustees

accounting parties,¹ (f) where the administrator of trustee has committed a *prima facie* breach of trust.²

Beneficiaries should always be made parties where the contention is between the beneficiaries *inter se* or between the beneficiaries and trustees.³ In many cases the joinder of beneficiaries may be necessary where the trustees are litigating between themselves. Thus in a suit by one of two executors or trustees against the other executor or trustee, the *cestui que trust* who have participated in the breach of trust are necessary parties.⁴ If a suit is brought by a legatee against an executor for a legacy but the estate is not sufficient to pay all the legacies in full, the other legatees may be added as parties on the executor's application, so that the question of rateable abatement may be ascertained in a manner binding on all the legatees.⁵

- (t) *When debtors to the estate may be joined in a suit against the legal personal representative*: Ordinarily, debtors to the estate cannot be made parties to a suit against the legal personal representatives. But if there is collusion, or some special case, or the executor is insolvent, the action may be brought both against the debtor and the executor.⁶
- (u) *When creditors of the estate may be joined in a suit against the legal personal representative*: The same principle will apply as to the joinder of a creditor who has been overpaid by the executor.⁷
- (v) *When the surviving partners of a deceased might be joined in a suit against the legal personal representative*: In a suit against the executors, the surviving partners of the deceased can be joined in all cases where the relation

for specific performance of a covenant to renew the lease granted under a power, and the questions were whether the covenant to renew was *ultra vires*, and whether rent proposed was the best rent obtainable).

1. *May v. Newton*, (1887) 34 Ch. D. 347.
2. *Chandri v. Abdul Karim*, (1927) I. L. R. 51 Bom. 16, (suit on a mortgage created by an administrator without the sanction of the court).
3. This follows by necessary implication from the terms of O. XXXI, r. 1, C. P. Code.
4. *Jesse v. Bennett*, 6 De. G. M. & G. 609.
5. *Purshottam v. Kala*, (1902) I. L. R. 26 Bom. 301.
6. Williams on Executors, 12th Edn., p. 1236.
7. Williams on Executors, 12th Edn., p. 1236.

between the executors and the surviving partners is such as to present a substantial impediment to the prosecution by the executors of the rights of the parties interested in the estate against the surviving partners.¹

- (w) *Where there is an executor de son tort*² : Executors *de son tort* are a class "who are in some sort regarded as executors but who assume the office by their own intrusion and interference."³ An executor *de son tort* has all the liabilities though none of the privileges that belong to the character of an executor.⁴

The executor *de son tort* cannot bring 'any action in right of the deceased', although 'being in possession of

1. Williams on Executors, 12th Edn., p. 1236. *Travis v. Milne*, 9 Hare. 141. 150. The rule does not apply to such a partnership as a joint stock company : *Per Romilly M. R., in Stainton v. The Carion Co.*, 18 Beav. 146; See *Yeatman v. Yeatman*, (1878) 7 Ch. D. 210, also *Davies v. Davies*, (1837) 2 Keen 534.
2. For definition of the term '*executor de son tort*', see Sec. 303, Ind. Suc. Act, 1925. Under Sec. 2 (11) of the C. P. Code, an executor *de son tort* is a legal representative of the deceased.
3. Williams on Executors, 12th Ed., p. 155. A sole executor who administers the estate without taking out probate is not an executor *de son tort* : *Mt. Balak v. Jadunath*, (1930) I. L. R. 57 Cal. 1358 ; *Ayesha v. Ebrahim*, (1908) I. L. R. 32 Bom. 364, 369. But if he does not take out probate for long, he may be sued as executor *de son tort* : *Webster v. Webster*, 10 Ves. 93 ; or if he refuses to take out probate : *Parten & Baseden's case*, 86 E. R. 836. Not so is a man who takes possession of the effects of the deceased under the authority of and as agent for the rightful executor : *Hall v. Elliott*, (1791) Peake 119 N. P. ; *Sykes v. Sykes*, (1870) L. R. 5 C. P. 113. But the agent of an executor *de son tort*, who collects the assets with the knowledge that they belong to the testator's estate and that his principal is not the rightful executor, may be treated as an executor *de son tort* : *Sharland v. Mildon*, 5 Hare, 469. An administrator *pendente lite* who intermeddles with the estate of a deceased person after he ceases to be administrator can be sued as quasi-executor *de son tort* : *Prayag Kumari v. Siva Prasad*, (1925) 42 C. L. J. 280. If a person sets up in himself a colourable title to the goods of the deceased though he may not be able to make out his title completely, he shall not be deemed as executor *de son tort*, provided the claim is a *bona fide* one : *Raja Parthasarathy v. Raja Venkatadri*, (1926) I.L.R. 46 Mad. 190 ; followed in *Prayag Kumari v. Siva Prasad*, supra. A donee of deceased in fraud of creditors, becomes executor *de son tort* if he disposes of the goods : Williams on Executors, 12th Edn., p. 158.
4. Williams on Executors, 12th Edn., p. 161 ; *Stratford-upon-Avon v. Parker* (1914) 2 K. B. 562, 569 ; *Carmichael v. Carmichael*, (1846) 2 Ph. C. C. 101.

the goods of the deceased, has sufficient title to maintain action for taking them away or injuring them against a mere wrong doer,¹ Sec. 212, Ind. Suc. Act, 1925, would apply to an executor *de son tort*. Thus an executor *de son tort* (a Parsee) was held not entitled to sue another executor *de son tort* for enforcement of his claim against the estate without obtaining the appointment of an administrator of the estate.² The executor *de son tort* is liable 'not only to an action by the rightful executor or administrator, but also to be sued as executor by a creditor of the deceased, or by a legatee'³. The rightful executor or administrator can bring an action of trover or trespass against the executor *de son tort*⁴. The reason of the rule why in a creditor's action the executor *de son tort* should be named as executor generally is that from his conduct strangers are entitled to assume that 'he has a will of the deceased wherein he is appointed executor, but has not proved it'⁵.

Where there is an executor *de son tort*, a creditor may sue for his debt and is not confined to an administration action.⁶ A creditor of a deceased Hindu who died intestate need only make 'the legal representative of the deceased within the primary meaning of the term' party to his suit for recovery of his debt and should not add executors *de son tort*, if any, as parties in addition to such legal representative.⁷ When a person is sued as executor *de son tort*, an allegation in the body of the plaint that the defendant has intermeddled with the estate will dispense with the necessity of

1. Williams on Executors, 12 Edn., p. 559.
2. *Framji Dorabji v. Adarji Dorabji*, (1893) I. L. R. 18 Bom. 337 referred to in *Ratanbai v. Narayandas*, (1927) I. L. R. 51 Bom. 771.
3. Williams on Executors, 12th Edn., p. 161.
4. Williams on Executors, 12th Edn., p. 165.
5. *Coulter's case* (1598), 5 Co. Rep. 30 a; Williams on Executors, 12th Edn., p. 162.
6. *Narayansami v. Esa Abbayi*, (1905) I. L. R. 28 Mad. 351.
7. *Obiter dictum in Satya Ranjan v. Sarat*, (1925-26) 30 C. W. N. 565. (The legal representative within the primary meaning of the term in this case was the widow of a Hindu deceased). Contra: *Villiamat v. Official Assignee*, A. I. R. 1933 Mad. 74, 79.

describing him as executor *de son tort* in the cause title.¹ A minor is not liable if he wastes assets which came to him as executor *de son tort*.² As to when it is necessary to join executors or administrators or legal heirs of the deceased along with executors *de son tort* in a suit for general administration is a question upon which there is difference of opinion between two eminent English Judges. In two cases,³ Malins V. C. held that a person who had in his possession and control a portion of the estate of the deceased could be sued as executor *de son tort*. Later Sir George Jessel held that there could not be judgment for general administration against an executor *de son tort* in the absence of a personal representative who was general administrator.⁴ In a still later case, Malins V. C. dissented from the view expressed 'somewhat incautiously' by Sir George Jessel and observed that "it would be the height of injustice if a man could possess himself of the assets of the testator and because he did not choose to clothe himself with the character of administrator, could not therefore be sued in respect of such assets". Where a person has intermeddled with the assets of a testator, he may be sued by a creditor of the estate as executor *de son tort* to the extent of the assets he has received⁵. In India, in case of the intestacy of a

1. *In re. Lovett, Ambler v. Lindsay*, (1876) 3 Ch. D. 198, followed in *Prayag Kumari v. Siva Prasad*, (1925) 42 C. L. J. 280.
2. *Whitmore v. Weld*, 1 Vern. 328 ; *Russell's case*, 5 Co. Rep. 27a.
3. *Rayner v. Koehler*, L. R. 14 Eq. 262 ; *Coote v. Whittington*, (1873) L. T. 16 Eq. 534, followed in *Amir Dalhin v. Baijnath*, (1894) I. L. R. 21 Cal. 311, 317, and quoted with approval in *Zamindar of Bhadrachalam v. Venkatadri*, (1923) I. L. R. 46 Mad. 190 F. B.
4. *Rowell v. Morris*, (1874) L.R. 17 Eq. 20.
5. *In re. Lovett, Ambler v. Lindsay*, (1876) 3 Ch. D. 198. (An action by a creditor of testator against the executors, who had not proved but had got in part of the assets but refused the funeral expenses and debts, and also against other defendants who had got in a portion of assets and had threatened to dispose of such assets without regard to the debts. Plaintiff claimed as against the executors administration of the estate and payment of debts ; and against the other defendant he claimed an injunction to restrain them from parting with the assets. Upon demurrer to the claim, *Held*, the executors were rightly sued

Hindu, Muhammadan, Buddhist, Sikh, Jaina or Indian Christian, no grant of letters of administration is necessary to establish any right to any property.¹ Therefore, Hindus, Muhammadans, Buddhists, Sikhs, Jains, and Indian Christians who are entitled to the property of the deceased intestate on succession can sue executors *de son tort* for administration and no representation of the estate by an administrator is necessary.² The joinder of legal representative, be he an executor, administrator or legal heir of the deceased intestate, in a suit for general administration against an executor *de son tort* has been considered in a Full Bench Case of the Madras High Court and their Lordships have held after taking into consideration the views of Malins V. C. and Sir George Jessel as follows : "*A suit for general administration can be maintained against an executor who takes possession of all the assets of the deceased without joining the legal representatives, and in cases where the executor de son tort takes possession of only a part of the assets he can be made accountable for the part he actually took possession of without joining the legal representative : but where administration is sought of the entire estate in cases where the executor de son tort has taken possession of only a part, the legal representative will also have to be added.*"³ As a general rule an executor *de son tort* cannot be sued by a legatee in the absence of the legal personal representative, but when a representative of the deceased or a person in possession of the estate is proved to have received enough to pay all demands against the estate in full, no such rule can

although they had not proved ; and the other defendants were properly made parties as executors *de son tort*).

1. Sec. 212, Ind. Suc. Act, 1925.
2. *Mt. Amir Bi v. Abdul Rahim*, A.I.R. 1928 Mad. 760 (suit by the widow of a deceased Muhammadan against the other legal heirs of the deceased for administration).
3. *Raja Parthasarathy v. Venkatadri*, (1923) I.L.R. 46 Mad. 190, 211 (F.B). (In this case the executor named in the will died before he acted and the defendants and their father took possession of the estate of the deceased testatrix and received enough to pay all demands against the estate and were therefore liable to be sued).

apply.¹ In a suit by an administrator for an account of meane profits against the heir of a deceased intestate who had acted as executor *de son tort*, the other heirs of the deceased though not necessary parties are proper parties.²

- (x) *Executor's right to sue before grant of probate* : Executor derives his title from the will and not from the grant of probate. The personal property of the testator including all rights of action vests in him upon testator's death and the consequence is, he can institute an action in the character of executor before he proves the will. He cannot, it is true, obtain a decree before probate, but this is not because his title depends on probate, but because the production of probate is the only way in which, by the rules of the court, he is allowed to prove his title.³ A grant of letters of administration with a copy of will annexed is equivalent to grant of probate.⁴ If an executor of the will of a person domiciled in a native state to whom probate has been granted by the state files a suit in British India he will not be entitled to a decree unless he takes out probate or letters of administration in British India and completes his title to sue.⁵

- (y) *Administrator's right to sue before grant of letters of administration* :— An administrator derives his title solely under his grant⁶ and cannot therefore institute an action as administrator before he obtains his grant⁷. In England, at law, that is, in the King's Bench Division, an administrator cannot bring an action before administration is granted⁸. But there are certain ex-

1. *Raja Parthasarathy v. Raja Venkatadri*, (1923) I. L. R. 46 Mad. 190.

2. *Ratanbai v. Narayandas*, (1927) I.L.R. 51 Bom. 771.

3. *Mayappa v. Supramanian*, L. R. (1915-16) 43 I. A. 113, referred to in *Ramiah v. Venkata Subamma*, (1926) I. L. R. 49, Mad. 261, 288 (F. B.) ; See *Chandra v. Prasanna*, (1910-11) L. R. 38 I. A. 7 ; *Prabhatnath v. Ramendra*, (1934) I. L. R. 61 Cal. 1081 ; *Rai Chand v. Jivraj* (1932) I. L. R. 56 Bom. 65. See Williams on Executors, 12th Edn., pp. 192, 408.

4. *Chandra v. Prasanna*, supra.

5. *Mansing v. Amad Kunhi*, (1894) I. L. R. 17 Mad. 14.

6. Cf. Sec. 212, Ind. Suc. Act, 1925 ; Williams on Executors, 12th Edn., p. 409.

7. *Mayappa Chetty v. Subramanian Chetty*, supra ; *Chandra v. Prasanna*, supra.

8. Williams on Executors, 12th Edn., p. 272 ; *Re Masonic, etc., Assurance Co.* (1895) 32 Ch. D. 373.

ceptions to this rule. For example, under S. 2 of the Administration of Estates Act, 1925, an intending applicant for administration can bring an action of trespass to real estate before letters obtained. In the Chancery Division, however, an intending applicant for administration may bring an action before grant of administration provided letters of administration are produced at the hearing¹.

In India, in the case of persons other than Hindus, Muhommadans, Buddhists, Sikhs, Jains, and Indian Christians, and in respect of whom, as in England, no right to intestate's property can be established in a Court of Justice unless letters have first been granted as provided in Sec. 213 (1) of the Ind. Suc. Act, 1925, it has been held that an intending applicant for administration can maintain a suit before grant provided letters of administration are produced at the hearing².

(z) *Executor's liability to be sued before grant of probate* : No action can be maintained against a party as executor until—

- (a) he has taken upon himself to act, or
- (b) has proved the will³,

Hence a judgment passed against him before he has intermeddled with the estate⁴, or proved the will does not bind the testator's estate. An executor before he has proved or administered the estate may exclude for all time his liability to be sued by renunciation of his office as executor. But an executor, once he has administered, is liable to be sued as executor in spite of his renunciation⁵. An executor who has acted may be cited to take probate, and may be peremptorily ordered

1. See Daniel's Chancery Practice, p. 232 ; Williams on Executors, 12th Edn., p. 273.
2. *Sethna v. Hemingway*, (1914) 1 L. R. 38 Bom. 618 (case of an Anglo-Indian) ; *Ma Son v. Ma Chitt*, 127 I. C. 381 (case of a Chinese Buddhist).
3. *Mohamidu Mohideen Hadgar v. Pitchay*, (1894) A. C. 437 ; *Kumar Saradinlu v. Dhirendra*, (1905) 2 C. L. J. 484, 486 ; *Balkrishna v. Oriental etc.*, (1902) 4 Bom. L. R. 340.
4. *Lal Behari v. Nagendra*, (1915) 22 C. L. J. 266.
5. Williams on Executors, 12th Edn., p. 171.

to do so. He cannot discharge himself from liability to account as executor by renouncing and paying his receipts to the executors who have proved¹.

- (z₁) *When heir-at-law ab intestato can sue before grant of probate* : If the executor of a will does not administer the estate or apply for probate, a person who is the heir-at-law as on intestacy may institute a suit claiming any property of the deceased against another person claiming to be in possession of the estate under the will of which no probate has been taken. The mere existence of the will does not displace the plaintiff's title and the unprobated will cannot be used as a defence, for the defendant has to prove that some one other than the plaintiff has title under the will which he cannot prove by virtue of the provisions of Sec. 213 of the Indian Succession Act, 1925.²

Federation : See "Government," *infra*.

Government : Section 79 of the C. P. Code, 1908, as substituted by the Adaptation Order for the original section provides as follows :—

"Subject to the provisions of sections 179 and 185 of the Government of India Act, 1935, in a suit by or against the Crown the authority to be named as plaintiff or defendant, as the case may be, shall be—

- (a) in the case of a suit by or against the Central Government, the Governor General in Council before the establishment of the Federation of India, and thereafter, the Federation ;
- (b) in the case of a suit by or against a Provincial Government, the Province ; and
- (c) in the case of a suit by or against the Crown Representative, the Secretary of State".

Order VII, r. 3 of the Code as substituted by the Adaptation Order provides—

"In suits by or against the Crown, instead of inserting in the plaint the name and description and place of residence of the plaintiff or defendant, it shall be sufficient to insert the appropriate name

1. *Mt. Balak v. Jadunath*, (1930) I. L. R. 57 Cal. 1358.

2. *Ganshamdoss v. Gulabbi Bai*, (1930) I. L. R. 50 Mad. 927 F. B ; *Achyutnanda v. Jagannath*, (1915-16) 20 C. W. N. 122. (A defendant can rely on an unprobated will provided he does not do so in order to establish a right under the will.)

as provided in section 79, or, if the suit is against the Secretary of State, the words 'the Secretary of State'."

Effect on pending suits by the passing of Government of India Act, 1935 :

Section 177 : "(1) Without prejudice to the special provisions of the next succeeding section relating to loans, guarantees and other financial obligations, any contract made before the commencement of Part III of this Act by, or on behalf of, the Secretary of State in Council shall, as from that date—

(a) if it was made for purposes which will after the commencement of Part III of this Act be purposes of the Government of a Province, have effect as if it had been made on behalf of that Province ; and

(b) in any other case have effect as if it had been made on behalf of the Federation,

and reference in any such contract to the Secretary of State in Council shall be construed accordingly, and any such contract may be enforced in accordance with the provisions of the next but one succeeding section.

(2) This section does not apply in relation to contracts, solely in connection with the affairs of Burma or Aden, or solely for purposes which will after the commencement of Part III of this Act be purposes of His Majesty's Representative for the exercise of the functions of the Crown in its relations with Indian States.

Section 178 : "(1) All liabilities in respect of such loans, guarantees and other financial obligations of the Secretary of State in Council as are outstanding immediately before the commencement of Part III of this Act and were secured on the revenues of India shall, as from that date, be liabilities of the Federation and shall be secured upon the revenues of the Federation and of all the Provinces.

(2) All enactments relating to any such loans, guarantees and other financial obligations of the Secretary of State in Council as aforesaid shall, in relation to those loans, guarantees and obligations, continue to have effect with the substitution therein, except in so far as the context otherwise requires, of references to the Secretary of State for references to the Secretary of State in Council, and with such other modifications and such adaptations as His Majesty in Council may deem necessary.

(3) No deduction in respect of taxation imposed by or under any existing Indian law or any law of the Federal or a Provin-

cial Legislature shall be made from any payment of principal or interest in respect of any securities, the interest whereon is payable in sterling, being a payment which would but for the provisions of this Act, have fallen to be made by the Secretary of State in Council.

(4) If in the case of any Local Government in India there are outstanding immediately before the commencement of Part III of this Act any loans or other financial obligations secured upon the revenues of the province, all liabilities in respect of those loans and obligations shall, as from that date, be liabilities of the Government of, and shall be secured upon the revenues of, the corresponding Province under this Act.

(5) Any liabilities in respect of any such loan, guarantee or financial obligation as is mentioned in this section may be enforced in accordance with the provisions of the next succeeding section.

(6) The provisions of this section apply to the liabilities of the Secretary of State in Council in respect of the Burma Railways three per cent. Debenture Stock, but, save as aforesaid, do not apply to any liability solely in connection with affairs of Burma or Aden."

Section 179 : "(1) Any proceedings which, if this Act had not been passed, might have been brought against the Secretary of State in Council may, in the case of any liability arising before the commencement of Part III of this Act or arising under any contract or statute made or passed before that date, be brought against the Federation or a Province, according to the subject-matter of the proceedings, or, at the option of the person by whom the proceedings are brought, against the Secretary of State, and any sum ordered to be paid by way of debt, damages or costs in any such proceedings, and any costs or expenses incurred in or in connection with the defence thereof, shall be paid out of the revenues of the Federation of the Province, as the case may be, or, if the proceedings are brought against the Secretary of State, out of such revenues as the Secretary of State may direct.

The provisions of this sub-section shall apply with respect to proceedings arising under any contract declared by the terms thereof to be supplemental to any such contract as is mentioned in those provisions as they apply in relation to the contracts so mentioned.

(2) If at the commencement of Part III of this Act any legal proceedings are pending in the United Kingdom or in India to which the Secretary of State in Council is a party, the Secretary

of State shall be deemed to be substituted in those proceedings for the Secretary of State in Council, and the provisions of sub-section (1) of this section shall apply in relation to sums ordered to be paid, and costs or expenses incurred, by the Secretary of State or the Secretary of State in Council in or in connection with any such proceedings as they apply in relation to sums ordered to be paid in, and costs or expenses incurred in or in connection with the defence of, proceedings brought against the Secretary of State under the said sub-section (1).

(3) Any contract made in respect of the affairs of the Federation or a Province by or on behalf of the Secretary of State after the commencement of Part III of the Act may provide that any proceedings under that contract shall be brought in the United Kingdom by or against the Secretary of State and any such proceedings may be brought accordingly, and any sum ordered to be paid by the Secretary of State by way of debt, damages or costs in any such proceedings, and any costs or expenses incurred by the Secretary of State in or in connection therewith, shall be paid out of the revenues of the Federation or the Province, as the case may be.

(4) Nothing in this section shall be construed as imposing any liability upon the Exchequer of the United Kingdom in respect of any debt, damages, costs or expenses in or in connection with any proceedings brought or continued by or against the Secretary of State by virtue of this section, or as derogating from the provisions of sub-section (1) of the last preceding section.

(5) This section does not apply in relation to contracts or liabilities solely in connection with the affairs of Burma or Aden, other than liabilities which are by this Act made liabilities of the Federation, or to contracts or liabilities for purposes which will, after the commencement of Part III of this Act, be purposes of His Majesty's Representative for the exercise of the functions of the Crown in its relations with Indian States."

Section 180 : (1) Any contract made before the commencement of Part III of this Act by or on behalf of the Secretary of State in Council solely in connection with the exercise of the functions of the Crown in its relations with Indian States shall, as from the commencement of Part III of this Act, have effect as if it had been made on behalf of His Majesty and reference in any such contract to the Secretary of State in Council shall be construed accordingly.

(2) Any proceedings which if this Act had not been passed might have been brought by or against the Secretary of State in Council in respect of any such contract as aforesaid may be brought by or against the Secretary of State and if at the commencement of Part III of this Act any proceedings in respect of any such contract are pending in the United Kingdom or in India to which the Secretary of State in Council is a party, the Secretary of State shall be deemed to be substituted in those proceedings for the Secretary of State in Council.

(3) Any contract made after the commencement of Part III of this Act on behalf of His Majesty solely in connection with the exercise of the said functions of the Crown shall, if it is such a contract as would have been legally enforceable by or against the Secretary of State in Council, be legally enforceable by or against the Secretary of State.

(4) Any sums ordered to be paid by the Secretary of State by way of debt, damages or costs, in any such proceedings as are mentioned in this section and any costs or expenses incurred by him in or in connection with the prosecution or defence thereof shall be deemed to be sums required for the discharge of the functions of the Crown in its relations with Indian States, and any sum received shall be paid or credited to the Federation."

Idol : The Civil Procedure Code, 1908, contains no rules for regulating the conduct of suits on behalf of a Hindu Idol. But the provisions of the Code are made applicable to the Idol subject to such special rules as have been evolved by the judges regarding its representation in suits and proceedings.¹ The question of parties to suits with reference to the worship and property of the Idol depends upon whether the Idol is a family Idol or an Idol of a public religious institution.

1. Family Idol :

A. *Where the Idol has got no property :* If the Idol has no property dedicated to it, all suits must relate only to the worship of the Idol, and the worship being voluntarily conducted by the members of the family who are descendants of the founder, no member can be sued for refusing to contribute towards the expense of worship of the Idol.¹ But where some members of the family wrongfully claim exclusive right of worship and possession of the Idol, the other members can bring suit for joint possession of the Idol. To such a

1. *Sham Lal v. Huro Sundaree*, 5 Suth. W. R. C. R. 29 ; followed in *Bansilal v. Govindlal*, A. I. R. 1932 Bom. 439.

suit (i.e., where the deity has no property which is likely to be affected by the adjustment of the rights of worship between the parties), the Idol and the female members of the family are not necessary parties¹.

B. *Where the Idol has got property* :. Idol's property may take any of the following forms :—

- (i) Property absolutely dedicated to the Idol.
- (ii) Property conveyed to trustees for the beneficial enjoyment of the Idol.
- (iii) Property conveyed to secular persons subject to a charge for maintenance of worship of the Idol.
- (iv) Property conveyed to Idol subject to a charge in favour of secular persons.

B. (i) *When property is absolutely dedicated to the Idol* :

(a) *Whether suits should be in the name of the Idol or the shebait* :

In a number of cases, the Judicial Committee have recognised the right of the shebait, who is entrusted with the possession and management of the property, to bring whatever suits are necessary for the protection of the property of the Idol. Thus we find the right of the shebait 'to defend hostile litigious attacks' included in the enumeration of his functions². In a later case, the right of suit respecting the property of the Idol was declared to be 'vested in the shebait and not in the Idol'³. This personal right of suit of the shebait was recognised by the Civil Procedure Code of 1908, not in any of its rules, but in its illustration of the cause-title of suits⁴.

Although "the right of suit" is vested in the shebait 'there may be in the nature of things, difficulties in adjusting the legal status of the Idol to the circumstances and requirements of its protection and location and

1. *Upendra v. Baikuntha*, (1928-29) 33 C. W. N. 96, 98, 99.
2. *Prosunno Kumari v. Golab Chand*, (1874-5) L. R. 2 I. A. 145.
3. *Jagadindra v. Hemanta Kumari*, (1903-04) L. R. 31 I. A. 203. 'On the question that property belongs to the Idol who is a juristic entity but its possession and management in the nature of things is vested in shebait or manager, read, *Vidya Varuthi v. Balusami Ayyar*, (1920-21) L. R. 48 I. A. 302; *Prosunno v. Golab Chand*, supra.
4. See 'Title of suits' in App. A, Sch. I., C. P. Code, which reads "A. B. (add description and residence) shebait of Thakur....."

there may also be a variety of other contacts of such a *persona* with mundane ideas.' Thus, in a suit for the establishment of individual rights as between contesting shebaita regarding the location of the Idol, the Judicial Committee held that in such a case the juridical status of the Idol and its power of suing and being sued must be recognised and "the will of the Idol itself, expressed through its guardian, must be given effect to."¹

The rule deducible from the decision of the Judicial Committee in Jagadindra's case read with Pramatha's case is that all suits respecting property dedicated to the Idol ought to be brought by or against the shebaita, and the Idol need not be joined in any such suit unless, if it is not so joined, 'the result might conceivably vitally affect its interests.'

In India, the High Courts have variously interpreted the rule in Jagadindra's case. A Full Bench of the Allahabad High Court on the analogy of a suit by or against a minor held that "a suit respecting property in which the Idol is interested is properly brought or defended in the name of the Idol represented by the shebait"², and not in the name of the shebait as was held by a Division Bench of the same Court.³ Jagadindra's case does not appear to have been cited before their Lordships, nor does it appear that their Lordships' attention was drawn to the "Title of suits" given in App. A, Sch. I, C. P. Code, 1908.

In spite of the Full Bench case of the Allahabad High Court, a Division Bench of the same Court have recently held that the exemplar in App. A, Sch. I of the C. P. Code relating to suit by shebaita shows that it is one of the ways in which a suit can be brought on behalf of the Idol⁴.

In many reported cases it appears that objections

1. *Pramatha v. Pradyumna*, (1924-25) L. R. 52 I. A. 245.

2. *Jodhi Rai v. Basdeo*, (1911) I. L. R. 33 All. 735 F. B.

3. *Thakur Raghunathji v. Shah Lal*, (1897) I. L. R. 19 All. 330.

4. *Per Sulaiman*, C. J. and Bennet J. in *Gopal Datt v. Babu Ram*, A. I. R. 1936 All. 653.

were taken to suits instituted in the name of shebait, but it was held that the suits were properly framed¹.

The Chief Court of Oudh, while recognising the shebait's right of suit in matters arising out of the possession and management of debutter property, has held that in as much as possession and management only are vested in the shebait, the shebait has no right of suit in which the crucial question is about the ownership of the property². It is submitted that this limitation of the shebait's right of suit is hardly warranted. Under the rule in Jagadindra's case, the shebait is empowered to bring whatever suits are necessary for the protection of the property of the Idol, and in such suits questions of title to the property may as well be involved.

For a long time the Calcutta High Court, following Jagadindra's case, held that there can be no other representation of the Idol than through its shebait and that the shebait is empowered for the protection of the Idol's estate to bring suits and to defend hostile litigious attacks³. But in a recent case, Mukherji and Ghose JJ. have purported to do away with the technicalities of form and have held that it makes no difference whether the Idol sues as represented by the shebait or the shebait sues as shebait of the Idol, the substance of the claim is the thing to be regarded⁴. It is submitted that having regard to the state of pleadings in India where technicalities of form are seldom observed, this view of their Lordships is the more acceptable.

(b) *Representation of Idol by a minor shebait*: A minor shebait can sue by his next friend and be sued by a *guardian ad litem*⁵. When he is suing by his next friend the

1. Cf. *Kunjabehari v. Mohit Singh*, A. I. R. 1934 Pat. 531; *Naurangi v. Ram-charan*, (1930) I. L. R. 9 Pat. 885. (case of a mohunt).
2. Per *Srivastava J. in Avadh v. Parmeshur*, A. I. R. 1930 Oudh 43.
3. *Pramoda v. Poorna Chandra*, (1908) I. L. R. 35 Cal. 691, 695, 698; *Gora Chand v. Makhan Lal*, (1906-07) 11 C. W. N. 489, 492; *Dinabandhu v. Chami*, 34 I. C. 548; *Joynath v. Hari Mohan*, (1921) 59 I. C. 469, 471 (the right of suit is a personal right of the shebait); *Kalimata v. Nagen-dra*, (1926) 44 C. L. J. 522.
4. *Gobinda Ramanuj Das v. Mohunt Ram Charan*, (1935) 62 C. L. J. 153.
5. *Ram Chandra v. Ram Krishna*, (1906) I. L. R. 33 Cal. 507. Cf. *Sheo Ramji v. Sri Ridhnath*, (1923) I. L. R. 45 All. 319.

cause-title should run as follows; A. B. minor, (add description and residence) shebait of Idol....., by his next friend C. D. It should be noted that a guardian cannot be appointed under Sec. 7 of the Guardians and Wards Act, 1890, to manage the debutter property of an Idol on behalf of a minor shebait¹.

(c) *Representation of Idol by a next friend or guardian*: In the following classes of cases, it has been held that the Idol can and should appear by a next friend appointed by the Court:

(1) Where the shebait definitely declines to institute a suit for the protection of the property of the Idol².

(2) Where the interest of the shebait is adverse to that of the Idol³.

The Idol should be added as a party represented by a disinterested guardian where there are special considerations for which the Idol should be so represented in the proceedings in the interests of all concerned.⁴

Ordinarily a person interested in the worship or in the subject matter of the suit and who has no interest adverse to that of the Idol should be appointed as a next friend of the Idol⁵. The same rule should be ap-

1. *Kilby v. Mt. Bahuria*, (1922) I. L. R. 1 Pat. 432, following *Obla Venkatachalapathi v. Thirugnana*, (1917) 33 M. L. J. 297; *Varadachariar v. Raja Ram Krishnambu*, (1923) 44 M. L. J. 367 (case of a guardian appointed under Sec. 59, Madras Court of Wards Act, I of 1902).
2. *Kalimata v. Nagendra* (1926) 44 C. L. J. 522 (where the next friend was a person interested in the worship of the Idol).
3. *Sharat Chandra v. Dwarkanath*, (1931) I. L. R. 58 Cal. 619 (case where the allegations against the shebait were mismanagement of the debutter estate, misappropriation of the income thereof etc); *Maruti v. Mallapur Shri Gopal Krishna*, (1932) 34 Bom. L. R. 415, 418; *Kalimata v. Nagendra*, supra.
4. *Pramatha v Prodyumna*, (1925) L. R. 52 I. A. 245 (in which there was a contest between shebaites as to the location, i. e., place of performance of worship, of the Idol. In the judgment their Lordships have used the words "guardian" and "next friend" in the same sense.)
5. *Kalimata v. Nagendra*, supra; *Sheo Ramji v. Sri Ridhnath*, (1928) I. L. R. 45 All. 319. The next friend of the Idol must make out that he has a right to act on behalf of the Idol. It is not a correct proposition that any person claiming a benevolent interest in the fortunes of the Idol would be permitted to maintain a suit in the name and as

plied where the Idol is added as a defendant and is represented by a guardian.

(d) *Representation of Idol by de facto shebait*: We have so far dealt with the right of a *de jure* shebait to represent the Idol in suits. It may so happen that a *de jure* shebait may place a third person in possession of the debutter estate and authorise him to deal with the property for the benefit of the endowment¹, or it may so happen that a third person is in peaceful possession of the properties of the Idol and manages them and is treated as manager by all persons interested². In such a case, the third person is the *de facto* shebait and he is competent to sue and be sued respecting the property of the Idol. The mere fact that a person has been able to acquire the custody of the Idol is not enough to make him a *de facto* shebait entitling him to bring a suit for the recovery of any property alleged to belong to the debutter estate unless the founder has expressly given him such power³.

(e) *Representation of Idol by future shebait*: A person who stands next after the shebait among persons entitled to succeed to the office, is entitled to maintain suits for the protection of the debutter estate. Thus he can maintain a suit for a declaration that the alienations of properties made by the shebait for the time being are unauthorised and are not binding on the debutter estate,⁴

next friend of the Idol: *Darshan Lal v. Shibji Maharaj*, (1922) 20 A. L. J. 977, 979.

1. *Venkayya v. Suramma*, (1839) I. L. R. 12 Mad. 235, followed in *Raja Ranjit Sinha, v. Basanta Kumar*, (1909) 9 C. L. J. 597, 602.
2. *Sri Radha Krishanji v. Rameshwar*, A. I. R. 1934 Pat. 584 (suit by *de facto* manager for recovery of some of the properties dedicated to the Idols and afterwards alienated by their Pujari without necessity); *Ram Charan v. Naurangi*, (1932-33) L. R. 60 I. A. 124, followed in *Mahadeo Prasad v. Karia Bharathi*, (1934-35) L. R. 62 I. A. 47; *Giris v. Upendra* (1930-31) 35 C. W. N. 768, 772; *Panchkari v. Amode Lal* (1936-37) 41 C. W. N. 1349; *Gopal Datt v. Babu Ram*, A. I. R. 1936 All. 653; Cf. *Prasanna Deb v. Bengal Duars Bank Ltd.*, (1936) 63 C.L.J. 52 (transferee of shebaitship as such is not a *de facto* shebait).
3. *Panchkari v. Amode Lal*, *supra*; *Gopalji Maharaj v. Krishna*, A. I. R. 1929 All. 887.
4. *Giris Chandra v. Upendra*, (1930-31) 35 C.W.N. 768.

or a suit for enforcement of the trust, for removal of the shebait, for administration of the debuttar estate and for appointment of a receiver.¹

- (f) *Representation of Idol by members of the founder's family* : A person interested in a private trust as a member of the family for whose spiritual benefit the worship of the Idol was established is entitled to maintain a suit for a declaration that alienations made by the trustee are not binding on trust.² And no one who is not a member of the family, is entitled to bring such a suit unless the founder has expressly given him such power.³
- (g) *Description of representative capacity of shebait* : The representative capacity of the shebait should be stated in the cause-title, but if this is not done, it will be sufficient if the plaint shows that the plaintiff or the defendant sues or is sued as the shebait of the Idol.⁴

If in a suit for enforcement of a claim against the debutter estate where all the living descendants of the original testator and all possible claimants to the office of shebait are parties, a subsequent amendment of the plaint by describing one of the defendants as the shebait does not amount to the addition of a new party within the meaning of Sec. 22 of the Limitation Act.⁵

- (h) *Joinder of all shebait, if necessary* : In suits by or against shebait, all shebait are necessary parties. In suits by shebait, those who refuse to join as plaintiffs or who by their conduct have precluded them from being added as co-plaintiffs ought to be made defendants⁶. This

1. *Monohur v. Raja Peary Mohon*, (1919) 30 C. L. J. 177 ; *Rabindra v. Chandi Charan*, (1931) 53 C.L.J. 621.
2. *Sri Radha Krishnaji v. Rameshwar*, A. I. R. 1934 Pat. 584, following *Giris v. Upendra*, (1930-31) 35 C. W. N. 768.
3. *Panchkari v. Amode Lal*, (1936-37) 41 C.W.N. 1349.
4. *Bidhu Sekhar v. Kuladaprasad*, (1919) I.L.R. 46 Cal. 877.
5. *Peary Mohan Mukerji v. Narendra*, (1909-10) L.R. 37 I.A. 27, 37, 38.
6. *Kokileswar v. Mohunt Rudranand*, (1907) 5 C.L.J. 627, followed in *Md. Soleman v. Tasaddug Hossain*, A.I.R. 1935 Cal 623 (case of a matwalli), and *Narendra v. Atul Chandra*, (1918) 27 C. L. J. 6C5 ; *Thina Shanmuga v. Mona Okuna*, (1922) 42 M.L.J. 133 ; *Rabindra v. Chandicharan*, (1931) 53 C. L. J. 621. Cf. *Rajendra v. Mohamed Lal*, (1880-81) L. R. 8 I. A. 135 ; *Baraboni Coal Concern Ltd. v. Gokulananda*, (1933-34) L. R. 61 I. A. 35 ; *Thattan v. Mangalath*. (1911) I.L.R. 34 Mad. 406.

rule will also apply where the suit is brought in the name of the Idol represented by the shebait. A shebait who has not accepted office 'may be treated as an outsider and for all purposes, a stranger',¹ and it follows that such a shebait is not a necessary party or a necessary representative of the Idol. A renouncing shebait is not a necessary party,² nor a shebait whose right to hold the office is extinguished by reason of the co-shebait remaining in exclusive possession of the debutter properties and holding the office adversely to him.³ Since the joinder of shebait follows the principle of joinder of trustees,⁴ *quære*, whether a shebait who after accepting office resides outside British India is a necessary party to a suit concerning the debutter estate.⁵ •

- (i) *Suits in forma pauperis on behalf of Idol*: Where a shebait institutes a suit and applies for permission to bring the suit as a pauper, the question that requires consideration is, whether or not the trust property which vested in the Idol was or was not sufficient to pay the Court fee. The shebait is not liable to pay Court fee out of funds which do not belong to the trust property.⁶ In such a case it is the pauperism of the idol and not that of the shebait personally that has got to be considered.
- (j) *Suits relating to exercise of right of management*: With regard to endowments for the support of a family idol, in the absence of any contrary provisions in the original

1. *Per Rankin C. J., and Costello J., in Surendrakrishna v. Bhubaneshwari* (1933) I. L. R. 60 Cal. 54; *Sreepati v. Krishna*, (1925) 41 C.L.J. 22, 28 (shebait is not bound to accept the office).

2. Where the office of manager or trustee is hereditary in a family, any member of the family by a family arrangement or with the knowledge and consent of the others may renounce or relinquish his claim to the office in favour of another member: *Ramanatham v. Muruguppa*, (1904) I.L.R. 27 Mad. 192, 199, on appeal, (1905-06) L. R. 33 I. A. 139, 142; *Giris v. Upendra*. (1930-31) 35 C.W.N. 768, 772.

3. *Ramanatham v. Muruguppa*, *supra*.

4. *Kokileswar v. Mohunt Rudranand*, (1907) 5 C.L.J. 527.

5. Cf. O. XXXI, r. 2 (proviso) C. P. Code.—case of an executor, administrator or trustee.

6. *Kunja Behari v. Mohit Singh*, A.I.R. 1934 Pat. 531.

grant, the right of management passes to the natural heirs of the original grantor, and if there be no other arrangement or usage and no scheme settled by the Court, will be exercised by the managing member of the family before partition or in turn by the several heirs after partition.¹ Thus so long as the members of the family remain undivided and the senior member of the family is entitled to exercise the right of management vested in the family on behalf of the trust, no junior member is entitled to maintain a suit for management of the trust in rotation.² His only remedy is to bring a suit for settlement of a scheme of management, or for partition, or for administration.³

- (k) *Suits relating to breaches of trust* : If the shebait is guilty of any breach of trust, the Idol represented by a next friend⁴ may sue the shebait for enforcement of the trust.⁵ In case of any unauthorised alienation, such suit ought to be brought by the Idol against the shebait and the alienee.⁶ It has been held that the shebait who made an unauthorised alienation may himself sue the alienee for a declaration that the alienation is void.⁷ In such a suit the shebait will sufficiently represent the Idol and

1. *Ramanatham Chetty v. Muruguppa Chetty*, (1905-06) L. R. 33 I. A. 139, referred to in *Sethuramaswamiar v. Meruswamiar*, (1917-18) L. R. 45 I. A. 1; *Thandavaroya v. Shunmugam*, (1909) I. L. R. 32 Mad. 167.
2. *Thandavaroya v. Shunmugam*, supra, referred to in *Tiruvengalaratnam v. Butchayya*, (1929) I.L.R. 52 Mad. 373.
3. For joinder of parties, see under heads 'Suits relating to settlement of schemes', 'Suits relating to partition of the office', 'Suits relating to administration', infra.
4. A next friend should ordinarily be a person interested in the worship or in the subject matter of the suit, with no interest adverse to that of the Idol: *Kalimata v. Nagendra*, (1926) 44 C. L. J. 522. In special cases an outsider may be appointed as next friend: *Rabindra v. Chandi Charan*, (1931) 53 C. L. J. 621, followed in *Bimal Krishna v. Gunendra Krishna* (1936-37) 41 C.W.N. 728, 731.
5. *Sarat Chandra v. Dwarka Nath*, (1931) I. L. R. 58 Cal. 619 (where the shebait was guilty of mismanagement and misappropriation).
6. *Giris v. Upendra*, (1930-31) 35 C. W. N. 768; *Sri Radha Krishnaji v. Rameshwar*, A. I. R. 1934 Pat. 584.
7. *Nagendra v. Rabindra*, (1926) I. L. R. 56 Cal. 132, 148; *Bhagwat Prasad v. Bindeshwari*, (1930) A. L. J. 964; *Mahamaya v. Haridas*, (1915) I. L. R. 42 Cal. 455, 470; cf. *Sidhu v. Gopi*, (1913) 17 C. L. J. 233, 237.

it may not be necessary to add the Idol represented by a disinterested next friend or guardian either as a co-plaintiff or a co-defendant. Suits for enforcement of the trust can also be brought by the future shebait or by the founder or any member of the family for whose spiritual benefit the Idol was established.¹

- (d) *Suits for administration of the property of the Idol* : In the case of a private debutter, 'the founder or his heirs may invoke the assistance of a judicial tribunal for the proper administration thereof on the allegation that the trusts are not properly performed.'² To such a suit, all members of the family interested in the administration of the debutter property (including female members where their rights are likely to be affected) are necessary parties. Those who refuse to join as plaintiffs ought to be added as defendants.³ The Idol should be represented by a disinterested next friend if its interests are likely to be affected, especially if the shebait has got any interest adverse to that of the deity. Necessity to join the Idol as a party has got to be judged on the facts of each particular case and the controversies to which it gives rise. If the deity is not joined as a party, the trial court may direct that the deity should appear by a disinterested next friend at a later stage of the proceedings when the scheme would have to be finally approved by the Court.⁴

Succeeding shebait in fact form a continuing representation of the Idol's property. There is, therefore, no proper scope for the theory that, where a shebait dies, a creditor who claims to be paid out of the Idol's property in respect of a debt incurred by such shebait

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1. *Sri Radha Krishnaji v. Rameshwar*, A. I. R. 1934 Pat. 584 ; *Giris v. Upendra*, (1930-31) 35 C. W. N. 768. *Fulmani v. Priya Nath*, A. I. R. 1930 Cal. 583 (case of a member of a family); *Monohur v. Raja Peary Mohon*, (1919) 30 C. L. J. 177 ; *Rabindra v. Chandi Charan*, (1931) 53 C. L. J. 621.
 2. *Monohur v. Raja Peary Mohon*, (1919) 30 C. L. J. 177, followed in *Rabindra v. Chandi Charan*, supra ; *Pramatha v. Prodyumna*, (1924-25) L. R. 52 I. A. 245 ; *Prasad Das v. Jagannath*, (1932-33) 37 C. W. N. 181.
 3. *Rabindra v. Chandi Charan*, supra ; cf. *Upendra v. Baikuntha*, (1928-29) 33 C. W. N. 96, 98, 99.
 4. *Bimal Krishna v. Gunendra*, (1936-37) 41 C. W. N. 728.

can bring an administration suit on behalf of himself and all other creditors of the deceased shebait.¹

- (m) *Suits relating to partition of the office of shebait* : In *Pranatha v. Prodyumna*,² a question was raised whether the right of worship of the Idol could be made the subject of partition and their Lordships of the Judicial Committee have held, approving a Calcutta case,³ that such a right exists. A suit for partition of such a right is to be regarded as a suit for partition of property.⁴ But such suits are confined to cases where there are emoluments attached to the office. When the trustees have no right of property or any personal pecuniary interest in the subject matter of the trust, no trustee is entitled to ask the Court to partition the duties of the trust between himself and his co-trustees.⁵

The plaintiff in a suit for partition of the duties of the office should implead as defendants, on the principles of partition of joint family property as far as they are applicable, all the other shebaits for the time being including transferees or donees of the shebaits' right where such transfer or gift is sanctioned by a valid custom⁶ or by the terms of the endowment.

- (n) *Suits relating to framing of a scheme* : A scheme providing for the exercise of right of management by rotation may be framed under a family arrangement⁷ or a suit may

1. *Gulabbhai v. Sohangdasji*, (1933) I. L. R. 52 Bom. 431 ; *Sharat Chandra v. Dwarkanath*, (1931) I. L. R. 58. Cal. 619.
2. (1924-25) L. R. 52 I. A. 245, followed in *Rai Sundari v. Benode Behary*, (1934-35) 39 C. W. N. 1264, 1269.
3. *Mitta Kuntha v. Neerunjun*, (1824) 14 B. L. R. 166.
4. *Monohar v. Bhupendra*, (1933) I. L. R. 60 Cal. 452 F. B. ; *Mahamaya v. Haridas*, (1915) I. L. R. 42 Cal. 455, 475, 476 (although probably religious offices were originally indivisible they are now deemed partible), followed in *Jagdeo Singh v. Ram Saran*, (1927) I. L. R. 6 Pat. 245 ; *Rajeshwar v. Goppeshwar*, (1907) I. L. R. 34 Cal. 828, 833.
5. *Sri Raman Lalji v. Sri Gopal Lalji*, (1897) I. L. R. 19 All. 428. See Mulla's Hindu Law, 9th Edn., p. 488.
6. For validity of transfer or gift by custom, see *Rajah Vurmah v. Ravi Vurmah*, (1876-77) L. R. 4 I. A. 76, 84, 85 (case of sale) ; *Rajaram v. Ganesh*, (1899) I. L. R. 23 Bom. 131 (case of gift).
7. *Ramanatham v. Muruguppa*. (1904) I. L. R. 27 Mad. 192, 199, followed in *Sethuramaswamiar v. Meruswamiar* (1911) I.L.R. 34 Mad. 470, 478,

be filed for the framing of a scheme¹ or for declaration of the plaintiff's right to his term of office under the family arrangement². Where the only issue in the suit is the adjustment of the rights of management among the shebait *inter se*, the Idol need not be joined as a party, but the Court may order the Idol to be added as a party, if it thinks necessary, at a subsequent stage of the proceedings before the scheme is finally approved³.

(o) *Suits between co-shebaits : joinder of Idol if and when necessary* : In the following classes of cases between co-shebaits it has been held that the Idol is not a necessary party :

(i) Where the Idol has got no property which is likely to be affected by the adjustment of the rights of the parties interested in the worship⁴.

(ii) Where the Idol has got property and the suit is for the framing of a scheme in which the only issue is the adjustment of the rights of management among the shebaits *inter se* which is not likely to affect the interests of the Idol⁵.

(iii) Where the suit is for declaration of the plaintiff's right to his term of office under a family arrangement,⁶ or where the suit is for partition of the joint right of worship, of an Idol.⁷

An Idol is a necessary party when its interests will be vitally affected by the result of the suit. Thus in a case where a testator by his will directed that on the failure of his widow to adopt a son, his properties will be the properties of a deity already existing, and some of the shebaits instituted a suit against the widow and other shebaits for a declaration

1. *Monohar v. Raja Peary Mohon*, (1919) 30 C. L. J. 177; *Prasad Das v. Jagannath*, (1932-33) 37 C. W. N. 181, 184; *Rabindra v. Chandi Charan*, (1931) 53 C. L. J. 621.
2. *Ramanatham v. Muruguppa*, (1905) L. R. 33 I. A. 139.
3. *Binal Krishna v. Gunendra*, (1937-38) 41 C. W. N. 728.
4. *Uendra v. Baikuntha*, (1928-29) 33 C. W. N. 96.
5. *Bimal Krishna v. Gunendra*, (1937-38) 41 C. W. N. 728.
6. *Ramanatham v. Muruguppa*, (1905) L. R. 33 I. A. 139.
7. *Mitta Kuntha v. Neerunjun*, 14 B. L. R. 166, followed in *Pramatha v. Prodyumna*, (1924-25) L. R. 52 I. A. 245; cf. *Rai Sundari v. Benode Behary*, (1934-35) 39 C. W. N. 1264.

that the alleged adoption by the widow was invalid, it was held that to such a suit the deity was a necessary or at least a proper party.¹

(p) *Who are the shebait of the Idol* : Since the shebait, except where they refuse to bring a suit, or where their interests are adverse to those of the Idol, or where there are special circumstances necessitating the representation of an Idol by a next friend or guardian appointed by the Court, are the only persons entitled to represent the Idol in suits, it is necessary to determine who the shebait of an Idol for the time being are in order to add them as parties. The rules which are applicable to the determination of the question are as follows :

- (1) The founder may expressly constitute himself the first shebait and nominate his successor, or without making himself the shebait, confer the office of shebait on another.
- (2) It is not necessary that there should be a deed of endowment, but when there is one and there is no provision relating to shebaitship in it, the founder is the *de facto* shebait, and he at any time before his death, may confer the office of shebait on another.²
- (3) In case (2) if the founder dies without providing for succession to shebaitship, the shebaitship becomes vested in the heirs of the founder in default of evidence that there has been some usage, course of dealing or circumstances to show a different mode of devolution³. This rule is subject to the condition that the devolution in the ordinary line of descent is not inconsistent with or opposed to the purpose the founder had in view in establishing the worship. Thus shebaitship cannot be vested in persons who, according to the

1. *Rai Sundari v. Benode Behary*, (1934-35) 39 C. W. N. 1264.

2. *Pramatha v. Prodyumna*, (1924-25) L. R. 52 I. A. 345, followed in *Narayan v. Bhuban Mohini*, (1933-34) 38 C. W. N. 15, 19.

3. *Gossamee Sree Greedharejee v. Rumanlolljee*, (1888-89) L. R. 16 I. A. 137, 144, followed in *Jagadindra v. Hemanta Kumari*, (1903-4) L. R. 31 I. A. 203, 208 and *Mohan Lalji v. Gordhan Lalji*, (1912-13) L. R. 40 I. A. 97, 103.

usages of worship, cannot perform the rites of the office¹.

- (4) Although the founder is entitled to nominate his successors, he cannot provide for a mode of devolution which is not in accordance with the ordinary Hindu Law of succession as to secular properties², nor a founder, after he has divested himself of the properties, alter the order of succession (i) if there is no express reservation in the deed of endowment, (ii) if the alteration will affect some right of property of the shebait appointed, (iii) if it affects the right of a third party which has already been created, (iv) or if such alteration will affect any of the fundamental gifts³. This rule is subject to the condition that on no account can a special line of succession unknown to Hindu Law be created. The dictum of Chakravarti J. to the contrary in Sripati's case last cited has been overruled by a Full Bench of the Calcutta High Court⁴.

In the absence of an express reservation in the deed of endowment and subject to the condition aforesaid the founder cannot alter the order of succession to shebaitship, except through intervention of the Court and for good cause shown.⁵

- (5) Where a person is appointed shebait with a power of appointing his successor, he may nominate his successor by an act *inter vivos* or by will. If he dies without exercising his power, the office reverts to the founder or his heirs.⁶
- (6) Where there is an accretion to debutter properties by a fresh dedication made by some members of the family

1. *Mohon Lalji v. Gordhan Lalji*, (1912-13) I. L. R. 40 I. A. 97.
2. *Gnansambanda v. Velu*, (1899-1900) L. R. 27 I. A. 69, 70 (where the founder created successive life estates); *Monohar v. Bhupendra*, (1933) I. L. R. 60 Cal. 452 F. B.; *Narayan v. Bhuvan Mohini*, (1933-34) 38 C. W. N. 15, 19; *Ganes Chander v. Lal Behary*, (1936-37) 41 C. W. N. 1 (P. C.).
3. *Sripati v. Khudiram*, (1924) 41 C. L. J. 22.
4. *Monohar v. Bhupendra*, *supra*, followed in *Narayan v. Bhuvan Mohini*, *supra*.
5. Per Mukerji J. in *Narayan v. Bhuvan Mohini*, *supra*.
6. *Annasami v. Ram Krishna*, (1901) I. L. R. 24 Mad. 219. See Mulla's Hindu Law, 9th Edn., p. 489. Cf. *Nirmal v. Jyoti Prasad*, (1937-38) 42 C. W. N. 1138.

(or by a stranger), it is not uncommon for the donor (maker of the fresh dedication) to appoint new shebaites to manage the properties and place the income in the hands of the shebaites appointed by the original founder.¹ The donor also may give directions purporting to alter the devolution of the office making the course of succession to depart either from the course laid down by the terms of the original dedication or the course in which the Hindu Law would recognise it to go. Any alteration in the mode of devolution which is repugnant to Hindu Law would be void.² But if there is a condition in the deed that the managers of the newly dedicated properties would act as the shebaites of the original endowment then "the Idol or those who speak for him on earth need not take advantage of the gift, but if the gift is taken and the condition insisted on it must be observed."³

- (7) While it is open to persons interested in the maintenance and worship of family Idols to create additional endowments and to nominate the persons who should be managers thereof, such managers, although they may be described by the donors as shebaites, do not become shebaites of the family Idols in the sense in which the shebaites nominated by the original founder are.⁴ Where there is an accretion to debuttar properties by a subsequent dedication and there is no provision in the document creating the endowment as to the succession of the shebaitship, the application of the rule that the shebaitship follows the line of the heirs of the founder will depend upon the facts of each case. In a case where there had been a division of the turn of worship and a *paladar* made a subsequent dedication, it was held that the shebaitship should follow the line of the heirs of the person who made the subsequent dedication.⁵

1. *Sripati v. Khudiram*, (1925) 41 C. L. J. 22, 30.

2. *Brojendra v. Lalit Mohan*, (1924) 45 C. L. J. 41, following *Gossamee Sree Greedharreejee v. Rumanlolljee*, (1888-89) L. R. 16 I. A. 137.

3. *Ashutosh v. Benode Behary*, (1929-30) 34 C. W. N. 177, 186. Cf. *Nirmal v. Jyoti Prasad*, (1937-38) 42 C. W. N. 1138.

4. *Brojendra v. Lalit Mohan*, (1924) 45 C. L. J. 41.

5. *Rai Sundari v. Benode Behary*, (1934-35) 39 C. W. N. 1264, 1269.

- (8) Where the office is hereditary, a shebait is entitled to resign or relinquish his office in favour of a co-shebait or a person who would succeed after his death.¹
- (9) If A and B, members of a family, discontinue possession of the debutter properties as also performance of the duties of the office of shebait and the other members remain in possession of the properties and perform the duties to the exclusion of and adversely to A and B, the rights of A and B to act as co-shebait are extinguished.²
- (10) In the absence of any custom or usage to the contrary, or any term to that effect in the deed of endowment, the office of a shebait cannot be alienated by the holder.³ The custom to be proved must be one which regulates a particular institution⁴ and must be reasonable. Thus a custom or well-established usage of a particular institution permitting alienation of religious office in favour of a person standing in the line of succession has been recognised as valid.⁵ But in any case if the custom set up is one to sanction not merely a transfer of trusteeship but the sale of trusteeship for the pecuniary advantage of the trustee, that circumstance alone would justify a decision that the custom is bad in law.⁶ The transferee in such a case is not entitled to exercise the right of shebait.
- (11) In a family governed by the Mitakshara Law a person on his birth becomes entitled jointly as shebait of debutter property held by the family,⁷ but the senior male member is entitled to manage the property, and the other members are not entitled to exercise the right by rotation.⁸

1. *Ramanatham v. Muruguppa*, (1904) I. L. R. 27 Mad. 192, 199; *Giris v. Upendra*, (1930-31) 35 C. W. N. 768, 772.
2. *Ramanatham v. Muruguppa*, *supra*.
3. *Mahamaya v. Haridas*, (1915) I. L. R. 42 Cal. 455, 470, 471 referred to in *Nagendra v. Rabindra*, (1930-31) 30 C. W. N. 389, 400, 405; *Nitya Gopal v. Nani*, (1920) I. L. R. 47 Cal. 990 (case of a transfer of a *pala* or turn-of worship).
4. *Raja Vurmah v. Ravi Vurmah*, (1876-77) L. R. 4 I. A. 76, 83, 84.
5. *Mahamaya v. Haridas*. *supra*.
6. *Raja Vurmah v. Ravi Vurmah*, *supra*.
7. *Ramchandra v. Ramkrishna*, (1906) I. L. R. 33 Cal. 507.
8. *Thandavaroya v. Shunmugam*, (1909) I. L. R. 32 Mad. 167.

- (12) When the family of the shebait appointed by the founder dies, the shebaitship reverts to a member of the family of the original grantor.¹
- (13) For the proper administration of the trust, the Court may remove a shebait and vest the property in somebody else.²
- (14) A person cannot be compelled to accept the office of shebaitship and when he refuses to accept the office of shebait, it may well be that in such a case, the office goes to the person next in succession.³
- (15) A private religious endowment can be converted into secular property with the consent of all the male and female relations of the founder interested in the charity.⁴

Numerous suits relating to construction of wills and deeds of gift and declaration of rights of parties thereunder, declaration that plaintiffs are the only shebait or joint shebait with the defendants⁵, declaration that the mode of devolution of the office of shebait as laid down by the settlor is invalid and so on are instituted every day and the parties entitled to maintain and defend such suits will depend upon the rules set forth above and mistakes in the joinder of parties will be avoided or greatly minimised if the above rules are strictly kept in view.

B. (ii). *Property conveyed to trustees for the beneficial enjoyment of the Idol* : We have seen that an absolute dedication of property to an Idol can be made without the creation of trust or the intervention of trustees. In the case of such a dedication, the property dedicated belongs to the Idol and the possession and management thereof are vested in the shebait. But it may well be that a person may convey properties to trustees who are to make over the properties to the shebait for the time being for the carrying on of the worship of the Idol.

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1. *Madhub v. Rani Sarat Kumari*, (1910-11) 15 C. W. N. 126; *Gurupada v. Manmohan*, (1923) I. L. R. 50 Cal. 292.
 2. *Monohor v. Raja Peary Mohon*, (1919) 30 C.L.J. 177 (where the shebait was removed and the estate was vested in the Receiver)
 3. *Panchanon v. Surendra*, (1929) 50 C. L. J. 382; *Surendra v. Bhubaneswari*, (1933) I.L.R. 60 Cal. 54.
 4. *Manickammal v. Muruguppa*, A.I.R. 1935 Mad. 483.
 5. *Tiruvengalaratnam v. Butchayya*, (1929) I.L.R. 52 Mad. 373; cf. *Panchanan v. Surendra*, *supra*.

In such a case neither the ownership of the property is vested in the Idol, nor the possession and management thereof is vested in the shebait. Both ownership and possession are vested in the trustees and the Idol is the *cestui que trust*. In suits by or against the trustees the provisions of Order XXXI, C. P. Code, shall apply.¹

B. (iii) *Property conveyed to secular persons subject to a charge in favour of Idol*: When property is so conveyed the dedication is said to be a partial one. The ownership of the property is vested in secular persons, who are usually the shebaits also, subject to the charge and the property descends beneficially to the heirs subject to the charge.² Suits for recovery of rent and other profits of the property can be instituted in the name of the secular persons. If the said persons are in separate enjoyment of their respective interests in severalty, a suit by one for his share of rent is maintainable.³ Not unless any dealings with the property affect the charge or the worship of the Idol, need such secular persons be described as shebaits of the deity. If the secular persons purport to alienate the property free of charge, the Idol by a next friend may sue the alienee and the secular persons in their individual capacity and as shebaits for a declaration of charge in its favour.

B. (iv). *Property conveyed to Idol subject to a charge in favour of secular persons*: In such cases the Idol is the owner of property subject to the charge and all suits respecting the dedicated property may be brought or defended just as in the case of an absolute dedication in favour of the Idol. If the shebaits purport to deal with property as the absolute debutter property of the deity, the secular persons may sue the shebaits or the Idol represented by the shebaits for a declaration of charge in their favour.

II. Idol of a public religious institution: An Idol may be installed in a temple, shrine or math and its worship may be thrown open to the public. The endowment in favour of such an Idol is known as a Hindu public religious endowment.⁴ The parties to

1. *Ram Ghulam v. Shyam Sarup*, (1933) I.L.R. 55 All. 687.

2. *Sonatan v. Sreemutty Juggulsoondree*, (1859) 8 M. I. A. 66, 87, 88; *Barboni Coal Concern Ltd. v. Paricharak*, A.I.R. 1930 Cal. 526.

3. *Barboni Coal Concern Ltd. v. Paricharak*, supra. Note: In the case of an absolute dedication no shebait can sue personally for his share of rent payable to the Idol: *Narendra v. Atul*, (1918) 27 C. L. J. 605.

4. A public religious endowment distributes its benefits to all men of all classes professing a particular religion at all times and in all seasons:

suits relating to a public religious endowment will be substantially the same as in the case of a private endowment save in so far as the right to sue and the liability to be sued are affected by statutory provisions applicable to public religious endowments. Thus in the absence of any statutory provisions to the contrary the principles applicable to a private religious endowment as to the vesting or devolution of shebaitship or trusteeship according to the terms of the grant¹ or according to the usage of a particular institution,² the reversion of the office of shebaitship to the founder and his representative in cases where a shebait appointed by the founder fails to nominate his successor in accordance with the conditions or usage of the endowment³ and so on, shall be applicable as well to public religious endowment. It is only necessary therefore to examine the following statutory enactments in so far as they affect the question of the right of suit and the liability to be sued.

1. The Religious Endowments Act, XX of 1863—which is in force in all Presidencies except (a) the Presidency towns,⁴ (b) the mofussil parts of the Madras Presidency, where the Act has been repealed by the Madras Act II of 1927, (c) Bombay, where the Act is made applicable to North Kanara only by the Religious Endowments (Extension to Kanara) Act VII of 1865, and (d) Orissa

Delrus Banoo Begum v. Kazee Abdoor Rahman, (1875) 23 Suth W.R. 453, 454. An endowment will be none the less a public religious endowment even if it distributes its benefits not to the public at large but to members of a particular sect or community only: *Monmotho v. Harish*, (1906) I.L.R. 33 Cal. 905, 909; *Jugalkishore v. Lakshmandas*, (1899) I. L. R. 23 Bom. 659, 664. A public religious endowment may be created by an individual or by the public by raising of subscriptions: *Thakersey v. Hurbhum*, (1884) I. L. R. 8 Bom. 432. For the creation of a public religious endowment it is usual though not necessary to vest the lands in the trustees, shebaits or managers. The endowments may be made verbally, and if it is created by a deed, it need not be registered: *Narasimhaswami v. Madini Venkataalingam*, (1927) I. L. R. 50 Mad. 687, 689. (F.B.).

1. *Ananda v. Braja Lal*, (1923) I.L.R. 50 Cal. 292, 303.
2. *Mohan Lalji v. Madhusudan*, (1910) I.L.R. 32 All. 461, 465; *Ananda v. Braja Lal*, *supra*.
3. *Sheoratan v. Rampargash*, (1896) I. L. R. 18 All. 227, 232; *Chandranath v. Jadbendra*, (1906) I. L. R. 28 All. 689; *Ananda v. Braja Lal*, *supra*.
4. *Panchcowrie v. Chumroolall*, (1878) I.L.R. 3 Cal. 563; *Annasami v. Ramakrishna*, (1901) I. L. R. 24 Mad. 219.

where the Act has been repealed by the Orissa Religious Endowment Act, 1938.

2. Section 92 of the Civil Procedure Code.

3. The Charitable and Religious Trusts Act, XIV of 1920.

1. *Suits under the Religious Endowments Act (XX of 1863)* :
Such suits may be considered under two heads :

(a) Suits respecting the property of the endowment.

(b) Suits under Sec. 14 of the Act.

(a) *Suits respecting the property of the endowment : Parties to*—At the time of the passing of the Religious Endowments Act, (XX of 1863), there were two distinct classes of religious establishments to which the provisions of the Bengal Regulation, XIX of 1810, or the Madras Endowments and Escheats Regulation, VII of 1817, were applicable :

(i) Where the nomination of the trustee, manager or superintendent was vested in or might be exercised by the Government or other public officer or was subject to the confirmation of the Government or of any public officer.

(ii) Where the nomination was not vested in, nor was exercised nor was subject to the confirmation of the Government or any public officer².

In case (i) where the nomination of the trustee etc., rested with the Government, the Local Government was required to appoint Committees to exercise the powers granted to the Board of Revenue and Local agents by the Regulations³. On the appointment of the Committee, the property of the endowment was to be transferred

1. The Religious Endowments Act, XX of 1863 was enacted to relieve the Board of Revenue, and the Local agents in the Presidency of Fort William in Bengal and the Presidency of Fort St. George, from the duties imposed on them by the Bengal Regulation XIX of 1810, and the Madras Regulation VII of 1817, "so far as these duties embrace the superintendence of lands granted for the support of mosque, or Hindu temples and for other religious usage, etc." See Preamble of the Act.
2. *Bhima Raut v. Dasarathi*, (1913) I. L. R. 40 Cal. 323, 331 ; *Sitharama v. Subramania*, (1916) I. L. R. 39 Mad. 700, 704.
3. Sec. 7. For qualifications of members of committee, tenure of office, removal and filling up of vacancies, see Secs. 8-10. Under Sec. 11 no member of the committee can also be a trustee or manager of a temple under charge of such committee.

to the committee and all the powers which might be exercised by any Board of Revenue or Local agents for the recovery of the rent of land or other property so transferred can be exercised by the Committee¹. The Committee so appointed can 'for good and sufficient cause', dismiss or suspend trustees² and appoint new trustees³ or additional trustees⁴.

The Act has not defined the position of the trustee, manager or superintendent, under the Committee. According to the Madras High Court, he is not a servant of the Committee. "He represents the property of the temple, which is vested in law in the God or Idol⁵". Section 12 of the Act, which refers to the transfer of possession of properties, does not provide for the vesting of properties in the committee. On the other hand, Sections 11 and 13, which speak of the duties of the trustees to keep accounts, make it clear that the Committees were not to hold properties⁶. In another case, the same High Court held, that a Dharmakarta of a temple is entitled to maintain a suit for recovery of possession of property, where it is not shown that the property in question was transferred to the Committee, and where the suit is not for recovery of rent of property⁷.

1. Sec. 12. *Kaliyanaramayyar v. Mustak Shah*, (1896) I. L. R. 19 Mad. 395, 397.
2. *Venkata Narayana v. Ponnusami*, (1918) I. L. R. 41 Mad. 357 ; *Sheshadri v. Nataraja*, (1898) I. L. R. 21 Mad. 179, 199, 200, 219, 220 and 221 ; *Chinna Rangaiyengar v. Subbraya*, 3 M. H. C. R. 334 ; *Bhavanishanker v. Timmanna Ram*, (1906) I. L. R. 30 Bom. 508, 514 (the power of dismissal is exercisable in the interest of the Devasthanam); *Bhima Raut v. Dasarathi*, (1913) I. L. R. 40 Cal. 323, 333 ; *Gholam Hossain v. Syed Allaf Hossain*, (1934) I. L. R. 61 Cal. 80 (case of a mutwalli who was appointed for a term with the condition that he was removable without assignment of any cause).
3. *Seshadri v. Nataraja*, supra.
4. *Ganapathi Ayyar v. Vedavyasa*, (1906) I. L. R. 29 Mad. 534 (No additional trustee or trustees can however, be appointed, where some or all of the trustees are hereditary. A trustee who is illegally suspended may sue the temple committee for damages : *Seshadri Ayyangar v. Nataraja*, supra ; so also a trustee who is wrongfully dismissed by the committee ; *Syed Amin Sahib v. Ibram Sahib*, (1868) 4 M. H. C. R. 112 ; *Venkata Narayana v. Ponnusami*, supra ; *Thiruvengadathaiyengar v. Pannappienyar*, (1915) I. L. R. 38 Mad. 1176, 1182.
5. *Sheshadri Ayyangar v. Nataraja*, supra.
6. *Sitharama Chetty v. Subramania*, (1916) I. L. R. 39 Mad. 700, 717.
7. *Sankaramurti v. Ohidambara*, (1894) I. L. R. 17 Mad. 143.

According to the Madras High Court, therefore—(a) the trustee of a temple is entitled to maintain a suit for the recovery of possession of property not transferred to the Committee, (b) the Committee, and not the trustee, is entitled to maintain a suit for recovery of rent of the property transferred to the Committee, (c) the trustee is entitled to sue for recovery of rent of property, not transferred to the Committee.¹

According to the Calcutta High Court, the manager appointed by the Committee has got the right to maintain a suit for recovery of property,² and the Committee has got the right to sue for recovery of rent.³ It does not appear from the Reports, if the properties in question were or were not transferred to the Committees. In another Calcutta case,⁴ their Lordships Guha and Bartley JJ. held that “the trustee, manager or superintendent of the religious endowment appointed by the Committee can have no possession strictly so called. The property is vested in the Committee; the trustee, manager or superintendent can have no legal property vested in him, he being only an agent or servant of the Committee..... As provided by Sec. 12, of the Act, the property is transferred to the Committee, and all powers previously exercised by the Board of Revenue or Local agent for the recovery of land or other property transferred were exercisable by the Committee, from the date of transfer.” If this proposition is correct, then the trustee, manager or superintendent appointed by the Committee can have no right either to institute suits for recovery of possession or of rent of the endowed property, and this would be contrary to the Madras and Calcutta cases previously cited.

In case (ii) where the nomination of the trustee, etc., did not rest with the Government, the Local Government was required to transfer the property which was under the superintendence of the Board of Revenue to the then manager, trustee, or superintendent in charge of the endowment. Subject to the powers of the Civil Court to appoint a manager, pending disputes as to succession to trustee-

1. *Ponduranga v. Nagappa*, (1889) I. L. R. 12 Mad. 362, 368, read with *Kaliyanaramayyar v. Mustak Shah*, (1896) I. L. R. 19 Mad. 395, 397.
2. *Ajax Hossain v. Allaf Hossain*, A. I. R. 1928 Cal. 651, 653, following *Sankaramurthi v. Chidambara*, (1894) I. L. R. 17 Mad. 143.
3. *Raghunandan v. Bibhuti*, (1912) I. L. R. 39 Cal. 304.
4. *Prince Gholam Hossain v. Syed Allaf Hossain*, (1934) I. L. R. 61 Cal. 80.

ship,¹ the rights, powers, and responsibilities of the trustee, manager or superintendent in charge of the endowment and the conditions of their appointment, election, and removal are the same as if the Religious Endowments Act had not been passed, except in respect of the liability to be sued under the Act. All the powers which might be exercised by the Board of Revenue or the Local agent for the recovery of the rent of land or other property transferred under Section 4 of the Act, may, from the date of such transfer, be exercised by any trustee or superintendent to whom such transfer is made.²

(b) *Suits under section 14 of the Religious Endowments Act :*

*Parties to:—*The subject may be considered under four heads :

(i) Who can sue. (ii) Who can be sued. (iii) Addition of parties. (iv) Abatement of suits.

(i) *Who can sue :* Any person or persons interested³ in any mosque, temple or religious establishment or in the performance of the worship or of the services thereof, or the trust relating thereto, may bring a suit under this section. Such person or persons may do so, without joining as plaintiff any of the other persons interested therein⁴. No such suit can be instituted without

1. *Mohunt Sheonandan v. Dhupan*, (1909-10) 14 C. W. N. 1104, 1106.

(District courts have no power, upon a vacancy occurring in the office of a trustee of a religious endowment, to appoint a manager unless the endowed property has been actually transferred to the former trustee under Section 4 of the Act by the Board of Revenue or (Government) ; *Gyanananda Asram v. Kristo Chandra*, (1903-04) 8 C. W. N. 404, 407.

2. Sec. 6 of the Act.

3. Under Sec. 15 of the Act, 'any person interested', includes "any person having a right of attendance, or having been in the habit of attending at the performance of the worship or service of any mosque or religious establishment or of partaking in the benefits of any distribution of alms.

4. Sec. 14 of Act XX of 1863 provides that a suit may be brought for any misfeasance, breach of trust or neglect of duty committed by the trustee, manager or superintendent of such mosque, temple or religious establishment or against the member of any Committee appointed under the Act in respect of the trust vested or confided to them respectively. And in such suits the Civil Court may direct the specific performance of any act by such trustee, manager or superintendent or member of a committee, and may decree damages and costs against such trustee, manager, superintendent or member of a Committee, and may also direct the removal of such trustee, manager, superintendent or member of a Committee.

the previous leave of court.¹ The persons to whom the leave is given must join as plaintiffs.²

- (ii) *Who can be sued* : The suit contemplated by the section is against the trustee, manager or superintendent of any mosque, temple or religious establishment or the member of any committee appointed under the Act. There is a divergence of judicial opinion as to the particular class of trustees, managers or superintendents to whom the section applies. Does the section apply (a) to the class of trustees, managers or superintendents who are under the control of the Committee under section 3 or (b) to the class of hereditary trustees under section 4 or (c) to both classes ?

According to the Allahabad High Court, it applies to the trustees, managers, or superintendents appointed under the Act, that is, under section 3 of the Act.³ According to the Calcutta High Court, in one case it was held that the words "trustee, manager or superintendent" refer only to the hereditary trustees under section 4.⁴ In other cases, it was held that Sec. 14 applies to trustees whether hereditary or selected.⁵

1. Section 18 of Act, XX of 1863.
2. Thus where the sanction to sue is given to two persons under Sec. 18, one of them cannot sue alone : *Venkatesha Malia v. Ramaya*, (1915) I. L. R. 38 Mad. 1192, followed in *Pitchayya v. Venkatakrishnamacharu*, (1930) I. L. R. 53 Mad. 223.
3. *Sher Khan v. Bhure Shah*, A. I. R. 1935 All. 273, 276 (the words "appointed under the Act", do not refer only to the words "members of any committee").
4. The suit contemplated by section 14 is a suit against the trustee, manager or superintendent to whom the property has been transferred under Sec. 4. The Legislature could not have intended that where there is a Committee, which controls the trustee, manager or superintendent a suit may be instituted not merely against the Committee, but independently of the Committee, against the trustee, manager or superintendent, for his removal : Per *Mookerjee and Beachcroft JJ.*, in *Bhima Rout v. Dasharathi*, (1913) I. L. R. 40 Cal. 323, 332, 333.
5. *Mahomed Athar v. Ramjan Khan*, (1907) I. L. R. 34 Cal. 587, 595, 596 ; *Badar Rahim v. Badshah Miya*, (1935) I. L. R. 62 Cal. 125, 127 (Nasim Ali J. held that the words used in Sec. 14 of the Act, *viz.*, "appointed under the Act" refer only to the Committee and not to the trustee, manager or superintendent. The trustee or manager who can be sued under the Act, therefore, need not necessarily be a trustee, superintendent or manager appointed under the Act).

According to the Madras High Court section 14 applies to both classes of trustees, managers or superintendents.¹ In a case from South Kanara, where the suit was against persons who were trustees under section 4 of the Act, their Lordships Shah and Martin JJ, of the Bombay High Court, laid down a negative proposition thus : "Under the circumstances it would not be easy to hold, that section 14 would not apply to suits like the present suit, if it were filed in the proper Court with the necessary leave".²

Having regard to section 6 of the Act, which speaks of the liability of the trustees under section 4 to be sued under the Act, and upon a proper construction of section 14,³ it is submitted, that the view expressed by their Lordships Mookerjee and Beachcroft JJ. in (1913) I. L. R. 40 Cal. 323 is the more plausible.

(iii) *Addition of parties* : In a suit under section 14 of the Act the Court may add other persons interested as parties to enable it to adjudicate fairly and properly on the matter, especially if it has reasons to believe that public interest will not be duly protected unless such persons are added.⁴

(iv) *Abatement of suits* : A suit under section 14 of the Act is a representative⁵ suit and the right of suit is not personal to the plaintiff. Therefore upon the death of one of the plaintiffs the suit does not abate.⁶

Where a suit is brought against trustees or members of any Committee, the right to sue survives against the surviving defendants alone.⁷

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1. *Fakurudin Sahib v. Akeni Sahib*, (1878-81) I. L. R. 2 Mad. 197, 199 : "The 14th Section of the Act of 1863 empowers the Civil Court to remove trustees for misfeasance, breach of trust, or neglect of duty, and it does not recognize any difference in the powers conferred on the Courts in respect of trustees, whether hereditary or selected."
 2. *Hansraj Laddashet v. Anant Padmanabh* (1918) I. L. R. 42 Bom. 742, 754.
 3. Compare the words used in Sec. 14 "in respect of the trust vested in such trustee, manager or superintendent", which exclude the trustee, manager or superintendent under Sec. 3.
 4. *Gyanananda Asram v. Kristo Chandra*, (1903-04) 8 C. W. N. 404, (where the Court of Appeal added several persons who were worshippers at the temple as party respondents as there were fair grounds for the conclusion that the plaintiffs and defendants were colluding together).
 5. *Vadlamudi Sastrulu v. Venkateshaya*, A. I. R. 1928 Mad. 614.
 6. *Alagappa v. Muthiah*, (1918) I. L. R. 41 Mad. 237, 240; *Prince Gholam Hossain v. Syed Altaf Hossain*, (1934) I. L. R. 61 Cal. 80.
 7. *Sekhara Menon v. Narayanan*, (1930) I. L. R. 53 Mad. 790 (case of trustees)

In a suit brought under section 14, against the sole surviving member of a Committee, appointed under section 3 of the Act, for his removal for neglect of duty, it was held that the relief claimed was purely personal, and that the cause of action did not survive against his heir on his death pending the suit.¹

2. *Suits under Section 92 of the Civil Procedure Code*² : *Parties*

to: The subject may be considered under four heads :

- (a) Who can sue ;
- (b) Who can be sued ;
- (c) Addition of parties ; and
- (d) Abatement of suits.

(a) *Who can sue* : In the presidency towns the Advocate-General or two or more persons having an interest³ in the trust and having obtained the consent in writing of the Advocate-General⁴ may institute a suit in the principal Civil Court of Original jurisdiction or in any Court empowered in that behalf by the Local Government within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is

1. *Bhima Rout v. Dasarathi Das*, (1913) I. L. R. 40 Cal. 323, (in this case the superintendent of the temple was a co-defendant with the surviving member of the committee and upon the death of the latter, his adopted son and the members of the new committee were substituted as defendants. It was held that the suit as framed was not maintainable either against the superintendent or against the heir or the members of the new committee.)
2. Section 92 is very much wider than section 14 of the Religious Endowments Act, XX of 1863.
3. The words "having a direct interest", which occurred in section 539 of the Code of 1882 have been changed into "having an interest", to widen the class of persons entitled to sue under the section. A person interested includes an infant, the term "person" being not restricted to persons *sui juris* : *Sri Sri Lakshmi Janardan v. Dradutullah*, (1910) 6 I. C. 119 (Cal.). Section 92 applies where the suit is representative in character. Thus suit instituted by the whole body of persons who are legally authorised to administer the trust to which it relates is not within the section : *Ram Das v. Badri Narain*, (1907) I. L. R. 29 All. 27.
4. The Advocate-General's written consent will not entitle a party to sue unless he has an interest in the trust : *Vidyanatha Ayyar v. Swaminath Ayyar*, (1924) L. R. 51 I. A. 282.

situate to obtain a decree for one or more of the reliefs specified in sub-section (1)¹ to that section.

Outside the presidency towns, except in the case of Madras in respect of all Hindu public religious endowments and in respect of such Jain religious endowments to which the provisions of the Madras Hindu Religious Endowments Act may be extended by the Local Government, the powers conferred by section 92 on the Advocate-General, may be, with the previous sanction of the Local Government, exercised also by the Collector or by such officer as the Local Government may appoint in this behalf.² In the case of the Madras presidency outside the presidency town, Sections* 92 and 93, and rule 8 of Order 1 of the First Schedule of the Code of Civil Procedure, 1908, shall have no application to any suit claiming any relief in respect of the administration or management of a religious endowment and no suit in respect of such administration or management shall be instituted except as provided by the Madras Hindu Religious Endowments Act.³

Sub-section (2) of section 92 provides as follows :

“Save as provided by the Religious Endowments Act, 1863, no suit claiming any of the reliefs specified in sub-section (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section.”*

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1. The reliefs which may be asked for in the suit under sub-section (1) of section 92 are : (a) removing a trustee ; (b) appointing a new trustee ; (c) vesting of any property in a trustee ; (d) directing accounts and inquiries ; (e) declaring what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust ; (f) authorising the whole or any part of the trust property to be let, sold, mortgaged or exchanged ; (g) settling a scheme ; or (h) granting such further or other relief as the nature of the case may require.
 2. Section 93 of the Civil Procedure Code.
 3. Section 73 (3) of the Madras Hindu Religious Endowments Act, II of 1927.
 4. The opening words of Section 92 (2) only mean that if the plaintiff elects to proceed under the Religious Endowments Act, he is not prevented from so doing by Sec. 92 : *Hansraj Laddashet v. Anant Padmanabh*, (1918) I. L. R. 42 Bom. 742. A person electing to proceed under the

Where a suit is instituted by two or more persons with the previous sanction of the Advocate-General, or the Local Government, the following principles relating to the joinder of plaintiffs shall apply:—

- (i) Where sanction is given by name to more than two persons, the power should be exercised by them all; and a suit by some only of the persons to whom sanction is given under Section 92 will not lie.¹
- (ii) Joining a person not entitled to sue does not affect the right of the other plaintiffs who are entitled to sue.²
- (iii) There is a difference of opinion between the Madras High Court on the one hand, and the Bombay and Allahabad High Courts on the other, as to whether a suit instituted by one plaintiff only with the consent of the Advocate-General is so defective as cannot be cured by amendment of the plaint by the addition of a second plaintiff. According to the Madras High Court,³ such a defect can, and according to the Bombay⁴ and Allahabad High Courts, such a defect cannot, be cured by the amendment.
- (iv) The Advocate-General has the power to sue, and persons interested have the same right, and they may exercise the right separately or in conjunction with each other.⁵
- (b) *Who can be sued*: The suit contemplated by section 92 is

Religious Endowments Act, can be given only such special relief as that special Statute says it may give. If he wishes for any relief beyond that he should proceed under section 539 of the C. P. Code (now section 92): *Gyanananda v. Kristo Chandra*, (1903-04) 8 C. W. N. 401. Sec. 92, C.P. Code. and Sec. 14 of Act XX of 1863, so far as the forms of relief to which they relate are the same. offer a choice to persons interested in the trust, who may proceed under either; they are not bound to proceed under both: *Venkatarama Charlu v. Krishnama*, (1914) I.L.R. 37 Mad. 181.

1. *Pitchayya v. Venkatakrishnamacharlu*, (1930) I. L. R. 53 Mad. 223; *Muhammad Ishaq v. Muhammad Hussain Khan*, A. I. R. 1927 Lah. 382, 383; Cf. *Badrul Islam v. Mt. Ali Begum*, A. I. R. 1935 Lah. 251, 254.
2. *Ramaswami v. Muthukaruppan*, A. I. R. 1925 Mad. 1011.
3. *Ambalavana v. Advocate-General*, (1920) I. L. R. 43 Mad. 707.
4. *Darves Haji Mahamad v. Jainudin*, (1906) I. L. R. 30 Bom. 603.
5. *Ambalavana v. Advocate-General*, *supra*.

directed against trustees.¹ Therefore, suits for recovery of possession of trust properties from third parties, for instance, from trespassers, from transferees, from trustees or from persons claiming a title adverse to the trust are not proper parties to such suits.² But an alienee of trust property, who purchases or receives trust property from the trustee with notice of the trust, is in law a constructive trustee, and as such is a proper and necessary party in a suit under section 92.³ Again where the alienee denies that the property is a public trust for religious purposes, he is a necessary party, though no relief can be given as against him by way of a decree in ejectment.⁴

(iii) *Addition of parties* : In a suit brought under section 92 of the Civil Procedure Code the Court has power under O. I. rule 10 (2) to add parties as in any other suit. Thus is a suit under section 92 to remove a trustee, the son of the trustee on his own application was added as a party even against the wishes of the plaintiffs, in order to enable him to establish his rights in any scheme that might be framed.⁵

1. It does not matter, whether such trustees are trustees *de jure*, *de facto* or *de son tort* : *Budree Das v. Chooni Lal*, (1906) I. L. R. 33 Cal. 789, 806, 807 ; *Baldeo Dutt v. Gopalji*, A. I. R. 1923 All. 217 ; *Venkatanarasimha v. Subba Rao*, (1923) I.L.R. 46 Mad. 300. The contrary view in *Sajedur Raja Chowduri v. Gour Mohun*, (1896) I. L. R. 24 Cal. 418 has been dissented from in the following cases : *Budh Singh Dudhuria v. Niradbaran*, (1905) 2 C. L. J. 431, 439 ; *Budree Das v. Chooni Lal*, *supra* at 805 ; *Abdul Majid v. Akhtar Nabi*, (1936) I. L. R. 63 Cal. 74 ; *The Collector of Poona v. Bai Chanchalbai*, (1911) I. L. R. 35 Bom. 470, 473.
2. *Munsi Gholam v. Mollah Ali Hafiz*, (1918) 28 C. L. J. 4, 16. Page C. J. held in *Johnson D Po Min v. U. Ogh*, (1932) I. L. R. 10 Rang. 342, that "strangers to the trust are not proper or necessary parties to a suit under Section 92 and in such a suit the plaintiffs who have wrongfully impleaded third parties cannot pray in aid the provisions of Order 1, Rule 3, or Order 1, rule 10 of the Civil Procedure Code" ; cf. *Id. Kazim v. Abi Saghir*, (1932) I.L.R. 11 Pat. 288.
3. *Abdul Majid v. Akhtar Nabi*, *supra* at 1113 ; *Ghazaffar Husain v. Yawar Husain*, (1906) I.L.R. 23 All. 112, 116.
4. *The Collector of Poona v. Bai Chanchalbai*, *supra*, at 472 (the question whether the property is or is not public trust for religious purposes cannot be properly tried unless such alienee is before the court).
5. *Vaithilingam v. Ramalingam* (1917) M.W.N. 550.

- (iv) *Abatement of suits* : A suit under section 92 not being a suit which is prosecuted by individuals for their own interest does not abate by the subsequent death of one of the plaintiffs.¹

A suit instituted against a trustee or a sajjadanashin of a religious institution for his removal for breach of trust and framing a scheme, does not abate by the death of the trustee or sajjadanashin, but the cause of action survives against the representatives of the deceased, in so far as the framing of the scheme is concerned.²

In a suit under section 92, if the defendant contends that the property in question is private and not public and pending the suit the defendant dies, the cause of action does not abate but survives as against the sons of the deceased defendant.³

3. *Suits under the Charitable and Religious Trusts Act XIV of 1920* : This act enables any person having an interest in any express or constructive trust created or existing for a public purpose of a charitable or religious nature to apply to Court for an order directing the trustee to furnish particulars *inter alia* as to the management and application of the subject matter of the trust.⁴ If any person appearing at the hearing of the petition either denies the existence of the trust or denies that it is a trust to which this Act applies, he may have the proceedings stayed, upon his undertaking to institute within three months a suit for a declaration to that effect and for any other appropriate relief.⁵

Insolvent : The right of action and the question of parties to suits relating to the property of an insolvent depend upon the effect of an order of adjudication, and it is necessary therefore to consider the effect of such an order both under the Presidency Towns Insolvency Act and the Provincial Insolvency Act.

1. *Raja Anand Rao v. Ramdas*, (1920-21) L.R. 48 I.A. 12. Similarly an appeal does not abate on the death of the plaintiffs : *Ram Ghulam v. Shyam Sarup*, (1932) I. L. R. 55 All. 687 ; *Sayyad Gulam Gouse v. Dost Mohammad Khan Sahib*, A.I.R. 1925 Mad. 244, 245, following *Parameswara Munpee v. Narayana Nambodri*, (1917) I.L.R. 40 Mad. 110.
2. *Arumuga Thambiran v. Namasiyaya Pundara Sannadhi*, (1926) I. L. R. 48 Mad. 688 ; *Shah Najihuddin Ahmad v. Amir Hasan Khan*, A. I. R. 1934 Pat. 443, 446.
3. *Tula Ram v. Tikam Singh*, A.I.R. 1934 All. 315, 316.
4. Sec 3 of the Act.
5. Section 5 (3) of the Act.

A. *Effect of an order of adjudication under the Presidency Towns Insolvency Act* : Under Sec. 17, on the making of an order of adjudication, the property of the insolvent¹ wherever situate² shall vest in the Official Assignee and shall become divisible among his creditors. Section 52 of the Act deals with the property of the insolvent which is, and which is not, divisible among the creditors. The property of an insolvent which by Section 17 vests in the Official Assignee must mean therefore only the property which by that section and section 52 is divisible among the creditors³.

Under the Presidency Towns Insolvency Act, a distinction is made between property acquired by or devolving on the insolvent before insolvency and property acquired by or devolving on the insolvent after insolvency and before discharge. While property of the first class vests in the Official Assignee, the property of the second class vests in the insolvent until the Official Assignee intervenes and claims it.⁴

1. Sec. 2 (c) of the P-t. Ins. Act defines "Property" thus : "Property" includes any property over which or the profits of which any person has a disposing power which he may exercise for his own benefit.
2. The expression "wherever situate", is wide enough to include property whether situate in British India or not: *Official Assignee v. Ghanshamdas*, A. I. R. 1934 Sind 44. As regards movable property situate in a foreign country, *prima facie* it is governed by the law of the insolvent's domicile: *Yokohama Specie Bank Ltd. v. Curlender & Co.*, A. I. R. 1926 Cal. 898. The immovable property situate in a foreign state, *prima facie*, is available to the creditors unless the law of the foreign state interferes with the operation of British Indian law: *Sumermull Surena v. Bansilal*, (1930-31) 35 C. W. N. 997, 1000, followed in *Re : Binraj Sagormull*, (1934-35) 39 C. W. N. 1135, 1138.
3. *Sat Narain v. Behari Lal*, (1924-25) L. R. 52 I. A. 22.
4. *Choung Taik v. Ma Thein Nu*, (1931) I. L. L. 8 Rang. 665; *Premchand v. Nilmoney*, (1934) I. L. R. 61 Cal. 281. But in case of after-acquired property representing the personal earnings of the insolvent, if the said earnings are just sufficient for the support of the insolvent and his family, the insolvent alone is entitled to sue for and recover them: *Re : Byrne Exp. Henry* (1892) 9 Morr. 213 (case where an agent employed to sell a property became insolvent after negotiating the sale); *Affleck v. Hammond*, (1912) 3 K. B. 162. If, however, such earnings are in excess of what is necessary for the support of the insolvent and his family, the insolvent may sue for and recover them unless the Official Assignee intervenes: *Jameson & Co. v. Brick & Stone Co., Ltd.*, (1878) 4 Q. B. D. 208; *In the matter of C. M. J. Donoghue* (1895) I. L. R. 19 Bom. 232; *Ranganatha v. Ananda*, (1911) I. L. R. 34 Mad. 183 (Cases under Ind. Ins. Act, 1848). If the Official Assignee does not intervene in the

B. *Effect of an order of adjudication under the Provincial Insolvency Act* : Under Sec. 28, on the making of an order of adjudication, the whole of the property of the insolvent shall vest in the Court or in a receiver and shall become divisible among the creditors. Except property which is exempted under that section, all property which may belong to or be vested in the insolvent at the date of the presentation of the petition is divisible amongst his creditors. Under sub-section 4 of that section the property acquired by or devolving on the insolvent after insolvency and before discharge 'forthwith' vests in the receiver as from the date of the acquisition or devolution. Opinion is divided as to the effect of the word 'forthwith'. According to the Bombay, Madras and Patna High Courts, in spite of the fact that the word 'forthwith' occurs in the section, the doctrine in *Cohen v. Mitchel*, (1870) 25 Q. B. D. 262 applies and the said section must be read as subject to the proviso that the after-acquired property can be dealt with by the insolvent before the intervention of the receiver in insolvency¹. According to the other High Courts the vesting in the receiver is not postponed until his intervention². The latter view, it is submitted, is correct.

For determination of the right of action both under the Presidency Towns Insolvency Act and the Provincial Insolvency Act, the tests to be applied are—

- (a) Is the suit in respect of any property which is, or is not, divisible among the creditors of the insolvent ?
- (b) Is the suit in respect of any property which remains vested in the insolvent until the official assignee or the receiver in insolvency intervenes ?

Parties to suits : The subject of parties to suits may be considered under the following heads :—

- (A) Suits by or against the official assignee or the receiver in insolvency.

suit, he may claim the amount recovered by the insolvent beyond what is necessary for the support of himself and his family : *Re : Roberts*, (1900) 1 Q. B. 122.

1. *Nagindas v. Ghelabhai*, (1920) I. L. R. 44 Bom. 673 ; *Ramanatha v. Nagen-dra*, A. I. R. 1924 Mad. 223 ; *Jagdish v. Mt. Ramsakal Kuer*, (1928) I. L. R. 8 Pat. 478.
2. *Ma Phaw v. Maung Ba Thaw*, (1926) I. L. R. 4 Rang. 125, followed in *Diwan Chand v. Manak Chand*, (1935) I. L. R. 16 Lah. 392 ; *Kala Chand v. Jagannath*, (1926-27) L. R. 54 I. A. 190, followed in *Lingayya v. Venkata-pathy*, A. I. R. 1935 Mad. 694.

- (B) Leave of Court if necessary in such suits.
- (C) Suits by creditors in the name of the official assignee.
- (D) Suits by or against the insolvent.
- (E) Suits against the insolvent : Leave of Court.
- (F) When the official assignee or the receiver in insolvency is a necessary party.
- (G) Suits against the official assignee or the receiver in insolvency : Notice under section 80, C. P. Code.
- (H) Suits by or against official receiver or interim receiver of insolvent's property.
- (I) Name in which to sue or be sued.

A. *Suits by or against the official assignee or the receiver in insolvency :—*

- (i) *Suits relating to the property of the insolvent* : The official assignee or the receiver in insolvency has the power to institute, defend or continue a suit relating to the property of the insolvent which has vested in him.¹ A suit by the insolvent in his own name after the insolvency in respect of such property is not maintainable ; and where such a suit is brought, the substitution of the official assignee (or receiver) at a later date will amount to addition of a new plaintiff within the meaning of Section 22 of the Limitation Act.²

Exceptions in the case of 'things in action' : The rule that every thing vested in an insolvent vests in the official assignee or receiver has been relaxed in the case of 'things in action' by the reluctance of the Courts to put a literal interpretation on the vesting clauses in the insolvency statutes so far as rights of action are concerned, and certain exceptions to the rule have thereby been created. The said exceptions as deducible from the cases have been clearly summarised in Williams on Bankruptcy, 15th Edition, at pages 280 to 283 as follows :—

- (a) A right of action in respect of a tort or breach of contract resulting in injuries wholly to the person or feelings

1. P-t. Ins. Act, Sec. 68 (1) (d) ; Prov. Ins. Act, Sec. 59 (d) ; *Maharana v. E. V. David*. (1924) I. L. R. 46 All. 16 ; *Abdul Rahman v. Nihal Chand*, A. I. R. 1935 All. 675 (F.B.).

2. *Sayad Daud v. Mulna Mahomed*, (1926) 28 Bom. L. R. 554.

of the bankrupt does not pass to the trustee : *Howard v. Crowther*, (1841) 8 M. & W. 601 ; *Beckham v. Drake*, (1849) 2 H. L. C. 579 ; *Wilson v. United Counties Bank*, (1920) A. C. 102. A right of action whether in respect of a tort or a breach of contract resulting in injuries wholly to the estate of the bankrupt passes to the trustee : *Stanton v. Collier*, (1854) 23 L.J.Q.B. 116.

(b) A right of action, whether in respect of a tort or of a breach of contract resulting in injuries both to the estate and also to person or feelings of a bankrupt, will be split and will pass so far as it relates to the estate to the trustee and will remain so far as it relates to the person or feelings of the bankrupt in him. The trustee and the bankrupt can bring separate actions to recover their appropriate damages, or they can join as plaintiffs in the same action, in which case the damages will be assessed under two separate heads : *Wilson v. United Counties Bank Ltd.*, (1920) A. C. 102 ; and *Beckham v. Drake*, 2 H. L. C. 579, 629, 634, *per* Parke B., and Hilde, C. J.

(c) The right of action for a breach of contract, even if it relates to the personal labour of the bankrupt, will vest in the trustee, if there was such a breach as to vest a right of action in the bankrupt before his bankruptcy : *Beckham v. Drake*, 2 H. L. C. 579 ; but if the contract is unexecuted at the date of bankruptcy, the right of action will not vest in the trustee, but remain in the bankrupt, who can sue in respect of it : *Bailey, v. Thurston & Co. Ltd.*, (1903) 1 K. B. 137.

(ii) *Effect of insolvency of members of a Hindu joint family* : The adult members of a joint family may be adjudged insolvents. No minor member can be adjudged insolvent.¹ On the insolvency of an adult member, no other member is liable to be so adjudged unless he has rendered himself personally liable for the debts.²

Under the Dayabhag School of Hindu Law, the father is the absolute owner of self-acquired as well as

1. *Sanyasi Charan v. Krishnadhan*, (1921-22) L. R. 49 I. A. 108.

2. *Official Assignee of Madras v. Palaniappa Chetty*, (1918) I. L. R. 41 Mad. 824, discussed in *Nagasubramania v. Narasimhachariar*, (1927) I. L. R. 50 Mad. 981, 986.

ancestral properties, and, upon his insolvency, the said properties vest in the official assignee or receiver. Upon the insolvency of any other member of the joint family, his separate property, if any, shall vest in the official assignee or receiver in insolvency.

Under the Mitakshara School of Hindu Law, upon the insolvency of the father, or the manager other than the father, or any other coparcener, his separate property and his undivided interest in joint family property shall vest in the official assignee or receiver in insolvency. As regards undivided property—

- (a) Upon the insolvency of the father, the undivided son's interest in the joint family property shall not vest in the assignee or receiver in insolvency,¹ but the right to exercise the insolvent's power as father to sell the joint family properties for his own debts provided such debts were not incurred for immoral or illegal purposes, vests in the assignee or receiver. As the father's power of sale for his debts exists only so long as the joint family is undivided, the capacity of the assignee or receiver must be similarly limited.² Thus if a suit is instituted by a son for partition, the assignee or receiver can no more sell the son's share for the father's debts. But he may intervene in the partition suit and obtain a decree which he can execute against the son's share, or he can institute a suit against the son for realising the debts due to the father's creditors and enforce the decree in such a suit by selling the son's share.³ While the family is undivided he can sue for partition.⁴

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1. *Sat Narain v. Behari Lal*, (1924-25) I. L. R. 52 I. A. 22 (a pre-emption suit by son after the insolvency of his father), on appeal from *Behari Lal v. Sat Narain*, (1923) I. L. R. 3 Lah. 329 (F.B.); *Balarenkataseetharam v. Official Receiver*, (1926) I. L. R. 49 Mad. 849 (F. B.); *Om Prakash v. Moti Ram* (1926) I. L. R. 48 All. 400; *Pinnamameni v. Garapati*, A. I. R. 1927 Mad. 1 (F.B.); *Gopala Krishnaya v. Gopalan*, (1928) I. L. R. 51 Mad. 342; *Allahabad Bank v. Bhagwan Das*, (1926) I. L. R. 48 All. 343.
 2. *Sat Narain v. Sri Kishen Das*, (1935-36) 40 C. W. N. 1382 (P.C.).
 3. *Official Assignee, v. Ramachandru Aiyar*, (1928) I. L. R. 51 Mad. 417.
 4. *Sat Narain v. Sri Kishen Das*, *supra*.

- (b) Upon the insolvency of a manager other than the father, while the family remains undivided, the right of such manager to alienate joint family property including the interests of minor coparceners for debts incurred for legal necessity vests in the assignee or receiver and becomes exercisable by him so as to bind the minors' shares.¹ In respect of a contract entered into by the Karta of a joint family and manager of a joint family business, the assignee or receiver in insolvency, upon the insolvency of such Karta, cannot sue for damages for breach of the contract unless he has declared his election to take up the contract within a reasonable time and (if the contract provided, cash against delivery) to have tendered cash before calling for delivery.²
- (c) Upon the insolvency of any other coparcener, the official assignee or the receiver must sue for partition and get possession of the divided share of the insolvent.
- (iii) *Effect of adjudication of a firm or members of a firm:* Any two or more persons, being partners, or any person carrying on business under a partnership name, may take proceedings or be proceeded against under the Insolvency Law in the name of the firm.³ In the case of a firm in which one partner is an infant, an adjudication order may be made against the firm other than the infant partner.⁴ Subject to contract between partners, a firm is dissolved by, amongst other grounds, the adjudication of a partner as an insolvent.⁵

When a partner in a firm is adjudicated an insolvent he ceases to be a partner on the date on which the order of

1. *Official Receiver, Anantapur v. Ramachandrappa*, (1929) I. L. R. 52 Mad. 246, 249, 251.
2. *Per Fletcher J.*, in *Grey v. Lamond Walker*, (1913) 40 Cal. 523, (case of a joint family consisting of grandfather and grandson).
3. Sec. 99, P-t. Ins. Act. There is no corresponding section in the Prov. Ins. Act. Rules framed under the latter Act, Sec. 79 (2) (c), regulating such procedure are: Calcutta Rules 19 to 27; Madras Rule 28; Bombay Rule 28; Allahabad Rules 22 to 30.
4. Sec. 95, P-t. Ins. Act and Sec. 110, Prov. Ins. Act; *R. K. Banerjee, Official Receiver v. S. M. N. Ahmed*, A. I. R. 1935 Rang. 327; *Re: Sital Prasad*, (1916) I. L. R. 43 Cal. 1157; *Jagmohan Narain v. Giris Babu*, (1920) I. L. R. 42 All. 515.
5. Sec. 42, Ind. Part. Act.

adjudication is made, whether or not the firm is thereby dissolved. Where under a contract between the partners the firm is not dissolved by the adjudication of a partner as an insolvent, the estate of a partner so adjudicated is not liable for any act of the firm and the firm is not liable for any act of the insolvent, done after the date on which the order of adjudication is made.¹ But this rule does not affect the liability of any person who has after the adjudication represented himself or knowingly permitted himself to be represented as a partner of the insolvent.² Where a firm is dissolved upon the insolvency of a partner, the assignee or receiver in insolvency becomes tenant-in-common (not co-partner) with the solvent partners of the partnership property.³

- (a) *Suits for account* : Upon the insolvency of a partner of a firm the assignee or receiver in insolvency can sue the solvent partners for account 'not only of the assets as they stood at the time of dissolution of the firm, but also of the profits subsequently made by the employment of the bankrupt's capital in the partnership business'.⁴
- (b) *Suits for administration* : Where a firm consists of two partners, and one partner dies and the other becomes insolvent, the assignee or the receiver in insolvency can maintain a suit for administration on behalf of himself and all other creditors of the deceased against his legal representatives (executors, administrators or legal heirs as the case may be) and for payment of what may be due to the surviving partner.⁵ Similarly, a solvent partner can sue the assignee or receiver in insolvency for account. In such a suit the insolvent may be made a defendant for the purpose of discovery.⁶

(c) *Suits by solvent partners on joint contract made with the*

1. Sec. 34, Ind. Part. Act. Cf. Sec. 36(3), Eng. Part. Act, 1890.
2. Sec. 47 (proviso) Ind. Part. Act. Cf. last proviso to Sec. 38 of the Eng. Part. Act, 1890.
3. See Lindley on Partnership, 10th Edn., pp. 588, 784, 811, *Wilson v. Greenwood*, (1818) 1 Swanst. 471, 482; *Fox v. Hanbury*, (1776) 2 Cowp. 445.
4. See Lindley on Partnership, 10th Edn. p. 784; *Crawshaw v. Collins*, (1808) 15 Ves. 218; *Williams on Bankruptcy*, 15th Edn. p. 205.
5. Lindley on Partnership, 10th Edn. p. 784; *Addis v. Knight*, (1817) 2 Mer. 117.
6. See Lindley on Partnership, 10th Edn. p. 588; *Whitworth v. Davis*, 1 V. & B. 545.

firm: It has been held in England that in suits by solvent partners on joint contract made with the firm, the insolvent partner is not a necessary party. The assignee or receiver in insolvency also need not be joined, but his joinder is necessary where an act of the insolvent is sought to be impeached, e.g., as being in fraud of the partnership.¹ The same principles seem to have been applied in India.²

(d) *Suits by creditors against the firm*: As regards suits against a firm one or more of the members of which have become insolvent, there is no remedy by suit against the assignee or the receiver in insolvency in respect of the liabilities of the insolvent. For 'the remedy is by proof against the bankrupt's estate, or, if the liability is secured, by proof against the estate and by action to enforce the security; for any liability which is not provable, the remedy is by action.'³ Suits for recovery of debts due from a firm one or more of the members of which have become insolvent need only be brought against the solvent partners.⁴

(iv) *Effect of adjudication order by two Courts*: When two orders of adjudication are passed by two different Courts, the adjudication order which is prior in time vests the property of the insolvent although the act of insolvency in respect of which the second order is passed is prior in time to the first.⁵

(v) *Effect of insolvency during pendency of a suit*:

(a) *Effect of insolvency of a plaintiff*: Order XXII, r. 8, C. P. Code provides:—

"The Insolvency of a plaintiff in any suit which

1. Lindley on Partnership, 10th Edn. p. 363; *Heilbut v. Nevill*, L. R. 5 C. P. 478 (where the trustee and the solvent partner joined as co-plaintiffs to recover the proceeds of bills of exchange which the other partner before his bankruptcy had indorsed to his own separate creditor in fraud of the other partner, in payment of a provable debt, the creditor having taken the bills with knowledge of the fraud.)
2. Cf. *Motilal y. Ghellabhai*. (1892) I. L. R. 17 Bom. 6.
3. Lindley on Partnership, 10th Edn. p. 363.
4. *Hawkins v. Ramsbottom*, 6 Taunt. 178.
5. *Official Assignee of Madras v. Official Assignee of Rangoon*, (1919) I. L. R. 42 Mad. 121, followed in *Ramlal v. Official Assignee of Calcutta*, (1932) I. L. R. 59 Cal. 1161.

the assignee or receiver might maintain for the benefit of his creditors shall not cause the suit to abate unless such assignee or receiver declines to continue the suit or (unless for any special reason the Court otherwise directs) to give security for the costs thereof within such time as the Court may direct."

"Where the assignee or receiver neglects or refuses to continue the suit and to give such security within the time so ordered, the defendant may apply for the dismissal of the suit on the ground of the plaintiff's insolvency and the Court may make an order dismissing the suit and awarding to the defendant the costs which he has incurred in defending the same to be proved as a debt against the plaintiff's estate.

If during the pendency of a suit the plaintiff becomes insolvent and the right of action passes to the assignee or the receiver, the latter alone can continue the suit¹. The Insolvent has no right to continue the suit². Where the assignee or the receiver in insolvency declines to continue the suit or to give security, the suit will abate³. If a person brings a suit after obtaining leave to sue in *forma pauperis* and is thereafter adjudged insolvent, the assignee or the receiver in insolvency can continue the suit just as the insolvent could have done⁴. Where the sole plaintiff in a representative action becomes insolvent, the action will be dismissed, unless the assignee or the receiver in insolvency elects to continue⁵. But in such events the rights of others of the same class remain unaffected; they may take proceedings on their own account⁶.

- (b) *Effect of insolvency of a defendant*: Section 18 of the Presidency Towns Insolvency Act provides that the Court may at any time after the making of an order of

1. *Jackson v. North Eastern Ry. Co.*, 5 Ch. D. 844.
2. *Buran Sheriff v. Venkatarama*, (1928) 109 I. C. 589.
3. *Ajodhia Pershad v. Sari Ram*, A. I. R. 1934 All. 1011; *Mul Chand v. Downie & Co. Ltd.*, A. I. R. 1928 Lah. 596; *Buran Sheriff v. Venkatarama*, *supra*.
4. *Muhammad Zaki v. Municipal Board of Mainipuri*, (1918) 47 I. C. 577.
5. *Wolff v. Van Boolen*, (1906) 94 L. T. 502.
6. *Handford v. Storie*, 2 S. & S. 196.

adjudication, stay any suit or other proceeding pending against the insolvent before any Judge or Judges of the Court, or in other Court subject to the superintendence of the Court. And any Court in which proceedings are pending against a debtor may on proof that an order of adjudication has been made against him under the Act, either stay the proceedings or allow them to continue on such terms as it may think just.

Under Section 18A of the Presidency Towns Insolvency Act¹, power is given to the Judge of a High Court sitting in insolvency to stay or annul any insolvency proceeding pending against the debtor in any Court subject to its superintendence.

Section 29 of the Provincial Insolvency Act provides that any Court in which a suit or other proceeding is pending against a debtor shall on proof that an order of adjudication has been made against him under the Act, either stay the proceeding or allow it to continue on such terms as such Court may impose².

The power to stay a suit or other proceeding is discretionary under both the Acts³. As a general rule no suit by a secured creditor to realise his security can, however, be stayed⁴. The insolvency of a defendant will cause a devolution of his estate on the official assignee or the receiver in insolvency⁵, and the question whether the latter can come in to defend the suit will

1. This is a new section. It was introduced into the Act by Sec. 3 of the Insolvency Law (Amendment) Act, 1930.
2. Note that under the P-t. Ins. Act, the power to stay suit or other proceeding pending against the insolvent is given to the Insolvency Court as well as to Court in which the suit or other proceeding is pending. *Kaliaperumal v. Ramchandra*, A. I. R. 1927 Mad. 693 (On the adjudication of a defendant, the receiver is brought on the record, not because he is an essential party to the suit in the sense that his absence is fatal to the suit and if he is impleaded at a later date the suit will be regarded as filed on that date, but because of the provisions of Section 29).
3. *Mahomed Haji Essack v. Abdul Rahiman*, (1917) I. L. R. 41 Bom. 312 : *Govindasami v. Ranaveerapandian*, (1926) 97 I. C. 765.
4. *Ex parte Hirst* (1879) 11 Ch. D. 278. See also *Sharp v. Mc. Henry*, (1857) 55 L. T. 747.
5. O. XXII, r. 10, C. P. Code.

depend upon the interest involved in the suit. Thus in a secured creditor's suit, on the insolvency of the mortgagor-defendant, the official assignee or the receiver must be impleaded¹. But if the suit is in *personam*, such as a money suit, no interest devolves on the assignee or the receiver in insolvency and he cannot claim to defend the suit². Where there are two or more defendants who are jointly and severally liable to the plaintiff, it is not necessary to join the assignee or the receiver of the property of such of the defendants as have become insolvent in order to proceed against the solvent defendants³.

B. *Suits by or against the official assignee or the receiver in insolvency : Leave of Court* : The official assignee or the receiver in insolvency may obtain leave to institute, defend or continue a suit. The provision as to leave is intended solely for the protection of the estate in matters of costs, and its absence is no defence to proceedings against third parties⁴. If the official assignee or receiver obtains the necessary leave to institute or defend or continue a suit, he is entitled to be paid out of the estate all costs and expenses incurred by him in the litigation⁵. No leave is necessary to sue the official assignee, or the receiver in insolvency who is what is known in the old English Law as the assignee in bankruptcy⁶.

1. *Kala Chand v. Jagannath*, (1922) L. R. 54 I. A. 190; *Nrishinha v. Deb Prosanna*, (1934-35) 39 C. W. N. 384, 387.
2. *Chandmull v. Ranee Soondery*, (1895) I. L. R. 22 Cal. 259; *Jethalal v. Gangaram*, (1915) 29 I.C. 30; *Uttamchand v. Nago*, A.I.R. 1933 Nag. 6.
3. *Lloyd v. Dimmack*, 7 Ch. D. 398.
4. Cf. the observations of Rankin J. in *Ladurum v. Nandalal*, (1920) I. L. R. 47 Cal. 555, 557 (It seems to me to be settled now by the authorities, that those provisions which have come into our Insolvency Act from the English Act, and which require the leave of the Court, are administrative provisions only; they are matters between the Court and the trustee; they are matters which may give creditors personal rights of action against the Trustee; they are not matters which can be set up when the Trustee as the person in whom the bankrupt's property is vested is meeting the enemy in the gate and is at arm's length with the third party outside the bankruptcy altogether); *Re Branson, Ex. p. Trustee*, (1914) 2 K.B. 701; *Official Receiver v. Kanga*, (1922) I.L.R. 45 Mad. 167.
5. Cf. Bombay Rules, 182, 183; Madras Rule 133.
6. *Amrita Lal v. Narain*, (1919) 30 O. L. J. 515, followed in *Sant Prasad v. Sheodut*, (1923) I. L. R. 2 Pat. 724; *Mt. Mahrana v. E. V. David*, (1924) I. L. R. 46 All. 16, 23.

C. *Suits by creditors in the name of the official assignee or receiver in insolvency*: "The proper course for creditors, if the trustee refuses to act, or to allow his name to be used, is for them to come to the Court and apply for leave to use the name of the trustee on giving him an indemnity against costs. On such application the Court will consider the nature of the proposed proceedings, and, if satisfied that there are *prima facie* grounds for allowing the creditors to proceed, will grant the application. But it is monstrous that any creditor, however small the amount of his debt, who is dissatisfied with the conduct of the trustee, should be at liberty to launch a motion like this.¹

D. *Suits by or against the insolvent*: The insolvent can institute or defend a suit in respect of his property and causes of action which do not vest in the official assignee or the receiver in insolvency but remain vested in the insolvent.² Thus, an insolvent can maintain and carry on a suit for damages caused to his reputation and credit in his personal capacity. The principle applicable to the individuals is also applicable to persons carrying on business under a firm name³.

E. *Suits against the insolvent: Leave of Court*: Under the Presidency Towns Insolvency Act and the Provincial Insolvency Act, one of the effects of an order of adjudication is a bar to the institution of any suit or proceeding for debt provable in insolvency without the leave of the Insolvency Court.⁴ Leave is a condition precedent and cannot be granted after the suit is filed,⁵ even where the suit was brought in ignorance of the fact of the adjudication order⁶ or where the original adjudication has itself been subsequently annulled⁷. A decree against the insolvent, no leave

1. *Per Cave J.*, in *Ex parte Kearsley, Re Genese*, (1886) 17 Q. B. D. 1, 3.
2. See heading, "Effect of an order of adjudication", *supra*.
3. *Cassim, D. K. & Sons v. Abdul Rahman*, (1930) I. L. R. 8. Rang 441.
4. Sec. 17 P-t. Ins. Act and Sec. 28 (2) and (6) Prov. Ins. Act. Sec. 46 of the P-t. Ins. Act which deals with debts provable in insolvency does not apply to a secured creditor who wants to enforce his security: *Rajendra Chandra v. Bipin Chandra*, (1933) I. L. R. 60 Cal. 1298.
5. *In re Dwarkadas Tejbhandas* (1916) I. L. R. 40 Bom. 235, followed in *Ghouse Khan v. Bala Subba Rowther*, (1928) I. L. R. 51 Mad. 833, 835, 838; *Rowe & Co. Ltd. v. Tan Thean Tuik*, (1924) I. L. R. 2 Rang. 643, 647.
6. *Panna Lal Tassaduq Hussain v. Hiranand*, (1927) I. L. R. 8 Lah. 593, dissenting from *Haji Uman Sharif v. Jwala Prasad*, (1924) 79 I. C. 662.
7. *Ponniusami v. Kaliaperumal*, (1928) 113 I. C. 550,

having been obtained, is not binding on the official assignee or the receiver in insolvency or the estate of the insolvent.

F. *When the official assignee or receiver in insolvency is a necessary party* : The following are illustrations of cases in which it has been held that the official assignee or the receiver in insolvency is a necessary party :

- (i) In suits by secured creditors to realise their security,¹ or in suits by creditors asking for declaration of lien against the estate of the insolvent ;²
- (ii) in suits for declaration that a property claimed by the insolvent does not belong to him ;³
- (iii) in suits by solvent partners on a joint contract made by the firm where an act of the insolvent is sought to be impeached.⁴

G. *Suits against the official assignee or receiver in insolvency* : Notice under Section 80 C. P. Code : The official assignee or the receiver in insolvency is a public officer and therefore no suit can be instituted against him in respect of any act done by him in his capacity as such public officer without previous notice prescribed under Section 80 C. P. Code.⁵

H. *Suits by or against interim receivers* : At any time after the presentation of an insolvency petition and before an order of adjudication, the Court may appoint an *interim* receiver of the property of the debtor and the *interim* receiver shall thereupon have such of the powers conferable on a receiver appointed under the

1. *Kalu Chand v. Jagannath*, (1927) L. R. 54 I. A. 190.
2. *In the matter of L. W. Nasse*, (1929) I. L. R. 7 Rang. 201 (Unless the official assignee is a party to the suit by creditors in which a decree is passed declaring a lien against the estate of the insolvent, he is not bound by it and he cannot be deemed to be party merely because he is given an opportunity to defend the suit and he elects not to do so) ; *Dhanrajmal v. Official Assignee*, A. I. R. 1931 Sind 44 (where the official assignee claimed the business debts for the general body of the creditors in preference to the right of the secured creditors under the doctrine of reputed ownership).
3. *Md. Umar v. Munshiram*, 41 I. C. 802.
4. *Heilbut v. Nevill*, (1870) L. R. 5 C. P. 478.
5. *Prasaddas v. K. S. Bonnerjee*, (1930) I. L. R. 57 Cal. 1127 ; *De Silva v. Govind*, (1922) I. L. R. 44 Bom. 895 ; *Mt. Mahrana v. E. V. David*, (1924) I. L. R. 46 All. 16 ; *Murari Lal v. E. V. David*, (1926) I. L. R. 47 All. 291.

Code of Civil Procedure, 1908, as the Court may direct.¹ Under the Presidency Towns Insolvency Act (Sec. 16), the Court may appoint the official assignee as the *interim* receiver. Under Sec. 57 of the Provincial Insolvency Act, any official receiver who has been appointed by the Local Government for the local limits of the jurisdiction of any Court having jurisdiction under the Act, shall be the receiver for the purpose of every order appointing a receiver or an *interim* receiver.

On the appointment of an *ad interim* receiver, the debtor is not divested,² and at the stage when the *ad interim* receiver is appointed no question arises as to the distribution of the property of the debtor amongst the creditors or as to preference amongst them.³

The provisions relating to suits by or against a receiver appointed under O. XL of the Civil Procedure Code are applicable to *ad interim* receiver under the Insolvency Statutes.

1. *Name in which to sue or be sued :*

(a) *Official Assignee :* The Official Assignee may sue or be sued by the name of "The official assignee of the property of....., an insolvent".⁴

(b) *Receiver in insolvency :* The receiver in insolvency may sue or be sued by the name of "A. B., Receiver in insolvency of the property of....., an insolvent."

(c) *Official Receiver :* The official receiver appointed under Section 57 of the Provincial Insolvency Act may sue or be sued by the name of "The Official Receiver and receiver (or *ad interim* receiver) of the property of....., an insolvent."

Joint Hindu Family : The subject of parties may be considered under the following heads :

1. Suits between members of a joint Hindu family and third persons.
2. Suits between members of a joint Hindu family *inter se*.
3. Effect of insolvency of a member of a joint Hindu family.

1. Sec. 16 P-t. Ins. Act and Sec. 20 Prov. Ins. Act ; *Subramania Aiyar v. Official Receiver*, A. I. R. 1926 Mad. 432.
2. *Kaliaperumal v. Ramchandra*, A.I.R. 1927 Mad. 693.
3. *Madhu Sardar v. Kshitish*, (1915) I. L. R. 42 Cal. 289, 292.
4. Sec. 83, P-t. Ins. Act.

1. *Suits between members of a joint Hindu family and third persons* : The members of a joint Hindu family may sue and be sued in respect of dealings between themselves and third parties. But the manager of a joint family as such may also sue and be sued alone as representing the family in respect of transactions entered into by him as manager of the family or in respect of joint family property.¹ In a suit by the manager of the family the defendants in order to safe-guard their interests, may however apply to bring the other members of the family on record.² But the other members of the family not being necessary parties their joinder, after the statutory period has expired, does not prevent the suit as originally constituted from being in time.³

Where a transaction is entered into in the names of two or more managers, they must all join as plaintiffs⁴. In a suit by or against a manager it is not necessary that the manager should be described as such in the pleadings⁵. It is a question of fact whether he is the manager or not and it is not the form in which he sues (or is sued) which determines the question.⁶

A decree passed against the manager in such a suit is binding on all the other members, if he acted in the former litigation either on behalf of the minors in their interest, or if they were majors, with their assent⁷.

1. *Madhgouda Babaji v. Kalappa*, (1934) I. L. R. 58 Bom. 348 ; *Kishen Parshad v. Har Narain*, (1910-11) L. R. 38 I. A. 45 (case of loan transactions entered into by the plaintiffs who were managing members) ; *Sheo Shankar v. Jaddo Kunwar*, (1913-14) L. R. 41 I. A. 216 (case of a foreclosure suit against manager-mortgagor) ; *Lingan-Gowda v. Basan-Gowda*, (1926-27) L. R. 54 I. A. 122 (Decision in a suit by a managing member to establish a right to immovable property is binding on the other members, who in this case were minors).
2. *Madhgouda Babaji v. Kalappa*, *supra*.
3. *Kishen Parshad v. Har Narain*, *supra* ; *Guravayya v. Dattatraya*, (1904) I. L. R. 28 Bom. 11, 18.
4. *Ramsebuk v. Ram Lall*, (1881) I. L. R. 6 Cal. 815 ; *Inum-ud-din v. Lildhar*, (1892) I. L. R. 14 All. 524, distinguished and explained in *Kishen Parshad v. Har Narain*, (1910-11) L. R. 38 I. A. 45, 53. (It is not competent to one only of two or more surviving partners to sue for a debt due to the firm).
5. *Madhgouda Babaji v. Kalappa*, *supra*.
6. *Ramkrishan v. Ganga Ram*, (1931) I. L. R. 12 Lah. 428. Cf. *Surendra v. Sambhunath*, (1928) I. L. R. 55 Cal. 210, 217.
7. *Lingangowda v. Basangowda*, (1926-27) L. R. 54 I. A. 122.

On the death of the manager pending a suit or appeal to which he was a party, the coparcener succeeding him as manager may be substituted in his place and the suit proceeded with. It is not necessary to bring the legal representatives of the deceased manager on the record¹.

2. *Suits between members of a joint Hindu family inter se*: In such suits *e. g.*, suits for partition or joint possession, the general rule is that all the members of the family who are entitled to a share therein are necessary parties².

3. *Effect of insolvency of a member or manager of a joint Hindu family*: See heading 'Insolvents' under "Classes of Persons", *supra*.

Mahant: See "Math" below.

Math: It is necessary to consider two classes of suits:—

1. Suits relating to the property of the Math.

2. Suits relating to the personal property of the Mahant.

1. *Suits relating to the property of the Math*: A math, like an idol, is a juridical person³. But the property of the math is vested in the Mahant as the owner thereof, although the nature of the ownership is an ownership in trust for the institution itself⁴. The expression "property of the math" means the property held by the Mahant in trust for the math. Though the ownership in the general case is with the spiritual head of the institution, still the property may in some cases be held on different conditions and subject to different incidents⁵. Thus property belonging to a religious institution may by the usage and custom of the institution vest in trustees other than the spiritual head⁶. When property is vested in the Mahant all suits respecting it have to be brought by,

1. *Atma Ram v. Banku Mal*, (1930) I. L. R. 11 Lah. 598.

2. Mitford on Pleading, p. 190; *Chudasama v. Partapsang*, (1904) I. L. R. 28 Bom. 209, 213, 214; *Kali Kanta v. Gouri Prosad*, (1890) I. L. R. 17 Cal. 906.

3. *Manohar v. Lakhmiram*, (1888) I. L. R. 12 Bom. 247, 263; *Thakardwara v. Ishar Das*, (1928) I. L. R. 9 Lah. 588; *Narasimhaswami v. Venkataalingam*, (1927) I. L. R. 50 Mad. 687 (F. B.).

4. *Ram Prakash v. Anand*, (1915-16) L. R. 43 I. A. 73, 76, followed and explained in *Satnam Singh v. Bawan*, A. I. R. 1935 All. 198; *Arunachellam v. Venkatachalapathi*, (1918-19) L. R. 46 I. A. 204, 224; *Vidyavaruthi v. Balusami*, (1920-21) L. R. 48 I. A. 302, 309, 311, 319.

5. *Sammantha Pandara v. Sellappa*, (1879) I. L. R. 2 Mad. 179.

6. *Arunachellam v. Venkatachalapathi*, *supra* at p. 224.

or against, and in the name of the Mahant as such. A decree obtained against a Mahant is binding on his successors as they form a continuing representation of the property of the math¹. This attribute of perpetual succession led Subrahmanya Ayyar J., by some stretch of language, to characterise the head of a math as a "Corporation sole".² It should be noted that "succession to the office of a Mahant is not settled by an appeal to general customary law; the usage of the particular math stands as the law therefor."³ In the absence of a *de jure* Mahant, a *de facto* Mahant may sue or be sued in respect of the property of the math⁴.

A suit for setting aside an improper alienation by a Mahant can be instituted under O. 1, r. 8 of the Code⁵, a suit for misfeasance, breach of trust or neglect of duty may be instituted, with the leave of the Court, by any person or persons interested in the math under Secs. 14 and 18 of the Religious Endowments Act (XX of 1863) in places where the said Act is still in force, and a suit may also be brought by the Advocate-General or two or more persons having an interest in the math and having obtained the consent in writing of the Advocate-General, for one or more of the reliefs specified in Sec. 52 of the Code except where the said section has not been abrogated by special enactments, e.g., the Madras Hindu Religious Endowments Act (II of 1927)⁶.

2. *Suits relating to the personal property of the Mahant*: As regards the personal property of a Mahant, that is, property acquired with his own money or by his own exertions, the same does not pass to his natural relatives but passes on his death to his spiritual heir including his chela who is recognised as his spiritual son. The descent of such property from a guru to his chela does not warrant the presumption that it is religious property⁷. Suits relating to the personal property of the Mahant

1. *Gulabbhai v. Sohangedasji*, (1928) I. L. R. 52 Bom. 431.
2. *Vidyapurna v. Vidyantidhi*, (1904) I. L. R. 27 Mad. 435, 457.
3. *Ram Prakash v. Anand*, (1915-16) L. R. 43 I. A. 73, at p. 76.
4. *Mahadeo Prasad v. Karia*, (1935) L. R. 62 I. A. 47; *Ramcharan v. Naurangi*, (1933) L. R. 60 I. A. 124 (suit by *de facto* Mahant to recover property for the benefit of the math from trespassers).
5. *Venkataramana v. Kasturiranga*, (1917) I. L. R. 40 Mad. 212, 223.
6. Cf. Sec. 73 of the Act.
7. *Parma Nund v. Nihal Chand*, (1937-38) L. R. 65 I. A. 252; but see *Susil v. Gobind*, A. I. R. 1934 Pat. 431.

ought to be instituted by or against the Mahant or his spiritual successor, as the case may be, in his personal capacity¹.

Minor: Every suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor². The next friend must present an affidavit of fitness along with the plaint³. Where the defendant is a minor, the Court shall appoint a proper person to be guardian for the suit for such minor⁴.

Where a suit is brought on behalf of a minor, the title of the suit should run thus : "A. a minor by his next friend B. against C."

Where a suit is brought against a minor and after a guardian *ad litem* of the minor is appointed, the title of the suit should run thus : "A. against B., a minor, by his guardian *ad litem* C."

Under Section 32 of the Presidency Small Causes Court Act XV of 1882, a minor may sue in a Presidency Small Cause Court without a next friend when the amount claimed does not exceed Rs. 500/- and is due to him for wages or for work done by him as a servant.

Where a suit is instituted on behalf of an alleged minor who is in fact a major, if it appears that it was so instituted through a *bona fide* mistake of the next friend, the suit ought not to be dismissed but the plaint ought to be allowed to be amended⁵.

Where a person who is in fact a minor sues as a major or without a next friend, the defendant may apply for taking the plaint off the file with costs to be paid by the pleader or by other person by whom it was presented⁶. This rule, according to the Calcutta High

1. See observations of Jenkins C. J., in *Babajirao v. Laxmandas*, (1904) I. L. R. 28 Bom. 215, 223.
2. O. XXXII, r. 1, C. P. Code.
3. Cf. Cal. H. C. O. S. Rules, Ch. XIX, r. 1; Bom. H. C. O. S. Rules, Ch. XIX, r. 388; Mad. H. C. O. S. Rules, O. VIII, r. 2; Rang. H. C. O. S. Rules, Part II, Ch. I, r. 64. As to who may act as next friend, see O. XXXII, rr. 3 & 4, C. P. Code.
4. O. XXXII, r. 3, C. P. Code. Cf., Mad. H. C. O. S. Rules, O. VIII, rr. 3-9; Bom. H. C. O. S. Rules, Ch. XIX, rr. 339-342; Rang. H. C. O. S. Rules, Ch. XIX, rr. 339-342; Rang. H. C. O. S. Rules, Part II, Ch. I, rr. 65-70.
5. *Taqi Jan v. Obaidulla*, (1894) I.L.R. 21 Cal. 866; *Ghasi v. Manga*, A. I. R. 1932 Lah. 322; *Shanmuga v. Narayana*, (1917) I. L. R. 40 Mad. 743; *Narayan v. Dulal*, A. I. R. 1927 Cal. 477; *Wali Mohammad v. Ishak Ali*, (1932) I. L. R. 54 All. 57; *Amritsaria v. Gamun*, A. I. R. 1926 Lah. 82.
6. O. XXXII r. 2, C. P. Code.

Court¹, applies where the fact of minority is apparent on the face of the plaint ; and if the fact of minority is to be established upon evidence taken, the suit ought to be dismissed. According to the Bombay High Court,² in either case, the Court should order the plaint to be taken off the file. The difference between the practice of the two Courts lies in this that while an appeal lies from a decree dismissing a suit, no appeal lies from an order taking the plaint off the file. Where the defendant being aware of the plaintiff's minority, does not object, the decree is binding upon him.³ If the plaintiff had instituted the suit in ignorance of his minority and without an intention to deceive the Court, the practice is to allow sufficient time to enable the minor plaintiff to be represented by a next friend.⁴ But if he attains majority before the Court has decided that he is a minor, there is no necessity to appoint a next friend.⁵

Where an adult person is sued as a minor, the decree made in the suit is binding upon him if he had knowledge of the suit.⁶

Where a person who was in fact a minor was sued as a major and remained unrepresented by a guardian-ad-litem, the decree against him is a nullity, even though the plaintiff may have been ignorant of the fact of the defendant's minority.⁷

A minor for whom a *disqualified person* (i. e., one who cannot

1. *Beni Ram v. Ram Lal*, (1886) I. L. R. 13 Cal. 189.
2. *Rattonbai v. Chabildas*, (1889) I. L. R. 13 Bom. 7.
3. *Mt. Fuli Bibi v. Khokai*, (1928) I.L.R. 55 Cal. 712 (Read the observations of Page J. at p. 718: The rule that a minor should be represented by a next friend is intended for the benefit and protection of the defendants, but the ground upon which protection is afforded to a defendant in a suit instituted by a minor is removed when the defendant at all material times is aware, or has received notice, of the minority of the plaintiff, and yet elects to proceed to trial and taking his chance of obtaining a decree in his favour on the merits without raising an objection to or issue upon, the maintainability of the suit ; and prefers the objection for the first time on appeal when the trial has gone against him).
4. *Rarichan v. Manakkalal*, A. I. R. 1923 Mad. 553 ; see also, *Mt. Durga Devi v. Gur Narain*, A. I. R. 1924 Lth. 157 ; *Ali Ahmad v. Said Mian*, (1924) I. L. R. 4 Lah. 390.
5. *Rarichan v. Manakkalal*, *supra*.
6. *Ramachari v. Duraisami*, (1898) I. L. R. 21 Mad. 167 ; *Hargobind v. Hukum Chand*, (1923) I. L. R. 45 All. 608 ; *Seshagiri v. Hanumantha*, (1915) I. L. R. 39 Mad. 1031.
7. *Purna Chandra v. Bijoy Chand*, (1912-13) 17 C. W. N. 549, followed in *Mt. Chambi v. Tara Chand*, A. I. R. 1924 All. 832 ; *Radhakisan v. Bhagwandas*, A. I. R. 1935 Nag. 235.

be a guardian under law or has an adverse interest against the minor) had been appointed as guardian-*ad-litem* and a decree was passed against him, the minor cannot be deemed to have been a party to the suit, and the decree would not be binding upon him.¹

It is the duty of the Court not only to appoint a guardian-*ad-litem* for the minor, but also to appoint a fit and proper person as such, so that there may be an effective representation².

Where there is a certificated guardian in existence, he must be appointed guardian-*ad-litem* unless there are special reasons for not appointing him. Where at the instance of the plaintiff, an officer of the Court was appointed guardian-*ad-litem* for the minor defedant, while there was a certificated guardian for him, it was held that the decree was void against the minor, although the Court acted in ignorance of the existence of such certificated guardian³.

Where a minor member of Joint Hindu family is added as a party in his individual capacity along with the manager, and no proper guardian-*ad-litem* is appointed for the minor, the decree cannot bind him⁴.

But, mere want of a formal order of appointment, or want of notice to minor or guardian are mere irregularities and the decree

1. *Mt. Rashid-un-Nisa v. Muhammad Ismail Khan*, (1908-09) L. R. 36 I. A. 169.
2. *Ramchandra v. Joti Prasad*, (1907) I. L. R. 29 All. 675 (appointment of step-mother, a pardanashin lady, who expressed her inability and suggested another person as fit to be the guardian); *Bhagwan Dayal v. Param Sukh*, (1915) I. L. R. 37 All. 179 (appointment of Amin of Court, without ascertaining if there were other fit persons, relations of the minor, to be guardian, and no costs of the Amin were ordered to be deposited and no action taken by the Amin). But see *Lakhmikantharaju v. Jagannatharaju*, A. I. R. 1924 Mad. 281 (where the father was unwilling to be guardian and neither uncle nor mother came forward to act as guardian and the Court appointed an officer of Court as guardian, it was held that the appointment was not bad).
3. *Bhimaji v. Hussain Saheb*, (1920) I. L. R. 43 Mad. 808. But it does not matter if the certificated guardian is appointed or changed during the pendency of the suit. *Sudarsana Rao v. Kameswara*, (1935) I. L. R. 58 Mad. 802; *Samarendranath v. Pyarecharan*, (1925) I. L. R. 61 Cal. 1023.
4. *Chandi Prasad v. Bataji Misir*, A. I. R. 1931 All. 136 (1).

made in the suit would be binding on the minor, unless it is shown that the minor was not effectively represented and his interests had been prejudiced thereby¹.

When minor can sue and be sued :

(a) *In contract*: A minor is absolutely incompetent to contract,² and therefore a minor's contract is not voidable at his option but is void³. Thus, in a suit by the mortgagee against a minor no decree can be passed on the mortgage either against the mortgagor personally or against the mortgaged property⁴.

Under Sections 38 and 41, Specific Relief Act 1 of 1877, the Court has a discretion to grant compensation in the case of a rescission of contract or cancellation of an instrument. But such discretion is not to be exercised arbitrarily but in a sound and reasonable manner. It is well settled that where the alienee chose to advance any money to the minor with knowledge of the minority, it would be improper to order a refund⁵. It is equally well settled that where an innocent purchaser or alienee was induced to part with money to a minor by a misrepresentation as to his age an order for refund will be

1. *Mussammatt Bibi Walian v. Banke Behari*, (1902-03) I. L. R. 30 I. A. 182; *Girwar Narayan v. Kamla Prasad*, (1933) I. L. R. 12 Pat. 117, (minor sued as major, but mother and guardian appeared, filed written statement on behalf of minor and contested suit. No formal appointment of mother as guardian-ad-litem: *Held*, decree binding); *Aramita v. Audithrao*, A. I. R. 1927 Bom. 613 (where notice was not sent to minor as required by O. 32, r. 3 (4), *Held*, appointment of guardian was mere irregularity); see also *Barodaprasad v. Sahantlal*, I. L. R. (1937) 1 Cal. 586; *Munnu Lal v. Ghulam Abbas*, (1909-10) I. L. R. 37 I. A. 77 (appointment of guardian without affidavit required by O. XXXII r. 3 (3), *Held*, it was a mere irregularity).
2. Sec. 11, Ind. Cont. Act, 1872.
3. *Mohori Bibi v. Dhurmodas* (1903) I. L. R. 30 I. A. 114. A minor is not stopped from setting up his infancy even where he fraudulently misrepresented his age: *Gadigeppa v. Balangowda*, (1931) I. L. R. 53 Bom. 741.
4. *Sarat Chand v. Mohun Bibi*, (1898) I. L. R. 25 Cal. 371, 385.
5. *Mohori Bibi v. Dhurmodas*, *supra*. Cf. *Sardar Prasad v. Binaykrishna*, (1931) I. L. R. 58 Cal. 224 (Fraudulent intention cannot be imputed by reason of a presumption of knowledge of law unless the person alleged to be fraudulent has such knowledge in fact).

made almost as a matter of course.¹ It has recently been held in a Madras case that the statutory discretion vested in the Courts of India by Section 41 of the Specific Relief Act is of wider amplitude than the corresponding rule of equity administered in England. Once it is found that the requirements of the section are satisfied and there exist circumstances which call for the exercise of the discretion, the Court is bound to afford relief without being hampered by reference to the limitations which surround the corresponding rule of equity as administered elsewhere. Thus, in a given case where a minor executed deeds of sale during his minority without making any mis-representation as to his age and the purchasers had no knowledge that the executant was a minor when the sales were made, a decree for setting aside the sale deed may be made on condition that the minor refunds to the purchasers the amount of the consideration money received by him².

There are difference of judicial opinion as to whether, having regard to Sections 38 and 41 of the Specific Relief Act, the Court has the power to order restitution or compensation where the minor does not sue as the plaintiff for the rescission of a contract or cancellation of an instrument, but is sued as a defendant, and restitution or compensation is claimed on the ground of fraudulent misrepresentation of age by the minors. According to the Full Bench decision of the Allahabad High Court, the equities under the said sections arise only where the minor as plaintiff sues for rescission of the contract or for cancellation of the instrument executed by him³. According to the earlier Full Bench decision of the Lahore High Court, the equities under the said sections are applicable both in suits by and against a minor⁴. The Madras High Court in two cases seem inclined to adopt the view of the Lahore Full Bench but in both these cases the

1. *Kamta Prasad x. Sheo Gopal*, (1904) I. L. R. 26 All. 342; *Appasami v. Narayanaswami*, (1930) I. L. R. 54 Mad. 112.
2. *Hanumantha v. Sitharamayya*, I. L. R. (1939) Mad. 203.
3. *Ajudhia Prasad v. Ohandan Lal*, (1937) All. L. R. 764 (F. B.).
4. *Khan Gul v. Lakha Singh*, (1928) I. L. R. 9 Lah. 701 (F. B.).

minor was the plaintiff and it was not necessary to decide the question as to whether in a suit against a minor the Court may order the minor to return the benefit or to pay compensation, and their Lordships did not therefore decide the question¹.

While a minor cannot be sued on a contract, he may as has already been pointed out, sue for rescission of a contract or for cancellation of an instrument executed by him. He may also sue to enforce a contract made in his favour. Thus, where a sale² or mortgage³ or promissory note⁴ was executed in favour of a minor, it was held that suits could be instituted by the minor for recovery of possession of the property sold to him, or to recover the monies due to him under the mortgage or promissory note. A minor cannot, however, sue to enforce a contract in respect of which there are onerous obligations to be discharged by him. Thus, a lease to a minor was held not to be enforceable by him as it imposed upon him obligations to pay rent and to perform covenants⁵.

A Hindu minor on attaining majority may sue to have the sale by his natural guardian of his property set aside, when there was no legal necessity for the sale⁶. In such a suit the Court is required only to

1. *Appasami v. Narayanaswami*, (1930) I. L. R. 54 Mad. 112; *Hanumantha v. Sitharamayya*, I. L. R. (1939) Mad. 203; cf. *Kunhibi v. Kalliani Amma*, A. I. R. 1939 Mad. 881, 883 (A Mahomedan minor whose property has been made subject to a void mortgage by an unauthorised person is entitled to ignore that mortgage and the mortgagee is entitled to claim no benefit thereunder in law as against the minor.)
2. *Ulfat Rai v. Gauri Shankar*, (1911) I. L. R. 33 All. 657; *Munni Kunwar v. Madan Gopal*, (1916) I. L. R. 38 All. 62; *Munia v. Perumal*, (1911) I. L. R. 37 Mad. 390; *Walidad v. Janak*, (1913) I. L. R. 35 All. 370 (suit by minor against his vendor of property for return of purchase money when he was deprived of possession).
3. *Raghavachariar v. Srinivasa*, (1917) I. L. R. 40 Mad. 308 (F. B.); *Zafar Ahsan v. Zubaida Khatun*, A. I. R. 1929 All. 604; *Madhab v. Baikuntha*, (1919) 4 Pat. L. J. 682; *Hari Mohan v. Mohini*, (1917-18) 22 C. W. N. 130.
4. *Rangaraju v. Madura*, (1913) 24 M. L. J. 363.
5. *Pramila Bala v. Jogesher*, (1918) 3 Pat. L. J. 518.
6. *Mon Mohon Chatterjee v. Bidhu Bhusan*, (1938-39) 43 C. W. N. 295.

find whether the alienation is binding on the minor or not. But a guardian's contract for sale or purchase made on behalf of the minor is not enforceable by or against the minor. This is because a contract for sale of immovable property is a contract of a purely personal nature, and as no personal liability can be imposed on the minor, the minor cannot be compelled to perform the contract; for the same reason he cannot take advantage of the contract and ask for specific performance. The purchaser's remedy is to claim compensation against the guardian and not against the minor or his property except in the case where the guardian uses the money obtained from the purchaser for the improvement of the minor's estate, a case which stands on a separate footing¹.

Where a lender of money deals with the guardian in his or her personal capacity and gives the latter credit on that footing only, the remedy of the lender is against the guardian and guardian alone. No recourse is available against the minor or his estate, even if the debts are found to be proper and necessary for the minor's estate. The creditor however can claim to be subrogated to the right of indemnity which the guardian might have in respect of monies whether of his own or borrowed from others, which he has applied for justifiable purposes of the estate, but this by its nature is a limited right, depending on the state of account between the guardian and the ward, and enforceable to the extent to which alone the guardian retains the indemnity unimpaired. In proper cases, and where the guardian is also impleaded as a party to the suit, the right of subrogation can apparently be worked out in the same suit. The best that the creditor can get in a suit in which he has sued the minor direct, without impleading the guardian as a party, is a mere declaration that he is entitled to subrogation but not a decree enforceable against the minor's estate by process of execution².

1. *Krishna Chandra v. Sett Rishabha*, A. I. R. 1939 Nag. 265.

2. *Margaret Lornie v. Abu Backer Sait*, A. I. R. 1939 Mad. 414.

A person who has supplied the minor with necessities is entitled to re-imburse himself from the minor's property ; and he can also claim interest on equitable grounds¹.

A minor's estate is liable for a debt evidenced by a promissory note executed by his guardian in respect of debts proved to have been incurred for his benefit or a purpose binding on him, even if the promissory note does not disclose that the borrowing was on behalf of the minor.²

A minor may under certain circumstances sue to set aside a decree against him. Mere negligence, apart from fraud or collusion, of the next friend or guardian does not afford the basis of a suit to set aside a decree against him³.

- (b) *In tort* : Unlike in the case of contractual obligations, a minor can be sued for all wrongs of omission as well as commission in matters where he was old enough to knew better. Where, however, a particular intention, knowledge or state of mind is essential to constitute a wrong, the age and mental capacity of the person charged may and should be taken into account as one of the circumstances to determine as a fact whether that intention, knowledge or state of mind was present⁴.

To sustain an action in tort against a minor the tort must be independent of any contract, for no person can evade the law⁵ which confers immunity to a minor in respect of contractual obligations by instituting an action which in reality is *ex contractu* as an action *ex delicto* for the purpose of charging the minor⁶. Thus, where a minor obtained a loan by falsely representing his age, he cannot be made to pay the amount of the loan as damages for fraud⁷. "The cause of action in

1. *Rajrathna Chettiar v. Shaick Mahboob*, (1939) M. W. N. 798.
2. *Pichamuthu Udayan v. Appavu Udayan*, (1939) M. W. N. 909.
3. *Nana Namdeo v. Dalpat Supadu*, (1939) 41 Bom. L. R. 1208 ; *Krishnadas v. Vithoba*, I. L. R. 1939 Bom. 340 (F. B.).
4. See Pollock on Torts, 14th Edn., pp. 48, 49.
5. See Sec. 11. Ind. Cont. Act, 1872.
6. *Ajudhia Prasad v. Chandan Lal*, (1937) All. L. R. 764 (F. B.).
7. *Leslie, v. Sheill*, (1914) 3 K. B. 607.

such a case is in substance *ex contractu* and is so directly connected with the contract of loan that the action would be an indirect way of enforcing that contract.¹"

There are, however, two cases where the minor can be sued in tort and held liable, although it may have some reference to a contract :

- (a) Where the minor commits a wrong of which a contract, or the obtaining of something under a contract, is the occasion, and only the occasion.² Thus, where a minor hired a horse for riding on the express condition that it was not to be used for jumping, and he allowed a friend of his to ride and use the horse for jumping several hedges and ditches, and the horse was seriously injured thereby, it was held that the minor hirer could be sued for damages, as the wrongful act complained of was a mere trespass and an independent tort, apart from any question of contract, just as if he had ridden the horse without hiring or leave³.
- (b) Where it is possible to trace the very property which was the subject of contract entered into by a minor by a fraudulent misrepresentation as to his age, he may be sued for making specific restitution of such property. Thus, where a minor had obtained the lease of a furnished house by representing himself to be a *sui juris* and the lease was declared void, the lessor would be entitled to delivery of possession, and to an injunction restraining the minor lessee from dealing with the furniture and effects. The lessee would not, however, be entitled to obtain damages for use and occupation, because to decree this claim would almost tantamount to enforcing the minor's pecuniary liability under the contract which is void⁴.

Mutwalli: A mutwalli's right and liability to sue and be sued depends upon :

- (a) his status under the Muhammadan law, in relation to (i) a public, and (ii) a private wakf ;

1. *Per Kennedy L. J., in Leslie v. Sheill*, (1914) 3 C. B. 607, 621.
2. *Pollock on Torts*, 14th Edn., p. 50.
3. *Burnard v. Haggis*, (1863) 14 C. B. N. S. 45.
4. *Lempriere v. Lange*, (1879) 12 Ch. D. 675.

- (b) his status as a mutwalli appointed by a committee under the Religious Endowments Act, 1863.

The status of a mutwalli under the Muhammadan Law is as follows :

- (i) *with regard to a public wakf*, he is merely a manager. He has no legal estate or any right in the property, the rights being vested in the God Almighty. He is not a trustee as understood in the English system,¹ although he stands in respect of his obligations in the position of a *quasi* trustee². His position is more closely allied to a receiver or a manager appointed over the property than to a trustee in whom the property is absolutely vested.³

The Mahomedan Law is strongly against attaching any right of inheritance to an endowment.⁴ A valid appointment of a mutwalli can be made only in one of three modes, *viz.*, (a) by the original author of the *wakf* or by some person expressly authorised by him, or (b) by the executor of the author, or (c) lastly, by the Court. The office of mutwalli may become hereditary by custom. But any person claiming to be a mutwalli by heredity must show by strict proof of precedents that the mode of appointment was one which must be necessarily deemed to have been sanctioned by the author of the trust⁵.

In the absence of any provision in the trust deed or any evidence of usage, the last incumbent can, on his death bed, nominate his successor without any judicial order, provided the person so appointed is adult and possessed of understanding. Puberty and understanding are essential in case of a valid appointment. Therefore, neither a minor nor a person of unsound mind can be appointed a mutwalli, but a minor can be a mutwalli where by virtue of some provision in the trust deed or otherwise the office devolves upon him. The kazi, however, is entitled to appoint somebody to discharge the

1. *Vidya Varuthi v. Balusami*, (1920-21) L. R. 48 I. A. 302, 315, followed in *Mt. Allah Rakhi v. Shah Mohammad*, (1933-34) L. R. 61 I. A. 50; *Abdur Rahim v. Narayan Das*, (1922) L.R. 50 I.A. 84; *Rukeya Banu v. Najira Banu*, (1928) I. L. R. 55 Cal. 448, 461.
2. *Kishwar Jahan v. Zafar Mohammad Khan*, (1933) I. L. R. 55 All. 164.
3. *Muhammad Rustam Ali v. Mushtaq Husain*, (1919-20) L. R. 47 I. A. 224, 232.
4. *Sayad Abdula v. Sayad Zain*, (1889) I. L. R. 13 Bom, 555.
5. *Phatmabi v. Haji A. Musa*, (1915) I. L. R. 38 Mad. 491.

duties during the minority of the mutwalli, who should get the office on attaining majority.¹ Where the wakf is not in favour of the Musalman public but in favour of a particular sect or inhabitants of a particular locality or fraternity, the members of which are ascertainable, the congregation can appoint a mutwalli.² A vacancy in the office of a mutwalli may be filled up by application to Court when it does not involve the removal of an existing mutwalli³.

- (ii) *With regard to a private wakf*, (that is, a wakf for the family of the founder where the ultimate benefit is expressly or impliedly reserved for the poor or for any other purpose of a permanent character recognised by the Mussalman law as religious, pious or charitable)⁴, the estate does not vest in the Almighty but vests in the beneficiaries. The mutwalli is, practically speaking, the owner of the property, with one limitation, and that is, that he cannot make a transfer of the wakf property. He holds the property during his life and cannot be said to be a mere manager or superintendent. After his death the mutwalliship will go to his legal heirs. The mutwalli in the case of a private wakf is not accountable to any outsider in respect of the income of the wakf property⁵.

Suits by or against mutwallis: Ordinarily it is the mutwalli in whom the right of suit relating to wakf property is vested. In the case of a public wakf, the mutwalli represents the wakf property and is entitled to appear in the courts on behalf of the property as the representative of God Almighty.⁶ In the case of a private wakf, the mutwalli being practically the legal owner of the property, the right of suit is vested in him as such owner. In the case of both a

1. *Per Ameer Ali J., in Piran v. Abdool Karim*, (1892) I.L.R. 19 Cal. 203, 219, 220; *Prince Gholam Hossain v. Syed Altaf Hossain*, (1933-34) 38 C. W. N. 214, 224; *Kaniz Zohra v. Syed Muxtaba*, (1923) I. L. R. 2 Pat. 819; *Syed Hasan Raza v. Mir Hasan*, (1917) I. L. R. 40 Mad. 941.
2. *Piran v. Abdool Karim*, *supra*, 222.
3. *Abdul Alim v. Abir Jan*, (1928) I. L. R. 55 Cal. 1284.
4. Cf. Sec. 3 of the Mussalman Wakf Validating Act (VI of 1913).
5. *Mohammad Qamar v. Md. Salamat Ali Khan*, (1933) I. L. R. 55 All. 512.
6. *Wakf Banam etc. v. Mt. Raj Kali*, A. I. R. 1938 All. 157 (In this case, their Lordships Bennet and Ismail JJ. held, on the analogy of an Idol under the Hindu Law and a monastery under the English law, that a wakf may be considered as a juristic person and a suit may be brought in the name of the wakf represented by the mutwalli).

public and a private wakf, if there are more mutwallis than one, all must be impleaded, and only such of the mutwallis as refuse to join as plaintiffs must be made defendants¹. A decree obtained against some out of several mutwallis is not binding on the wakf².

Suits by a de facto mutwalli : A *de facto* mutwalli of a Mahomedan religious trust is entitled to act on behalf of the trust and sue for recovery of rent of the property belonging to the trust, without being put to proof of his antecedents and the origin of his authority to manage the trust.³ He may institute a suit for recovery of possession⁴ of wakf properties from one who may have wrongfully acquired possession of it, if he has acted as *de facto* mutwalli for six years and has acquired an indefeasible right to hold the office of a mutwalli⁵. Under Sec. 2 (c) of the Mussalman Wakf Act, XLII of 1923, a mutwalli includes a person, save as otherwise provided in the Act, who is for the time being administering any wakf property.

Suits by a future mutwalli : A future mutwalli, that is to say, a person on whom the office of mutwalli will fall by descent, on the death of the existing mutwalli can bring a suit for setting aside an unauthorised alienation made by the existing mutwalli and to have the wakf property restored to the service of the mosque⁶. To such a suit the alienees are necessary parties.

Suits for setting aside alienations made by the mutwalli : The right of a future mutwalli to bring a suit to set aside unauthorised alienations by the existing mutwalli has already been dealt with. A suit to set aside alienations by the mutwalli may also be brought under O. 1, r. 8 of the Civil Procedure Code⁷.

1. *Mohammad Soleman v. Tasaiddug*, A. I. R. 1935 Cal. 623, 625.
2. *Abdul v. Nagendra*, 65 I. C. 592.
3. *Abdul Rahim v. Ramzan*, A. I. R. 1929 All. 518.
4. *Debendra v. Sheik Sefatulla*, (1926-27) 31 C. W. N. 184, 191.
5. *Debendra v. Sheik Sefatulla*, *supra*, at 191 (The office of mutwalli not being a hereditary one, a suit to oust the plaintiff from his office of mutwalli is regulated by Art. 120 of the Schedule to the Limitation Act, and if no suit has been brought to oust the plaintiff by reason of his having held the office for over six years, he would acquire an indefeasible right to hold the office of mutwalli and would acquire a title for the purpose of litigation or anything connected with the endowment).
6. *Kazi Hassan v. Sagun Balkrishna*, (1900) I. L. R. 24 Bom. 170, 176.
7. *Ashraf Ali v. Mohammad Nurojjoma*, (1918-19) 23 C. W. N. 115 (case of an unauthorised permanent lease granted by the mutwalli). Cf. *Zefaryab v. Bakhtawar*, (1883) I. L. R. 5 All. 497.

Suits in cases where no mutwalli has been validly appointed : Where there is no properly constituted mutwalli of the wakf property, a representative suit under Order I, rule 8 of the Code of Civil Procedure can be brought for the protection and preservation of the property¹.

Suits for removal of the mutwalli : In the case of a public wakf, a mutwalli may be removed (a) on proof of misfeasance or breach of trust, (b) if he is otherwise unfit to hold the office, though the founder may have expressly directed that he should not be removed in any case, (c) if he is insolvent, (d) if he claims the wakf property as his private estate. A suit for his removal may be brought under Sec. 92 of the Code of Civil Procedure² or under Sec. 14 of the Religious Endowments Act³. "The rule of Mahomedan Law that a mutwalli or superintendent of an endowment is removable for mismanagement does not apply to the case of a trustee who has an hereditary proprietary right vested in him⁴". As to parties to suits under Sec. 14 of the Religious Endowments Act, 1863, see "Suits under Sec. 14 of the Religious Endowments Act", pages 172—175. As to parties to suits under Sec. 92 C. P. Code, see "Suits under Section 92 of the Civil Procedure Code", pages 175—179.

Parties to suits under Special Statutory Provisions relating to wakf or mutwalli : The following statutes have a bearing on the question of parties :—

(i) The Musalman Wakf Act XLII of 1923.

(ii) The Bengal Wakf Act XIII of 1934.

1. *Mohammad Abid v. Haji Baksha*, A. I. R. 1936 Oudh 133, 136 (suit for recovery of possession of property).
2. *Shah Najihuddin v. Amir Hasan*, A. I. R. 1934 Pat. 443 (suit under Sec. 92 C. P. Code. for removal of the mutwalli on the ground of misappropriation and waste. and for framing of a scheme). Other suits under Sec. 92 : *Fazla v. Zainulab Din*, (1932) I. L. R. 13 Lah. 162 (Case where the mutwalli set up an adverse claim) ; *Ahmad Shah v. Pir Atta Khan*, (1934) 152 I. C. 323 (case where the mutwalli claimed the property as his private property) ; *Nuraz Ahmad v. Hasamaddin*, (1936) 162 I. C. 762 (case where the mutwalli set up an adverse title and was also guilty of misfeasance, breach of trust and negligence) ; *Mahamed ally v. Akber ally*, (1933-34) 38 C. W. N. 452 (P. C.) (where the mutwalli was insolvent).
3. *Mt. Hussain Bibi v. Sayad Nur Hussain*. (1927-28) 32 C. W. N. 769, 771 (P. C.).
4. *Gulam Hussain v. Ali Ajan*, (1868-69) 4 M. H. C. R. 44, referred to in *Ram Charan v. Rakhhal Das*, (1914) I. L. R. 41 Cal. 19, 30.

- (iii) The Bombay Wakf Act XLII of 1923 as amended by the Musalman Wakf (Bombay Amendment) Act XVIII of 1935.
- (iv) The United Provinces Musalman Wakf Act, XIII of 1936.

The Bengal Wakf Act XIII of 1934 : The following are the relevant provisions in the Act :

Sec. 70 (1). In every suit or proceeding in respect of any wakf property or of a mutwalli as such except a suit or proceeding for the recovery of rent by or on behalf of the mutwalli the Court shall issue notice to the Commissioner at the cost of the party instituting such suit or proceeding.

Sec. 70 (4). In the absence of a notice under sub-section (1) any decree or order passed in the suit or proceeding shall be declared void, if the Commissioner, within one month of his coming to know of such suit or proceeding, applies to the Court in this behalf.

Sec. 71. In any suit or proceeding in respect of a wakf or any wakf property by or against a stranger to the wakf or any other person the Commissioner may intervene and shall on his application be added as a party, and shall be entitled to conduct or defend such suit or proceeding on behalf of and in the interest of the wakf.

Sec. 72. If there is no mutwalli or the mutwalli refuses or neglects to act in the matter within a reasonable time, the Commissioner may in his own name institute a suit or proceeding in Court against a stranger to the wakf or any other person for the recovery of any wakf property wrongfully possessed, alienated or leased, to have any wakf property discharged or an encumbrance or obligation wrongfully created or to recover any money belonging to a wakf.

Sec. 73 (1). A suit to obtain any of the reliefs mentioned in section 14 of the Religious Endowments Act, 1863, and in section 92 of the Code of Civil Procedure, 1908, relating to any wakf may, notwithstanding anything to the contrary contained in those Acts, be instituted by the Commissioner without obtaining the leave or consent referred to in those Acts.

Sec. 73 (2). No suit to obtain any of the reliefs referred to in sub-section (1) relating to a wakf shall be instituted by any person or authority other than the Commissioner without the consent in writing of the Commissioner.

Sec. 58. Notwithstanding anything contained in any other law a mutwalli may be liable to removal by a suit under sub-section (1) of section 73 on the ground that he has been fined more than once under section 57.

Pakka and Kachha Adatias :

These types of commercial agents are peculiar to Bombay.

1. *Pakka Adatias* :— When an up-country constituent gives an order to buy, the adatia is his agent to ascertain the market price. Having done that if he accepts the order he is employed for reward and undertakes to produce the goods at the due date in return for the constituent's cash and is liable to be sued by the constituent upon his failure to produce the goods at the due date. But more than that his constituent has nothing whatever to do with the seller. He has no interest in the contract and the adatia can deal with it as he pleases. He is entitled to sue and is liable to be sued by the seller upon the contract. If he sells back the goods to the seller at a profit, his employer is not entitled to and cannot sue him for recovery of that profit nor of course will he be liable for any loss¹.

2. *Kachha Adatias* :—"When a cutcha adatia enters into transactions under instructions from and on behalf of his up-country constituent with a third party, he makes privity of contract between the third party and the constituent, so that each becomes liable to the other, but he also renders himself responsible on the contract to the third party. He does not ordinarily communicate the name of his constituent to the third party, but he informs the constituent of the name of the third party. The position, therefore, as between himself and the third party is that he is agent for an unnamed principal with personal liability on himself. His remuneration consists solely of commission, and he is in no way interested in the profits or losses made by his constituent on the contracts entered into by him on his constituent's behalf²".

Partners :—

Definition of the term : Persons who have entered into partnership with one another are called individually 'partners' and collect-

1. *Manilal v. Radhakisson*, (1921) I. L. R. 45 Bom. 386, 411. For incidents, see *Bhagwandas v. Kanji*, (1906) I. L. R. 30 Bom. 205, followed in *Bhagwandas v. Burjorji*, (1917-18) L. R. 45 I. A. 29; *Hukumchand v. Abraham*, (1919) 21 Bom. L. R. 783.
2. *Sobhagmal v. Mukundchand*, (1925-26) L. R. 53 I. A. 241.

ively 'a firm' and the name under which their business is carried on is called 'the firm name'¹.

'Firm' in the mercantile and legal sense : In the mercantile sense a firm is looked upon as a body distinct from the members composing it. But in the legal sense the name of a firm is only 'a conventional mode of designating the persons composing it'. In other words, for the purpose of determining legal rights, there is no such thing as firm known to the law². This legal notion of a firm prevails in India³ 'though the practical significance of the collective term receives a new emphasis in the Indian Partnership Act, 1932'⁴.

Effect of non-recognition of the firm in the mercantile sense : The consequences of the non-recognition of the firm in the mercantile sense have an important bearing on the determination of the question of parties to suits under this head. In this connection it is necessary to bear in mind the effect of O. XXX of the C. P. Code and Sections 25 and 69 of the Indian Partnership Act, 1932.

*Order XXX, C. P. Code, effect of—*In the legal sense a firm can neither sue nor be sued otherwise than in the names of the partners composing it⁵. But under O. XXX, r. 1 of the C. P. Code 'any two or more persons claiming or being liable as partners and carrying on business in British India may sue or be sued in the name of the firm (if any) of which such persons were partners at the time of the accruing of the cause of action'. This rule merely provides a new procedure. It does not treat the firm as a juristic *persona*. A suit by or against a firm is therefore really a suit by or against a group of individuals, and the name of the firm is the collective name of the individuals⁶. Nor does the rule affect the law on the subject which is to the effect that partners may sue or be sued in their individual names⁷.

1. Sec. 4 Ind. Part. Act, 1932.

2. *Ex parte Corbett*, (1880) 14 Ch. D. 122, 126 ; cf. *Seodayal Khemka v. Joharmull*, (1923) I. L. R. 50 Cal. 549, 558 ; *Brojo Lal Saha v. Budh Nath Pyarilal & Co.*, (1927) I. L. R. 55 Cal. 551 ; *Janki Nath v. Dhokar Mull*, A. I. R. 1935 Pat. 376. Cf. *Ghisulal v. Gumbhirmull*, (1934-35) 39 C. W. N. 606 at 613, 614.

3. *Ram Protab v. Gaurishankar*, A. I. R. 1924 Bom. 109.

4. Pollock & Mulla's Ind. Part. Act, p. 16 ; *Ghisulal v. Gumbhirmull*, *supra* at p. 613.

5. Lindley on Partnership, 10th Edn., p. 151.

6. *Bibi Kazmi Begum v. Lachman Lal*, (1930) I. L. R. 9 Pat. 717.

7. *Ramdas v. Ram Babu*, A. I. R. 1936 Pat. 194.

Order XXX, r. 9 of the Code implies that suits between a firm and one or more of its partners and suits between firms having one or more partners in common may be instituted in the firm name, provided the firms carry on business in British India.

As to whether the Code authorises the use of the firm name so as to make a partner both plaintiff and defendant is a question involved in some obscurity. According to the Lahore High Court, such a suit is maintainable in certain circumstances¹. It is not easy to follow the *ratio decidendi*, of the judgment of the said High Court which, in the case decided, was that of a single judge. Upon the facts of that case it appears that it was a suit by a firm against a partner in his individual capacity and not *qua* partner. That such suits, namely, suits by an individual in one capacity against himself in a different capacity, are maintainable under certain circumstances admits of no doubt². But this is upon a different principle which has nothing to do with the nature of suits which Order XXX, r. 9 of the Code implies. There is however clear authority for the proposition that the Code does not authorise the use of the firm name so as to make a partner both plaintiff and defendant³.

As a general rule, partners suing in their individual names ought all to join as co-plaintiffs⁴. If a partner refuses to join as plaintiff⁵, or if a firm has a cause of action, and one member has

1. *Chaudhri Fazl Din etc. v. Ghulam Rasul*, A. I. R. 1936 Lah. 648 (suit by a firm doing commission agency business in the firm name against G. R., a partner of the firm who did transactions of this nature with the firm on his own behalf).
2. *Premji Ludha v. Dossa Doongersay*, (1886) I. L. R. 10 Bom. 358 (In this case the plaintiff, as heir of his mother, sued a firm in which he was himself a partner to recover the amount of certain loans which he alleged his mother in her life time had made to the said firm).
3. *Pollock & Mulla's Ind. Part. Act*, 1932, p. 16 (note); *Ghisulal v. Gumbhir-mal*, (1935) I. L. R. 62 Cal. 510, 523 (which decides that no suit can be brought in the firm name against a partner in the firm), following *Meyer & Co. v. Faber*, (1923) 2 Ch. 422; *Rustomji v. Seth Purshottam-das*, (1901) I. L. R. 25 Bom. 606, 612 (which decides that no suit between two houses of trade with a common partner is maintainable), followed in *Kashinath v. Ganesh*, (1902) I. L. R. 26 Bom. 739, 743 (where both the plaintiffs were partners in the defendant firm); *Ohla Nagendrier v. Thoomathi*, A. I. R. 1927 Mad. 1196 (A suit can be maintained by those members of one firm who are not common to both against the members of the other firm).
4. *Trikha Ram v. Durga Prasad*, A. I. R. 1934 Lah. 459.
5. *Bulli Mal v. Jhabba*, A. I. R. 1925 Lah. 504.

improperly released it¹, the other partners can maintain the suit, joining him as a defendant. One partner of a firm can bring a suit in the firm name even when the other partners refuse to sue. To such a suit the objecting partners are not necessary parties in the sense that they ought to have been named in the cause-title and served with summons of the suit. Such partners as refuse to sue are entitled to apply for indemnity against costs to which they may be subjected².

Section 25 of the Indian Partnership Act, 1932, effect of—In India joint promises create a joint and several obligation in the absence of express agreement to the contrary³. As regards partners, their joint and several liability for all acts of the firm has been recognised by the Ind. Part. Act, Sec. 25⁴. In a suit in respect of any debts or obligations of a firm a decree can be passed against the individual partners who are parties to the suit.

Section 69 of the Indian Partnership Act, effect of—Under Section 69 of the Indian Partnership Act, 1932, no member of a firm carrying on business in British India can enforce any right arising from a contract or conferred by the Act against any present or past member of it unless the firm is registered and the person suing is or has been shewn in the Register of Firms as a partner in the firm⁵. Neither can the firm enforce its rights against any third party unless the firm and its members are so registered⁶. A firm although unregistered may be sued by persons outside it but cannot plead a set off or institute any proceeding to enforce a right arising from a contract unless it is registered⁷.

Suits for dissolution or⁸ for accounts of a dissolved firm or for enforcement of any right or power to realise the property of a dissolved firm, and the powers of the official assignee, receiver of Court under the Insolvency Acts are exempt from the prohibition⁹.

1. Lindley on Partnership, 10th Edn., p. 349.

2. *Bhadreswar Coal Supply Co. v. Satis*, (1935-36) 40 C. W. N. 824.

3. Sec. 43 Ind. Contract Act.

4. In England the liability of a partner is joint, in Scotland, as in India, joint and several).

5. Sub-section (1) read with sub-section 4 (a)

6. Sub-section (2).

7. Sub-section (3) ; Cf *Gulab Rai v. Shibba Mal*, A. I. R. 1937 All. 674.

8. 'Or' should be read as 'and/or' : *Gulab Rai v. Shibba Mal*, *supra*.

9. Sub-section 3 (a) and (b).

The prohibition also does not extend to any suit or claim of set off of a certain kind not exceeding Rs. 100/- in value¹.

It should be noted that the Indian Partnership Act, 1932, came into force on the 1st October, 1932, but the operation of Sec. 69 was suspended for a year.

In several cases it has been held that Section 69 would apply to suits for enforcement of claims accrued before commencement of the Act, if such suits are started after Sec. 69 begins to operate and that such suits are not saved by Sec. 74 (b), because that section deals only with proceedings pending at the time when the Act came into operation and not to future proceedings². In some cases the opposite view has been taken. In a recent case which came up before the Madras High Court, the promissory note sued on was executed on the 12th of March, 1931, and the suit on the note was filed in August, 1934. Pandrang Row J., held that Sec. 69, cl. (2) does not apply as the contract was entered into prior to the commencement of the Act and that the suit is expressly saved from the operation of the bar imposed by Sec. 69 (2) and by Sec. 74 of the Act. Venkataramana Rao J., differed from the above view and held that Sec. 69 (2) is not controlled by Sec. 74 (b) and that the subsequent registration of the firm is not enough to validate the original institution of the suit in as much as the condition regarding registration of the firm is a condition precedent to the institution of the suit. On account of this difference of opinion, the matter was referred to a third Judge, and Varadachariar J., to whom the matter was referred, held that even on the footing that Sec. 69 applies to contracts entered into before the Act came into force and to causes of action which accrued before that date, the

1. Sub-section 4 (b); *Nidhu Charan v. Jogindra*, (1937-38) 42 C. W. N. 841.
2. *Surendra v. Monohar*, (1934-35) 39 C. W. N. 67, 99, followed in *Basanta Kumar v. Lala Durgadas*, (1934-35) 39 C. W. N. 1030, followed in *Ram Sundar v. Madhu Sudan*, (1935-36) 40 C. W. N. 1180; *Shazad Khan v. Darbar Babu*, (1936) I. L. R. 15 Pat. 810; *Sundararaja v. Mannarsami*, A. I. R. 1937 Mad. 528; *Parinchu v. Ravi Varma*, A. I. R. 1937 Mad. 419; *Danmal Parshottam Dass v. Babu Ram*, 1935 A. L. J. 1245 (Sec. 74 is intended to apply to substantive rights and not to matters of procedure and the procedure laid down by Sec. 69 must be followed in a suit which is filed after 1st October, 1933); *Patel v. Husseinbhani*, I. L. R. 1937 Bom. 628 (Sec. 69 is applicable to a firm in existence as well as to a dissolved firm).

saving words found in Sec. 74 have the effect of exempting a suit of this nature from the operation of Sec. 69¹.

The question was considered by a Full Bench of the Rangoon High Court which held, it is submitted, rightly, that Sec. 74 (b) extends the saving clause to any legal proceeding or remedy in respect of any right mentioned in sub-section (a) and which has accrued before the commencement of the Act. It would be wrong to say that section 74 (b) saves only suits which are pending at the time when the Act came into force. It saves a remedy, which connotes the right to institute a suit as well. Hence, when a suit has been instituted after 1st October, 1933, by a firm not registered under the Partnership Act for recovery of a debt accruing before that date, the suit is not barred by Sec. 69 of the Act but is saved by the provisions of Sec. 74 (b)². This Full Bench case has since been followed by a division Bench of the Bombay High Court³.

Even on the footing that Sec. 69 would apply to suits for enforcement of claims accrued before the commencement of the Act, there are difference of opinion on the question whether a suit previously filed by an unregistered firm may be validated by subsequent registration. According to some decisions, the registration of the firm before suit is a condition precedent and any suit by an unregistered firm must be dismissed⁴. According to other decisions, the suit previously filed may be validated by subsequent registration, although for purposes of limitation the suit will be treated as filed on the date of registration.⁵

In any case, the dismissal of a suit by an unregistered firm is no bar to a fresh suit after registration if it is within time⁶. Again the dismissal of such a suit cannot operate as *res judicata* against the assignee of that firm which is a registered firm⁷.

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1. *Girdharilal Son & Co. v. Kappini Gowder*, (1938) 2 M. L. J. 44.
 2. *Soonoiram Ramniranjandas v. Junjilal*, A. I. R. 1938 Rang. 273 (F. B.).
 3. *Rivappa v. Babu Sidappa*, A. I. R. 1939 Bom. 61.
 4. *Subramania Mudaliar v. East Asiatic Co. Ltd.*, A. I. R. 1936 Mad. 991, followed in *Ohagan Lal v. Firm Mangal Sain, etc.*, A. I. R. 1938 Lah. 767.
 5. *Radhacharan v. Motilal*, (1936-37) 41 C. W. N. 534; *Suga Kuer v. Brijraj*, A. I. R. 1937 Pat. 526; *Varadarajulu Naidu v. Rajamanika*, A. I. R. 1937 Mad. 767.
 6. *Krishan Lal v. Abdul Ghafur*, (1935) I. L. R. 17 Lah. 275 (Sec. 69 (2) applies to a promissory note executed on behalf of a firm).
 7. *Mohan Sing Kishen Chand v. Janki Dass*, A. I. R. 1937 Lah. 241.

Subject to the above rules the question of parties to suits relating to partnership may be considered under the following heads :—

1. Suits between partners :—
 - A. during the continuance of the partnership.
 - B. after dissolution of the partnership.
 - C. where there is a minor who is admitted to the benefits of the partnership.
2. Suits between persons who have agreed to become partners :
3. Suits by persons induced by fraud to become partners :—
4. Suits between partners and non-partners :—
 - A. where no change in the firm has occurred.
 - B. where a change in the firm has occurred.
 - C. where there is a secret or dormant partner.
 - D. where there is a nominal partner.
 - E. where there is a sub-partner.
 - F. where there are minors who are admitted to the benefits of the partnership.
 - G. where a member of a Hindu joint family representing the family is a partner.
 - H. where the firm is dissolved.
5. Suits by and against persons holding themselves out as partners :—
6. Suits by and against persons carrying on business in names other than their own.

1. *Suits between partners :*

A. *During continuance of the partnership :* A partner, during the continuance of the partnership, can sue his co-partners for general accounts of the partnership and dissolution. He may as well ask for the granting of an injunction or the appointment of a receiver which materially affects all the partners. In exceptional cases, he may sue for accounts without asking for dissolution and winding up of the affairs of the partnership¹. In proper cases he may sue all or some of his co-partners, as the case may be, without asking for general accounts or dissolution.²

(i) *Suits for accounts and for dissolution :* The question as to who among the partners is competent to sue for dissolution

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1. *Kassa Mat v. Gopi*, (1836) I. L. R. 9 All. 120. followed in *Krishnaswami v. Jayalakshmi*, (1931) I. L. R. 54 Mad. 671; *Damodara v. Subraya Pai*, (1917) 33 M. L. J. 509; *Shib Ram v. Chinta Har*, A.I.R. 1933 Lah. 1032; *Dropadi v. Bankey Lal*, I. L. R. (1939) All. 577.
 2. *Ohhagatal v. Jaggiwandas*, A. I. R. 1940 Bom. 54.

will depend upon the grounds upon which dissolution is sought. Thus, if a partner has become of unsound mind the suit may be brought either (a) by any other sane partners or (b) by the next friend of the insane partner. If a partner has become in any way permanently incapable of performing his duties as partner, the suit can only be brought by one or more of his co-partners, and so on¹.

As to joinder of parties in a suit for general accounts of the dealings and transactions of the firm and for its dissolution, the rule is that all the members, however numerous, must be parties². In other words, the suit cannot proceed in the absence of one of the partners, or, in the event of his death *pendente lite*, in the absence of his legal representatives³.

It is not sufficient for one to sue on behalf of the others⁴, specially if the interest of each partner is in conflict with that of the other⁵. 'But if the partners are numerous, and it can be shewn that they are divisible into classes, and that all the individuals in each class have the same interest, then although the interest in each class conflicts with that of every other class, there seems to be no reason why, if such class is represented by one or two of the individuals composing it, a decree for a dissolution should not be made.'⁶ This is an exception to the rule that to every suit for a dissolution all the partners must individually be parties.

'If a partner has by virtue of an agreement between himself and his co-partners a right to assign his share in the partnership and to make the assignee a partner, the assignee will, by virtue of the agreement, acquire the rights of the assignor, and will therefore be entitled to an account from the other partners.'⁷

1. Sec 44, Ind. Part. Act, 1932.

2. Lindley on Partnership, 10th Edn., p. 552; *Evans v. Stokes*, 1 Keen 24; *Richardson v. Hastings*, (1843-44) 7 Beav. 301, 307; *Long v. Yonge*, (1830) 2 Sim. 369; *Paras Das v. Prem Chand*, A. I. R. 1935 Pat. 456; *Trikha Ram v. Durga Prashad*, A. I. R. 1934 Lah 459.

3. *Pulin Behari v. Mahendra*, (1921) 34 C. L. J. 405.

4. *Richardson v. Hastings*, *supra*; *Harvey v. Rignold*, 8 Beav. 343.

5. *Van Sandau v. Moore*, 1 Russ. 441.

6. Lindley on Partnership, 10th Edn., pp. 554, 555. Cf. *Wallworth v. Holt*, 4 M. & Cr. 619.

7. Lindley on Partnership, 10th Edn., p. 588; *Redmayne v. Forster*, (1866) 2 Eq. 467 (foreclosure action by an equitable mortgagee of a share in a

In the absence of any such agreement, the assignee of a partner's share cannot ordinarily require any accounts of the partnership transactions before dissolution¹. A receiver appointed at the instance of an assignee of the share of a partner cannot, any more than the assignee himself, sue the other partners for accounts before dissolution².

Where some parties form a partnership and the whole firm as a unit carries on dealings with another person in a sort of superior partnership, to an internal suit between the members of the partnership business for dissolution and accounts, that other person is not a necessary party³.

In a suit for dissolution as between partners, neither a sub-partner nor an assignee of a partner's interest⁴ is a necessary party. A suit by a sub-partner for an account of the partnership is maintainable against his partner and he must accept the account in the main partnership as settled between the partners of that partnership unless *mala fides* or mistake has been shown⁵.

- (ii) *Suit for an account without a claim for dissolution* : Suits for accounts between partners may be of two kinds, one for a general account of the dealings and transactions of the firm with a view to the winding up of the partnership, and another, for a more limited account directed to some particular transaction as to which a dispute has arisen⁶. There is no rule of law now in force that a partial account can be ordered only under exceptional circumstances⁷.

mining partnership in a case where the articles of partnership empowered any partner to sell or dispose of his shares).

1. *Dhanaji v. Gulab Chand*, A. I. R. 1925 Bom. 347; *Mulhia Chetty v. Veerappa Chetty*, (1929) I. L. R. 52 Mad. 509; *Gowa Petha v. N. H. Moos*, (1931) I. L. R. 10 Pat. 792.
2. *Gowa Petha v. N. H. Moos*, *supra*.
3. *Sathappa Chetty v. Subrahmanyam*, (1926-27) 31 C. W.N. 857 (P. C.)
4. *Chidambaram Chetty v. Karuthan*, (1916) 34 I. C. 543.
5. *Gidasingh v. Bicchand*, (1921) 60 I. C. 967.
6. *Binraj v. Kisanlal*, A. I. R. 1933 Nag. 127, 129.
7. *Karivenkata Reddi v. K. Narasayya*, (1909) I. L. R. 32 Mad. 76, followed in *Binraj v. Kisanlal*, *supra*, and explained in *Santhana Krishna Naidu v. Chellappa Aiyar*, A. I. R. 1927 Mad. 650; *Firm of Rai Bahadur Harji Mela v. Firm of Kirparam Brij Lal*, (1922) I. L. R. 2 Lah. 351 (suit by a partner excluded from the annual profits of a concern for an account and for his share of the profits).

Lindley has referred to the following three classes of cases in which actions for an account without a dissolution are more frequently common¹ :

- (a) Where one partner has sought to withhold from his co-partner the profit arising from some private transaction.
- (b) Where the partnership is for a term of years still unexpired, and one partner has sought to exclude or expel his co-partner or to drive him to a dissolution.
- (c) Where partnership has proved a failure, and the partners are too numerous to be made parties to his action and a limited account will result in justice to them all.

(iii) *Suit in which neither account nor dissolution is asked for :*

The question of parties in such suits will depend upon the nature of the right the plaintiff seeks to enforce. Thus, in a suit for obtaining payment of a certain aliquot proportion of a certain ascertained sum, the persons entitled to other aliquot shares of the fund are not necessary parties². If one partner had agreed separately with such of his co-partners that each should be interested in the profit and loss in a certain proportion, he may sue any of his co-partners to obtain payment of the proportion of the loss without making the others parties³. Suits for contribution are an important class of cases under this head. In a recent case the Judicial Committee have pointed out that between partners any right to contribution has reference *prima facie* at least to the ultimate balance appearing as the result of a general account. Relying on this *dictum* of the Judicial Committee, the Madras High Court in a recent case has pointed out that a partner can sue his co-partners for contribution if the right to contribution is in respect of a matter not involved in the general account⁵. This seems to be the correct principle

1. Lindley on Partnership, 10th Edn., p. 590.

2. *Smith v. Snow*, (1809) 3 Madd. 10.

3. *Hills v. Nash*, 1 Ph. 594 (for this would constitute as so many separate contracts).

4. *Arunachalam Chettiar v. Commissioner of Income Tax*, (1936) L. R. 63 I. A. 233.

5. *Chokalingam Chettiar v. Mayappa Chettiar*, (1938) 2 M. L. J. 287, 315, referring to *Sedgwick v. Daniell*, (1857) 2 H. & N. 319 and *Damodara v. Subraya*, (1917) 33 M. L. J. 509. For partners' liability to contribute towards losses, see Sec. 13, Ind. Part. Act, 1932,

and it can be stated in a more general form: One partner has not a right of action against another for the balance owing to him until after final settlement of accounts; but a partner may have a right of action against another for a debt which is independent of the partnership account¹. In some of the decisions this principle has not been kept strictly in view². In case of a promissory note executed by some of a number of partners for better securing payment of a debt owing by them and by their co-partners, it was held by the Madras High Court that one of the makers of the note who was compelled to pay the whole amount was entitled to sue each of the other makers of the note for his proportion of the sum so paid and it was pointed out that his right to sue the other partners who did not join in making the note has not been established in the English cases in the absence of special circumstances³. Suit by one partner against another for damages for breach of certain covenants in the partnership deed is not maintainable⁴.

B. *After dissolution of the partnership*: After dissolution of a partnership, any partner or his legal representatives, as the case may be, can sue the other partners including the legal representatives of a deceased partner⁵ for the taking of partnership accounts and winding up of the affairs of the partnership⁶. Even where the surviving partners alienate any property, the proper remedy of the personal representative of the deceased partner is to ask for the taking of a general partnership account and not to sue for his share in the alienated property⁷. If upon taking the partnership account the surviving partners are to get any sum out of the estate of the deceased

1. Hals., 2nd. Edn. Vol. 24, p. 480, followed in *Ghisulal v. Gumbhirmal*, (1935-36) 39 C. W. N. 606, 613; *Durga Prasanno v. Raghu Nath*, (1899) I. L. R. 26 Cal. 254, 258; *Thirunarukkarasu v. Muthukrishnan*, (1931) M. W. N. 467.
2. *Of. Ellappa Mudaliar v. Swaminatha Mudaliar*, A. I. R. 1933 Mad. 755.
3. *Damodara v. Subraya*, (1913) 33 M. L. J. 509.
4. *Santhana Krishna Naidu v. Chellappa Aiyar*, A. I. R. 1927 Mad. 650.
5. For limit of the liability of the legal representatives to render accounts, see *Kumeda Charun v. Asutosh*, (1912-13) 17 C. W. N. 5.
6. *Gopal Chetty v. Vijayraghavachariar*, (1922) I. L. R. 45 Mad. 378; *Ramaswami v. Muthukaruppan*, A.I.R. 1925 Mad. 737.
7. *Sugan Chand v. Lukhe*, A. I. R. 1938 Nag, 182,

partner, they may as creditors bring an action for administration of his estate¹.

If a partner without the consent of his co-partner assigns his share to an outsider after dissolution of the firm, the assignee can bring an action for the winding up of the partnership affairs for the purpose of ascertaining and receiving the assignor's share in the partnership. To such a suit the assigning partner who is under liability to render accounts in a necessary party². Although the assignee of a share in a partnership is not, during the continuance of a partnership, a necessary party, to an action by one partner against the other partners for an account, he may become so after dissolution of the partnership³.

Where a firm is dissolved upon the insolvency of a partner, the assignee or the receiver in insolvency, as the case may be, can sue and be sued by the solvent partner for account⁴.

C. *Where there is a minor who is admitted to the benefits of a partnership*: In England a minor may be a partner⁵, although, generally speaking, he incurs no liability and cannot be sued for debts of the firm during his minority. In British India, a minor cannot be a partner⁶, but with the consent of all the partners for the time being, he may be admitted to the benefits of a partnership⁷. He is not entitled to sue the partners for an account or payment of the share of the property or profits of the firm⁸. At any time within six months of his attaining majority, or of his obtaining knowledge that he had been admitted to the benefits of the partnership, whichever date is later, such person may give public notice that he has elected to become or that he has elected not to become a partner in the firm. If he fails to give such notice he shall become a partner in the firm on the expiry of the said six months⁹. Where such person elects not to become a partner he shall be entitled

1. *Robinson v. Alexander*, 2 Cl. & Fin. 717.
2. *Lindley on Partnership*, 10th Edn., p. 552.
3. *Hals.*, 2nd. Edn. Vol. 24, Art. 903, p. 473.
4. *Lindley on Partnership*, 10th Edn. p. 583.
5. *In Re. A. and M.*, (1926) 1 Ch. 274 (where the only two partners were infants).
6. *Sanyasi Charan v. Krishnadhan*, (1922) L. R. 49 I. A. 108.
7. Sec. 30(1), Ind. Part. Act, 1932.
8. Sec. 30(4), Ind. Part. Act, 1932.
9. Sec. 30(5), Ind. Part. Act, 1932.

to sue the partners for the purpose of his share of the property and profits¹.

2. *Suits between persons who have agreed to become partners* : If a person agrees to become a partner he is liable to be sued for damages for breach of the agreement². If a member of a firm agrees to introduce a stranger into the firm, the latter may sue the former for damages for breach of the agreement³. To such a suit the other members are not necessary parties. Where by the Articles of partnership between two partners there is a covenant that they and their respective executors and administrators would continue partners for twenty-one years, determinable upon the death of both partners unless their respective representatives should agree to continue the business for the residue of the term, and there being no provision in the Articles for the case of the death of either partner during the term, and one of the partners died during the term, and his executors and administrators refused to be concerned in the business with the surviving partner and called for an immediate dissolution, it was held that the executors repudiating the partnership were entitled to a dissolution ; but that such relief would be given to them in equity, subject to any legal right which the surviving partner had, to recover damages against the executors of the deceased partner for a breach of the covenants contained in the articles⁴.

3. *Suits by persons induced by fraud to become partners* : If a person has been induced by fraud to become a partner and if the fraud was committed by the other partner, the person defrauded may either affirm or rescind the contract, but in any case he is entitled

1. Sec. 30(7), Ind. Part Act, 1932.

2. *Andrews v. Garstin*, 10 C. B.N.S. 444. (The defence in this case was that the plaintiff carried on trade in partnership with one S. and he acted with fraud and dishonesty with his said partner, which fraudulent and dishonest acts were unknown to the defendant at the time of his entering into the agreement—wherefore the defendant declined to carry into effect the said agreement. *Held*, that this plea afforded no answer to the action).

3. *McNeill v. Reid*, (1833) 9 Bing. 68. (The defence in this case was that the plaintiff was aware of the fact that persons were already in partnership with the defendant, consequently the defendant could not, without the consent of such persons, force a stranger into the firm. *Held* : This is no answer in the mouth of the defendant, for he should have secured the consent of his partners before he ventured to enter into such a contract).

4. *Dawns v. Collins*, (1849) 6 Hare 418.

to damages for any loss which he may have sustained by reason of the fraud¹. But if the fraud has been committed by a third person, then the person defrauded cannot rescind the contract; he can only sue the person who defrauded him for damages².

4. Suits between partners and non-partners :

(A) *Where no change in the firm has occurred* : As already pointed out, as a general rule, in suits by partners, all partners must join as plaintiffs and those who refuse to join as co-plaintiffs must be joined as co-defendants. Any partner may sue in the name of the firm or in the name of himself and his co-partners without their consent³, and any partner may defend an action brought against the firm without the consent of his co-partners⁴ provided he indemnifies the firm against the consequences of his so doing. In suits by non-partners against partners, all the partners, however, need not be joined as defendants, in as much as in India, the liability of the partners for all acts of the firm is joint and several⁵. But this general rule has its exceptions, or apparent exceptions, and they relate to suits *ex contractu*, *ex delicto*, and suits for enforcement of equitable rights. We may deal under this head with two classes of cases : (1) Suits *ex contractu* ; (2) Suits *ex delicto* .

(1) *Suits ex contractu* : The subject can be classified under two sub-heads :

(a) Negotiable instruments.

(b) Other contracts.

(a) *Negotiable instruments : Suits by the firm* :—If a promissory note is executed in favour of a firm in the firm name, the persons composing the firm when the note was executed ought to be plaintiffs⁶. But if a promissory note is executed in favour of one of the partners only, such one is the proper person to sue on the note⁷. The indorsee from such person

1. Lindley on Partnership, 10th Edn., pp. 573-575. For effect of rescission, read Sec. 52, Ind. Part. Act. 1932; cf. *Small v. Attwood*, Younge 507; *McConnel v. Wright*, (1903) 1 Ch. 546.
2. Lindley on Partnership, 10th Edn., p. 573.
3. *Whitehead v. Hughes*, 2 Cr. & M. 318; *Bhadreswar Coal Supply Co. v. Satish*, (1935-36) 40 C. W. N. 824.
4. *Goodman v. De Beauvoir*, 12 Jur. 989 and 1037.
5. Sec. 25, Ind. Part. Act, 1932.
6. Lindley on Partnership, 10th Edn., p. 348.
7. *Chettyar, K. S. V. (Firm) v. Mahoo*, A. I. R. 1934 Rang. 280; *Bawden v. Howell*, 3 Man. & G. 638.

is also entitled in his own name to receive or recover the amount due thereon. But although the person in whose favour a promissory note is executed is the proper person to sue on the note, a suit brought in the name of the firm of which such person is a member will not be thrown out¹.

If the only or last endorsement upon a bill or note is an indorsement in blank, any lawful holder of the bill or note may sue upon it, unless he has obtained the bill by fraud, or unless the bill or note has come to his hands with a conditional right only². Since the proper persons to sue upon a bill of exchange or a promissory note are only those named in the instrument as drawers, payees or indorsees, they are entitled to do so, notwithstanding the fact that some of them are not in fact partners. Thus, in a case where a bill of exchange was drawn by the name, style and firm of G. & H., and G. alone as the drawer and payee of the bill sued the acceptor, it appeared that G. traded in the firm name of G. & H. and that a man of the name of H. was employed as the clerk of G. but was held out to the world as partner—*Held*, that H. ought to have been joined as a co-plaintiff, in that he was to be considered in all respects a partner as between himself and the rest of the world³.

But if the name of a person is mentioned in the note as promisee by mistake, the person intended as the real promisee of the note can maintain a suit on the note and it is not necessary for him to bring a suit for rectification of the instrument before bringing a suit on the note⁴. This is distinguishable from the class of cases where what is sought to be proved is not that the parties intended that the benefit of the pro-note should accrue to a person not named in the pro-note, but that, by the promisee named in the pro-note,

1. *Brojo Lal v. Budh Nath*, (1928) I. L. R. 55 Cal. 551, 558, followed in *Sewa Ram v. Hoti Lal*, (1931) I. L. R. 53 All. 5. The view taken in that case that a suit on a promissory note can be maintained by the true owner and not merely by the holder of the note has been dissented from in *Harkishore v. Gura Mia*, (1931) I. L. R. 58 Cal. 752.
2. Sec. 54 Neg. Inst. Act; *Law v. Parnell*, 7 C. B. (N. S.) 282.
3. *Guidon v. Robson*, 2 Camp. 302.
4. *Gopal Row v. Veerappan*, (1912) 13 I. C. 95 (Mad.), a case where the plaintiff's father was dead and his name was inserted by mistake, the parties intending all the time that the plaintiff was to be the promisee.

the real promisee was intended.¹ Thus the holder of a promissory note, though merely a benamdar, can maintain a suit thereon². A suit by the true owner is not maintainable, even if the holder be a party thereto and he admits that he is merely a benamdar of the plaintiff. The true owner may however bring a suit on the consideration.³

- (a) *Negotiable instruments : Suits against the firm* : In this connection the distinction between trading and non-trading firms should be borne in mind. A firm is a trading firm if its business consists in buying and selling which are of a commercial nature. The business of a non-trading firm is not of a commercial nature, e. g., where it is a professional business, or even the business of a farmer or a quarry worker where there is no buying or selling of goods, or an auctioneer⁴. Any partner in a trading firm has an implied authority to borrow money and for that purpose "to draw, make, sign, indorse, accept, transfer, negotiate and procure to be discounted, promissory notes, bills of exchange, cheques and other negotiable paper, in the name and on account of the partnership". This authority is subject to two limitations : 'His acts beyond the business will not bind the firm. Neither will his acts done in violation of his duty to the firm bind it, when the other party to the transaction is cognizant of, or co-operates in such breach of duty'⁵.

In case of trading partnerships, the drawing of a bill by one partner in the recognised trading name binds even the secret partners who were not known or named

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1. *Subba Narayan Vathiayar v. Ramaswami*, (1907) I. L. R. 30 Mad 88, referred to in *Gopal Row v. Veerappan*, (1912) 13 I. C. 95 (Mad.).
 2. *Raghubir Mahto v. Ramasray*, A. I. R. 1939 Pat. 347.
 3. *Harkishore v. Gura Miya*, ((1931) I.L.R. 58 Cal. 752. dissenting from *Brojo Lal Saha v. Budhnath*, (1928) I. L. R. 55 Cal. 551 ; Cf. *Surajman Prasad v. Sadanand*, (1912) I. L. R. 11. Pat. 616.
 4. *Saremal Punamchand. v. Punamchand*, (1924) I. L. R. 48 Bom. 176, 182, and the English cases cited.
 5. *Bank of Australasia v. Briellat*, (1847) 6 Moo. P.C. 152, 193, 194, followed in *Saremal Punamchand v. Punamchand*, *supra* ; *Ram Ohandra v. Kasem Khan*, (1923-24) 28 C. W. N. 824 ; *Moti Lal v. Unao Commercial Bank*, (1930) I. L. R. 52 All. 851 ; *Bunorsee Dass v. Gholam Hossein*, 13 Moo. I. A. 358 (case of a transaction not within the scope of the partnership) ; *Kirk v. Blurton*, (1841) 9 M. & W. 284 ; *Maung Pe Thaung v. Toungo Timber Co.*, (1932) I. L. R. 10 Rang. 204.

at the time, unless however it were known to the holder of the bill at the time he received it that the transaction was the private affair of a single partner¹; and 'it is immaterial that the act of the partner is in fraud of or inconsistent with an agreement with the other partners, provided it is done ostensibly on behalf of the firm and within the scope of his authority as a partner'². If a person dealing with an individual partner has reason to think that what is done in the partnership name is done for private purposes, he is put upon enquiry to ascertain the extent of the partner's authority³.

The implied authority of one partner, to bind another by signing bills of exchange and promissory notes in their joint names may be rebutted by express notice to the party taking such security from one of them and the other would not be liable for it though it was represented to the holder by the partner signing such security that the money advanced on it was realised for the purpose of being applied to the payment of partnership debts and that it was in fact so applied⁴.

In no case, the firm would be liable if the promissory note or bill of exchange mentions nowhere in it the name of the firm⁵. No person is liable on a negotiable instrument unless his name appears upon the instrument in

1. *Motilal v. Unao Commercial Bank*, (1930) I. L. R. 52 All. 581; *Beckham v. Drake*, (1847) 11 M. & W. 315; *Ram Chandra v. Kasam Khan*, (1923-24) 28 C. W. N. 824.
2. Chitty on Contracts, 19th Edn., 476; *Hambro v. Burnand*, (1904) 2 K. B. 10.
3. *Re Riches & Marshall's Trust Deed*, (1865) 4 De G. J. & Sm. 581 (In this case a partner drew bills in the name of a partnership firm and obtained acceptances to them from various persons by fraudulent misrepresentation and then indorsed the bills, so accepted, with the name of the firm and again indorsed them over to himself, *Held*: the partner's private bankers who discounted the bills, having full notice of the fact that their customer was using partnership property for his private purposes, cannot be allowed to prove in bankruptcy, for the loss they have sustained and on the fraudulent acceptance against the estate of the surviving partners). Cf. *Kirk v. Blurton*, (1841) 9 M. & W. 284.
4. *Gallway (Lord) v. Mathew & Smithson*, (1808) 10 East. 264.
5. *Kwong v. C. A. M. A. L. Firm*, (1933) 144 I. C. 866 (Rang).

such a way that upon a fair interpretation of the instrument his name is the real name of the person liable on the bill ; and it is not open to the plaintiff to make any partner other than the signatory liable on the plea that the signatory was acting for an undisclosed principal¹. But although a partner whose name does not appear on the bill or note may not be sued thereon, he will be liable in an action on the debt, if he agreed to make himself liable for the debt or if his partner who was a party to the instrument borrowed for the benefit of the joint trade. But the indorsee of the note cannot recover against the partner not executing the note².

In case of non-trading partnerships, one partner cannot bind his co-partner by bills except by express authority or by evidence that such power is usually vested in such partner. Therefore, a solicitor, a partner with another, cannot without express authority of his co-partner, bind the latter by a bill or note³. The rule is the same in the case of partners carrying on business as brokers⁴. So in the case of a mining⁵ or farming⁶ concern, bills accepted by one partner without express authority of his co-partners do not bind the firm. This rule is applicable to the business of auctioneers, but if the partnership articles provide for purchases and sales of goods and property and also the drawing and accepting of bills in the course of the partnership business, the firm of auctioneers will be liable on a bill accepted by a partner in respect of a partnership transaction.⁷

1. *Sadusuk Janki Das v. Maharaja Sir Kishan Pershad*, (1918-19) L. R. 46 I. A. 33; *Somasundaram v. Krishnamurti*, (1907) 17 M. L. J. 126; cf. *Brojo Lal v. Budh Nath* (1923) I. L. R. 55 Cal. 551, 559, dissented from in *Harkishore v. Gura Mia*, (1930-31) 35 C. W. N. 53, 57.
2. *Dickinson v. Valpy*, (1829) 10 B. & C. 128, 136, 137, followed in *Garland v. Jacomb*, (1873) L. R. 8 Eq. 216, 219.
3. *Hedley v. Bainbridge*, (1842) 3 Q. B. 316; *Forster v. Mackreth*, (1867) L. R. 2 Ex. 163.
4. *Yates v. Dalton*, (1858) 28 L. J. Exch. 69.
5. *Dickinson v. Valpy*, (1829) 10 B. & C. 128, 136, 137; Cf. *Brown v. Kidger*, (1858) 3 H. & N. 853, 859.
6. *Greenslade v. Dower*, (1828) 7 B. & C. 635.
7. *Wheatley v. Smithers*, (1907) 2 K. B. 684 C. A.

If a member of a non-mercantile firm has assented to a bill being drawn by his partner in the firm's name, payable to the order of the firm, he impliedly authorises its endorsement as if the business of the firm required the drawing and indorsing the bills.¹

(b) *Other Contracts : Suits by the firm :* Where a contract is made by a partner in his own name, the firm may sue upon it, provided it can show that the contract is for and on behalf, and for the benefit, of the firm. It makes no difference if the partner entering into the contract has for the purposes of the agreement provided money out of his own pocket². In such a case, the partner with whom the contract has been personally made is also entitled to sue upon that contract in his own name without joining the co-partners as plaintiffs, although in such a suit the benefit of the contract would result to the partnership firm. This right to sue is based upon the well-recognised rule that an agent having an interest in the contract which he has entered into on behalf of the principal is entitled to sue in his own name.³

(b) *Other Contracts : Suits against the firm :* As a general rule, all partners are liable for acts done and obligations incurred by one partner in the course of his business and within the scope of his authority.⁴ Thus if goods are supplied to the partnership at the request of one of the partners acting within the scope of his authority, express or

1. *Garland v. Jacomb*, (1873) L. R. 8 Eq. 216, 219, referring to *Lewis v. Reilly*, 1 Q. B. 349.
2. *Makhanlal v. Basudharanjan*, (1934) I. L. R. 61 Cal. 504. Note : The old English rule relating to contracts under seal, namely, the person or persons with whom such contracts are expressly entered into are alone entitled to sue upon them, does not apply to India : *Beckham v. Drake*, (1841) 9 M. & W. 79 ; *Chinnaramanuja v. Padmanabha*, (1896) I. L. R. 19 Mad. 471, 476 ; cf. *Hirachand v. Jayagopal*, (1925) I. L. R. 49 Bom. 245, 258.
3. *Agais v. Forbes*, (1861) 14 Moore P. C. 160, followed in *Kapurji v. Pan-naji*, (1929) I. L. R. 53 Bom. 110 ; *Coorla Spinning v. Vallabhdas*, A. I. R. 1925 Bom. 547, following *Williams v. Millington*, (1788) 1 Hy. Bl. 81 ; *Durga Prasad v. Cawnpore Flour Mills*, A. I. R. 1929 Oudh 417.
4. Secs. 18 and 19, Ind. Part. Act, 1932. Note that Sec. 19 is subject to the provisions of Sec. 22 of the Act.

implied, all the partners are liable for the value of them,¹ notwithstanding any misapplication of the goods by that partner.² Any person dealing with the firm is entitled to presume that a partner has the usual implied authority and to bind the firm notwithstanding any restriction agreed on among partners, unless he has notice of that restriction³. A partner has authority in an emergency to bind the firm, *e. g.*, he may borrow money on the firm's credit to enable the business to be carried on⁴.

The other partners are not liable for acts done and obligations incurred by one partner without authority unless they have ratified the unauthorised acts of their co-partner or have by words or conduct induced third persons to believe that the acts done and obligations incurred by their co-partner to such third persons were within the scope of his authority.⁵ As regards the liability of partners in respect of contracts not binding on them but of which they have had the benefit, the rule is that the use of the money borrowed by a partner in his own name by the firm is at the most, evidence, but not conclusive, to show that the borrowing was in fact on account of the firm.⁶ The ultimate test of the liability of the firm would be, Did the firm by one of its partners or otherwise enter into the contract? If the contract of loan is with one partner and not with the firm, as a general rule, the lender has no right to make the firm liable although the money borrowed was applied for its benefit.⁷ 'Where, how-

1. *Glenester v. Hunter*, (1831) 5 C. & P. 62; *Barton v. Hanson*, 2 Camp. 97; *Karmali Abdulla v. Karimji Jiwani*, (1915) I. L. R. 39 Bom. 261, 276 (P. C.).
2. *Bond v. Gibson*, (1801) 1 Camp. 185; Sec. 27, Ind. Part. Act, 1932.
3. Sec. 20, Ind. Part. Act.
4. Sec. 21, Ind. Part. Act. Note that the words of this section are much too comprehensive to allow any limitations on the partner's authority in an emergency.
5. Cf. Sec. 237, Ind. Cont. Act. The personal liability of a partner who gave the creditor reasonable cause to believe that the acting partner had authority, is in the nature of an individual estoppel and not peculiar to the law of partnership. Query: Will this estoppel prevail against Sec. 22 of the Ind. Part. Act 1932?
6. *Ram Ohandra Sahu v. Kasem Khan*, (1923-24) 28 C. W. N. 824.
7. *Bevan v. Lewis*, 1 Sim. 378; *Smith v. Craven*, 1 Cr. & J. 500; *Ricketts v. Bennett*, 4 C. B. 686. Cf. *Gordhandas v. Raghubirdasji*, (1932) 34 Bom.

ever, money borrowed by a partner in the firm name but without authority of his co-partners has been applied in paying off debts of the firm, the lender is entitled in equity to repayment by the firm of the amount which he can show to have been so applied even though he knew that the money was borrowed without authority ; and the same rule applies of money *bona fide* borrowed and applied for any other legitimate purposes of this firm. This doctrine is founded partly on the right of the lender to stand in equity in the place of those creditors of the firm whose claims have been paid off by his money ; and partly on the right of the borrowing partner to be indemnified by the firm against liabilities *bona fide* incurred by him for the legitimate purpose of relieving the firm of its debts or carrying on its business.¹

In order to bind a firm, an act or instrument done or executed by a partner or other person on behalf of a firm shall be done or executed in the firm name or in any other manner expressing or implying an intention to bind the firm.² This rule of course does not affect any provision of law relating to the execution or registration of deeds or documents, or relating to negotiable instruments which are

L. R. 1137 (case of a non-trading partnership) ; *Kasam v. Narayan*, A. I. R. 1930 Nag. 42 ; *Kush Kanta v. Chandra Kanta*, (1923-24) 28. C.W.N. 1041, 1043, 1045. Cf. Sec. 22, Ind. Part. Act, 1932.

1. Sec. 22, Ind. Part. Act, 1932, which is new. Cf. Sec. 6 of the Eng. Part. Act, 1890, to which there is a *proviso*, that the section shall not affect any general rule of law relating to the execution of deeds or negotiable instruments which has been omitted from the Indian Act.
2. This result does not follow from Sec. 6 of the Eng. Part. Act, 1890, which runs as follows :—

“An act or instrument relating to the business of the firm and done or executed in the firm-name or in any other manner showing an intention to bind the firm, by any person thereto authorised, whether a partner or not, is binding on the firm and all the partners. Provided that this section shall not affect any general rule of law relating to the execution of deeds or negotiable instruments.”

In the words of the Special Committee on the Indian Partnership bill, “The English model says that certain acts if done in a certain way bind the firm. Clause 22 of the Indian Bill says that those acts do not bind the firm unless they are done in a certain way.” The verbal variations in Sec. 22 of the Ind. Part. Act are not merely variations in form but in substance.

governed by the Negotiable Instruments Act, but its effect would be that an instrument, other than a negotiable instrument, to be binding on the firm must purport to be the deed of all the partners or must imply an intention to bind the firm, although it was executed by only one of the partners. A deed will not be binding on the firm if it does not express or imply an intention to bind the firm.

Thus, a mortgage ¹ or lease ² or any other contract ³ executed by a partner will bind the firm, only if it appears, either expressly or by implication, from the deed itself, that it was executed for, or on behalf of the partnership, or for partnership purposes.

There is much scope for judicial interpretation of section 22 of the Indian Partnership Act, 1932, as it is worded, and judicial determination of its effect on the liability of partners on grounds of individual estoppel arising out of ratification of unauthorised acts or inducing third parties to believe that the partner dealing with them had authority to incur the obligations on behalf of the firm. It will be a matter for judicial determination if oral evidence would be admissible to show that the party liable on the contract contracted for himself and as the agent of his copartners and that such persons are liable to be sued on the contract although there is no allusion to them at all in the deed, and the deed is not in such form as to express or imply an intention to bind the firm.

(2) *Suits ex delicto :*

In suits by partners for torts, the general rule is, that all partners ought to join where a joint damage accrues to them. In other words,

1. Cf. *Juggeewundas v. Ramdas*, (1841) 2 M. I. A. 487; *Asan Kani v. Soma-sundaram*, (1908) I. L. R. 31 Mad. 206. Cf. *Jafferli v. Standard Bank of S. Africa*, (1928) 47 C. L. J. 292. (These and the two following cases were decided before the Ind. Part. Act, 1932, was enacted, but the facts of these cases fall within the requirements of Sec. 22 of the Act).
2. Cf. *Chinnaramanua v. Padmanabha*, (1896) I. L. R. 19 Mad. 471, 476.
3. *Mathura Nath v. Bageswari*, (1927) 46 C. L. J. 362, 366 (case decided under Sec. 251 read with Sec. 231 of the Ind. Cont. Act. In this case a certain elephant was hired by a partner for the purpose of employing him in the partnership business. The other partner who was undisclosed was held liable.)

where the interest is joint, all may join in the action¹. As illustration of this doctrine we may consider suits for libel. If the libel is on the firm the suit can be brought by the firm. It may well be that a statement is a libel both on a firm and on an individual partner of a firm ; for example, where it is alleged that one of the partners in the firm is insolvent. In such a case the partner and the firm have separate causes of action which may be properly joined.² If one partner is libelled and the libel cannot be imputed to the firm, the suit for the libel should be brought in the name in the individual partner who is aggrieved.³

In suits against partners for torts, the general rule governing the liability of a firm for a wrongful act of a partner is contained in section 26 of the Indian Partnership Act, 1932, which runs as follows :—

“Where, by the wrongful act or omission of a partner acting in the ordinary course of the business of a firm, or with the authority of his partners, loss or injury is caused to any third party, or any penalty is incurred, the firm is liable therefor to the same extent as the partner.”

This section is based upon the principle of agency according to which everyone is answerable for the acts or defaults of his servants and agents in the course of their employments. A firm will be liable if the tort complained of is imputable to a firm and a suit in respect of it may be brought against all or any of its partners. It follows that if a wrong is extraneous to the partnership business the other partners are not liable. In one case the Bombay High Court held that if one partner maliciously prosecutes a person the other members of the firm are not liable in damages unless all the members are in some way or other privy to the malicious prosecution.⁴ But although the decision may be correct upon the particular facts of that case, it must not be supposed to lay down the general test. If a malicious prosecution is started by a partner and if the prosecutor was acting in the interest of the firm and not merely for his private purposes, then, however perverse or erroneous that prosecution may be, the other partners are liable whether at the time they knew anything about the prosecution or not.⁵

1. *Forster v. Lawson*, (1826) 3 Bing. 452.

2. O. II, r. 3, C. P. Code ; *Forster v. Lawson*, *supra*.

3. *Solomons v. Medex*, 1 Stark. 191.

4. *Ahmedbhai v. Framji*, (1904) I. L. R. 28 Bom. 226.

5. See Pollock & Mullah's Ind. Part. Act, 1st Edn., p. 71 (foot-note), relying on *Citizens Life Assurance Co. v. Brown*, (1904) A. C. 423.

A person who holds himself out as a partner in a firm is not liable for tort committed by an actual partner of that firm.¹

B. *Where a change in the firm has occurred* : A change in the members of a firm may take place by reason of either the introduction of a new partner, or the retirement, death or bankruptcy of an old one.

- (i) *By retirement* : The word "retire" is properly confined to cases where a partner withdraws from a firm and the remaining partners continue to carry on the business of the firm without dissolution of partnership as between them. It does not cover the case where a partner withdraws from a firm by dissolving it, which should properly be referred to as a dissolution and not as a retirement².

A retiring partner is liable to any third party for acts of the firm done before his retirement. But such liability may be discharged by an agreement made by him with such third party and the partners of the reconstituted firm, and such agreement may be implied by a course of dealing between such third party and the reconstituted firm after he had knowledge of the retirement³.

Notwithstanding the retirement of a partner from a firm, he and the partners continue to be liable as partners to third parties for any act done by any of them which would have been an act of the firm if done before the retirement until public notice is given of the retirement.⁴

A retired partner is however not liable to any third party who deals with the firm without knowing that he was a partner⁵.

'The retirement of a partner in no way affects his rights against or obligations to strangers in respect of past transactions. Subject, thereto, a retired partner ought to join as a defendant, in every action to which, had he not retired,

1. *Smith v. Belley*, (1891) 2 K. B. 403.
2. Note of Special Committee under Sec. 32, Ind. Part. Act, 1932.
3. Sec. 32 (2), Ind. Part. Act, 1932.
4. Sec. 32 (3), Ind. Part. Act, 1932 (It is not necessary to give separate notices, as under the English law, to old customers). Notices under Sec. 32 (4) may be given by the retired partner or by any partner of the reconstituted firm.
5. *Proviso* to Sec. 32 (3), Ind. Part. Act, 1932.

he would have been a necessary party. This rule holds good even where a contract is entered into before and the breach of it occurs after the retirement of a partner¹.

- (ii) *By introduction of a new partner*: An incoming partner is not liable for any act of the firm done before he became a partner². He is liable for the future debts of the firm³. The new firm, including the new partner, may agree to assume liability to pay the existing debts of the old firm and the creditors of the old firm may agree to accept the new firm as their debtor and discharge the old one⁴. 'If there is any such agreement, the incoming partner will be bound by it, but his liabilities in respect of the old debts will attach by virtue of the new agreement, and not by reason of his having become a partner.'⁵ 'It must be borne in mind, that even if an incoming partner agrees with his co-partners that the debts of the old shall be taken by the new firm, this, although valid and binding between the partners, is, as regards strangers, *res inter alios acta*, and does not confer upon them any right to fix the old debts on the new partners⁶.'

'If on the introduction of a new partner or the retirement of an old partner the debts due to the old firm are assigned to the new firm, the new firm can sue in respect of them, either in its mercantile name or in the names of its members⁷.

- (iii) *By death*: Subject to contract between the partner, a firm is dissolved, amongst other grounds, by the death of a partner⁸. This rule shall apply even where the partnership is for a period fixed⁹.

Where under a contract between the partners the firm is not dissolved by the death of a partner, the estate of a deceased

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1. Lindley on Partnership, 10th Edn., p. 360.
 2. Sec. 31 (2), Ind. Part. Act, 1932.
 3. Sec. 25, Ind. Part. Act, 1932.
 4. *Rolfe v. Flower*, (1885) L. R. 1 P. C. 27; *Ex parte Whitmore*, 3 Deac. 365.
 5. Lindley on Partnership, 10th Edn., p. 268.
 6. Lindley on Partnership, 10th Edn., p. 268; *Russa Engineering Works v. Kanara Transport Co.*, (1926) I. L. R. 49 Mad. 930.
 7. Lindley on Partnership, 10th Edn., p. 359.
 8. Sec. 42, Ind. Part. Act, 1932.
 9. *Sayyad Abdul Hawk v. Vikuntam*, A. I. R. 1927 Mad. 491.

partner is not liable for any act of the firm done after his death¹.

The rule that "where a firm constituted for a fixed term continues to carry on business after the expiry of that term, the mutual rights and duties of partners remain the same as they were before the expiry of that term so far as they may be consistent with the incidents of partnership at will", has been substantially acted upon in the case of a partnership business being continued by the surviving partners after the death of a member of the original firm².

(iv) *By insolvency*: Sec. 34 of the Indian Partnership Act provides as follows :

"(1) Where a partner in a firm is adjudicated an insolvent he ceases to be a partner on the date on which the order of adjudication is made, whether or not the firm is thereby dissolved."

"(2) Where under a contract between the partners the firm is not dissolved by the adjudication of a partner as an insolvent, the estate of a partner so adjudicated is not liable for any act of the firm and the firm is not liable for any act of the insolvent, done after the date on which the order of adjudication is made."

See "Insolvent" under "Classes of Persons", pp. 185, 186.

C. *Where there is a secret or dormant partner* : "Dormant partners may join as plaintiffs in an action on a contract entered into on behalf of the firm of which they are members. But a dormant partner never need be joined as a co-plaintiff in an action on a contract entered into with the firm or with one of its members"³.

"Dormant partners are liable on all contracts entered into on behalf of the firm to which they belong, and whether such a contract is written or unwritten, express or implied, it is clear that a dormant partner may be sued upon it. Dormant partners, moreover, ought to be made co-defendants in an action on a contract binding the firm"⁴.

The estate of a partner who, not having been known to the person dealing with the firm to be a partner, retires from the firm,

1. Sec. 35, Ind. Part. Act, 1932. Cf. Sec. 45.

2. *King v. Chuck*, (1853) 17 Beav. 325 ; Lindley on Partnership, 10th Edn., p. 486 ; Pollock & Mulla's Partnership Act, p. 50.

3. Lindley on Partnership, 10th Edn., pp. 349, 350.

4. Lindley on Partnership, 10th Edn., pp. 354, 355, 239.

is not liable for acts done after the date on which he ceases to be a partner¹.

D. *Where there is a nominal partner*: In England the position of nominal partners is stated thus: "Nominal partners, that is, persons who are not entitled to share the profits of the firm, but whose names appear and are used as if they were, never need join as plaintiffs in an action on an ordinary contract not under seal. If a partner retires, and leaves his name in the firm, it is not necessary that he should be a co-plaintiff in an action brought by the continuing partners in respect of what has happened since the retirement. But if a nominal partner's name is on a bill of exchange or promissory note, he ought to be a party to the action brought upon it; and the same rule applies to actions on contracts under seal"².

It has already been pointed out that the old English rule relating to contracts under seal, namely, the person or persons with whom such contracts are expressly entered into are alone entitled to sue upon them, does not apply to India. Subject to this exception the English rule above set forth shall apply to India.

E. *Where there is a sub-partner*: "A sub-partnership is as it were, a partnership within a partnership. If several persons are partners and one of them agrees to share the profits derived by him with a stranger, this agreement does not make the stranger a partner in the original firm. The result of such an agreement is to constitute what is called a sub-partnership"³.

A sub-partner is not liable to be sued by the creditors of the firm by reason only of his participation in the profits thereof⁴.

F. *Where there are minors who are admitted to the benefits of the partnership*: Where a minor is admitted to the benefits of a partnership, his share is liable for the acts of the firm, but he is not personally liable for any such acts⁵. Where such minor on attaining majority becomes a partner under circumstances specified in

1. *Proviso* to Sec. 45, Ind. Part. Act, 1932.

2. Lindley on Partnership, 10th Edn., p. 350.

3. Lindley on Partnership, 10th Edn., p. 66.

4. Lindley on Partnership, 10th Edn., pp. 66, 67.

5. Sec. 30 (3), Ind. Part. Act, 1932; *Lackmi Narain v. Beni Ram*, (1931) I. L. R. 53 All. 479 (The section applies where a minor is admitted to the benefits of a subsisting partnership); cf. *Jafferli v. Standard Bank of S. Africa*, A.I.R. 1928 P. C. 135.

Sec. 30(5), Ind. Part. Act, 1932, he becomes personally liable to third parties for all acts of the firm done since he was admitted to the benefits of the partnership¹.

G. *Where a member of a Hindu joint family representing the family is a partner* : A Karta of a Hindu joint family may enter into a partnership with strangers, acting for the joint family and employing the joint family assets². The Karta is accountable to the family but the partnership is exclusively between him and the stranger partners. If the Karta died, the partnership would be dissolved on his death. The surviving members of the family cannot claim to continue as partners³.

Where on a dissolution the managing member partner has entered into an arrangement prejudicial to the interests of his family, the junior coparceners in that family may take steps to protect the interests of their family and for the realisation of what represents the share of their managing member in the assets of the dissolved partnership⁴.

H. *Where the firm is dissolved* : Section 45, Ind. Part. Act, 1932, provides—

“(1) Notwithstanding the dissolution of a firm, the partners continue to be liable as such to third parties for any act done by any of them which would have been an act of the firm if done before the dissolution, until public notice is given of the dissolution : Provided that the estate of a partner who dies, or who is adjudicated an insolvent, or of a partner who, not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable under this section for acts done after the date on which he ceases to be a partner.”

“(2) Notices under sub-section (1) may be given by any partner.”

Where there has been dissolution to the knowledge of the plaintiff, he cannot make an outgoing partner liable unless he served the writ of summons upon him⁵.

“(1) Notwithstanding anything contained in section 45 of the Indian Contract Act, 1872, where two or more persons may sue or be sued in the name of a firm under the foregoing provisions and any of such persons dies, whether before the institution or during the

1. Sec. 30 (6), Ind. Part. Act, 1932.

2. *Ramlal v. Lachmichand*, (1861) 1 Bom. H. C. app. 11.

3. *Sokkanadha v. Sokkanadha*, (1905) I. L. R. 28 Mad. 344.

4. *Venkataramana v. Varahalu*, A.I.R. 1940 Mad. 308.

5. O. XXX, r. 3 (*Proviso*), C. P. Code.

pendency of any suit, it shall not be necessary to join the legal representative of the deceased as a party to the suit.

(2) Nothing in sub-rule (1) shall limit or otherwise affect any right which the legal representative of the deceased may have—

(a) to apply to be made a party to the suit, or

(b) to enforce any claim against the survivor or survivors.”¹

Section 47, Ind. Part. Act, 1932, provides—

“After the dissolution of a firm the authority of such partner to bind the firm, and the other mutual rights and obligations of the partners, continue notwithstanding the dissolution, so far as may be necessary to wind up the affairs of the firm² and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise :

Provided that, the firm is in no case bound by the acts of a partner who has been adjudicated insolvent ; but this *proviso* does not affect the liability of any person who has after the adjudication represented himself or knowingly permitted himself to be represented as a partner of the insolvent.”

5. *Suits by and against persons holding themselves out as partners* : The liability of a person as partner by holding out is provided for in Section 28 of the Ind. Part. Act, 1932, thus :—

“(1) Any one who by words spoken or written or by conduct represents himself, or knowingly permits himself to be represented, to be a partner in a firm, is liable as a partner in that firm to any one who has on the faith of any such representation given credit to the firm, whether the person representing himself or represented to be a partner, does or does not know that the representation has reached the person so giving credit.

(2) Where after a partner's death the business is continued in the old firm name, the continued use of that name or of the deceased partner's name as a part thereof shall not of itself make his legal representative or his estate liable for any act of the firm done after his death.”

The above rule is neither more nor less than a special application of the principle of estoppel.³

“It frequently happens that after a dissolution of partnership, one or more of the partners continue to carry on the business of the

1. O. XXX, r. 4, C. P. Code.

2. *Babu alias Gobindoss v. Gokuldoss*, A. I. R. 1930 Mad. 393 (disposal of partnership property by surviving partners for purposes of winding up held to give a good title to the purchaser).

3. *Mollwo, March & Co. v. Court of Wards*, (1872) L. R. 4 P. C. 436 ; *Porter v. Ince*, (1905-06) 10 C. W. N. 313, 320,

late firm under the old name. In applying the doctrine of holding out to the retiring partner in such cases, it must be remembered that a person who deals with a firm after a change in its constitution is entitled to treat all apparent members of the old firm and all persons whom he knows to have been members of the old firms as continuing to be members until he has notice to the contrary.¹

"The usual ground upon which it is sought to hold a partner, who has retired and given notice of his retirement, liable under the doctrine of holding out, is that he has allowed or suffered his former partners to continue to use the old firm name."²

6. *Suits by or against persons carrying on business in names other than their own* : Any person carrying on business in a name or style other than his own name, may be sued in such name or style as if it were a firm name,³ but he cannot sue in that name.⁴ On the death of such a person the suit must be brought against his legal representatives,⁵ and not against him in his trade name.⁶

Receiver : Receivers as parties to suits may generally be divided into three classes :

I. Receivers appointed out of Court.

II. Receivers appointed by Court.

III. Receivers in Insolvency proceedings.

I. *Receivers appointed out of Court* : Receivers may be appointed of property by agreement between persons interested in such property or by virtue of any statutory power enabling a person to appoint a receiver. Common instances of such receivers are—

(a) Where co-sharers of properties appoint a receiver to manage the properties and to institute and defend suits in connection therewith.

(b) Where a mortgagee appoints a receiver by reason of a power expressed in the mortgage deed, or where registered debenture-holders appoint a receiver of the assets

1. Lindley on Partnership, 10th Edn., p. 73; cf. Sec. 32, Ind. Part. Act, 1932.

2. Lindley on Partnership, 10th Edn., p. 278.

3. O. XXX, r. 10, C. P. Code (O.XLVIII, r. 11, R.S.C.).

4. *Bhagvan v. Hiraji*, A. I. R. 1932 Bom. 516; *Samrathrai v. Kasturbhai*, A.I.R. 1930 Bom. 216.

5. *Habib Bax v. Samuel Fitz & Co.*, A. I. R. 1926 All. 161 (2).

6. *Haribandhu v. Harimohan*, (1930) I. L. R. 57 Cal. 931.

of the company by reason of a power expressed in the deed.¹

- (c) Where a mortgagee appoints a receiver under Sec. 69A of the T. P. Act, 1882, as amended by Act XX of 1929.²

The right of suit of a receiver appointed by agreement between persons will depend upon the terms of his appointment. A receiver which a mortgagee can appoint under Sec. 69A of the T. P. Act shall have "power to demand and recover the income of which he is appointed receiver, by suit, execution or otherwise, in the name either of the mortgagor or of the mortgagee to the full extent of the interest which the mortgagor could dispose of etc." In suits by or against receivers appointed out of Court, no leave of Court is necessary, and in suits against such receivers there is no necessity for any notice under Sec. 80, C. P. Code.

II. *Receivers appointed by Court*: The powers of a receiver appointed by Court are limited by the terms of his appointment. If there is no evidence as to the terms under which he was appointed, it may be presumed that he was appointed under Order XL, r. 1, C.P.Code, in terms of Form No. 9 given in App. F., which is the form in use in the Mofussil.³ The subject of receiver appointed by Court as a party to suits may be considered under the following six heads:—

(a) When Receiver may sue.

1. Cf. Sec. 118, Ind. Companies Act, 1913. A receiver so appointed shall have power to take possession of, collect and get in the property charged by the debentures, and for that purpose to take all proceedings in the name of the Company or otherwise as may seem expedient: Palmer's Company Law, 13th Edn., page 312.
2. Under Sec. 69A, T. P. Act, 1882, the power to appoint a receiver is implied not only in the case of English mortgages, but also in the case of mortgages referred to in clauses (b) and (c) of that section. A receiver can be appointed under the Trustees and the Mortgagees Powers Act XXVIII of 1866 in case of English mortgages, but Sec. 69 of the T. P. Act, 1882, as it stands after the amendment, has virtually repealed Act XXVIII of 1866 in its application to mortgages.
3. *Jabbar Ali v. Monmohan*, (1928) I. L. R. 55 Cal. 1216, 1220. Note: A different Form has been substituted in place of the Form given in the Code by the Rules framed by the Madras High Court under Sec. 122 C. P. Code. For special Forms of order appointing Receiver by the Calcutta, Madras and Rangoon High Courts (Original Side) see Form No. 1 App. F. (Calcutta High Court O. S. Rules) read with rules 5 and 7 of Chap. XXI, Form No. XL (Madras High Court O. S. Rules) read with

- (b) When Receiver may be sued.
- (c) When Receiver is a necessary or proper party to suits.
- (d) Suits by or against Receivers : Leave of Court—
- (e) Suits against Receivers : Notice under Sec. 80 C. P. Code—
- (f) Abatement of Suits.

(a) *When Receiver may sue* : A Court may authorise a receiver to sue in his own name,¹ and a receiver who is authorised to sue though not expressly in his own name, may do so by virtue of his appointment with full powers under O. XL, r. 1 of the C. P. Code.² Where a receiver obtained permission to bring a suit on behalf of the parties interested in the estate, but brought the suit in his own name, it was held that the error was only of form only.³ "From the point of view of convenience the rule allowing a receiver to sue in his own name is the preferable one. Thus, for instance, a receiver may be appointed in a suit in which there is a dispute as to the title of the property, and if the receiver was compelled to sue in the name of the true owner, he could not do so, because the question of true ownership is the subject matter of the litigation. He could not very well sue in the name of both the contesting parties as one of them admittedly has no title ; nor could he sue in the name of the party at whose instance he was appointed, because the order of the appointment of a receiver gives no advantage to the party applying for it and at whose instance it is made over other claimants of the property."⁴

(b) *When Receiver may be sued* : The receiver alone is to be sued in the following cases :—

Order XX, r. 13, Form No. 10 (Rangoon High Court O. S. Rules) read with rules 203 and 206.

1. *Achut Sitaram v. Shivajirao*, A.I. R. 1937 Bom. 244.
2. *Jagat Tarini v. Naba Gopal*, (1907) I. L. R. 34 Cal. 305, 313, 316, 317, 318, followed in *Jabbar Ali v. Monmohan*, (1928) I. L. R. 55 Cal. 1216 at p. 1220. Cf. *Haji Cassim v. K. B. Dutt*, (1914-15) 19 C. W. N. 45 ; *Achut Sitaram v. Shivajirao*, A. I. R. 1937 Bom. 244.
3. *Juggunnath Pershad v. C. S. Hogg*, (1869) 12 Suth. W. R. 117, referred to in *Jagat Tarini v. Naba Gopal*, *supra* at p. 313 ; *Jabbar Ali v. Monmohan*, *supra*.
4. *Per Mookerjee and Holmwood J.J.*, in *Jagat Tarini v. Naba Gopal*, *supra*.

- (i) Where he has made a contract in his own name or entered into a contract in his own name.¹
- (ii) In respect of any act purported to be done by him in his official capacity.²

A receiver can be sued even after his discharge.³

- (c) *When Receiver is a necessary or proper party to suits* : The following test is to be applied to determine whether a receiver is or is not a necessary party to a litigation. The appointment of a receiver does not of itself debar a creditor of the person over whose estate the receiver has been appointed from suing for his claim provided that such suit does not in any way interfere with the possession or jurisdiction of the Court appointing the receiver. But if the object of the suit is to affect a property lawfully in charge of a receiver, he is not only a proper but a necessary party to such a suit, and that by way of addition to and not substitution for the parties primarily responsible⁴.

Illustrations :—

(i) A. sued for recovery of money alleged to be due on account of the price of jute sold to D. H. the eldest son of D. was appointed receiver of the assets left by his father. A. therefore prayed for a decree against the estate of D. in the hands of the receiver. *Held*, the receiver is a necessary party to the suit : *Banku Behari v. Harendra*, (1910-1911) 15 C. W. N. 54.

(ii) A. sued the beneficial owners for declaration of title to property. *Held*, in a suit for declaration of title when the beneficial owner has been made a party, it is not necessary to join the receiver : *Rodger v. Ashutosh*, (1901-02) 6 C. W. N. 829.

(iii) A. filed a suit against the heirs of a deceased person, whose estate was in the hands of a receiver. The receiver had nothing to do with the satisfaction of the claim. *Held*, the receiver was not a necessary party to the suit. The plaintiff could get a decree against the representatives and if he wished to execute the decree against the estate, he should go to the Court which appointed the receiver for permission to attach the estate in the hands of the receiver : *Moos v. Abdul Husain*, A. I. R. 1925 Bom. 523.

1. *Rodger v. Ashutosh*, (1901-02) 6 C. W. N. 829.
2. Cf. Sec. 80, C. P. Code.
3. *Harihar v. Jaharuddin*, (1921-22) 26 C. W. N. 992 ; *Radharani v. Purna Chandra*, (1929-30) 34 C. W. N. 671 ; *Dinshaw v. Amrit Lal*, (1931) I. L. R. 10 Pat. 379.
4. *Jotindra v. Sarfaraj Mia*, (1909-10) 14 C. W. N. 653, 658 ; *Zohra Bibi v. Zobeda Khatun*, (1910) 12 C. L. J. 368, 371 (suit by a partner against the legal representatives of a deceased partner for ascertainment and distribution of assets of the partnership in the hands of a receiver).

(iv) A receiver, in pursuance of the directions of the Court, borrowed Rs. 5,000/- from S. on mortgage of a certain press. In execution of his mortgage decree, S. purchased the property at a court-sale. P, a joint owner of the press, brought a suit for a declaration that the sale that had taken place in execution of the mortgage decree was not binding in as much as the mortgagee had wrongfully and fraudulently caused to be sold properties which were not included within the mortgage. *Held*, the receiver who was himself the mortgagor, was vitally interested in the sale that took place and it was certainly desirable, if not essential, that he should have been made a party : *Sarada Churn v. Pratira Sundari*, (1935-36) 40 C. W. N. 428, 429.

(d) *Suits by or against Receivers : Leave of Court :—*

(1) *When leave to sue necessary* : As a general rule, a receiver can neither sue nor be sued without the leave of the Court.¹ In India there is no statutory provision which requires a party to take the leave of the Court to sue a receiver, and grant of such leave is made not in the exercise of any power conferred by statute but in the exercise of Court's inherent powers².

(2) *When leave to defend necessary* : When a suit is brought against the receiver with the leave of the Court, the receiver may or may not defend the suit according as he has or has not a good or valid defence. When he wants to defend, it is wise for him to obtain sanction to defend, otherwise, if he be unsuccessful the Court may refuse to allow him his costs of the action.³

(3) *When no leave to sue the Receiver necessary* : No leave of Court is necessary to sue a receiver—

(i) If there is any statutory right of suing such a receiver⁴.

(ii) According to the Patna High Court, if the receiver has already been discharged and is no longer an officer of the Court.⁵

1. *Miller v. Ram Ranjan*, (1884) I. L. R. 10 Cal. 1014, followed in *Dunne v. Kumar Chandra*, (1903) I. L. R. 30 Cal. 593, 598; *Fink v. Corporation of Calcutta*, (1903) I. L. R. 30 Cal. 721, 724.
2. *Braja Bhusan v. Sris Chandra*, (1919) 4 P. L. J. 20, 28.
3. See Kerr on Receivers, 10th Edn., pp. 253, 254.
4. *Kuppuswamy Ayyar, Receiver v. Suppan*, (1907) I. L. R. 30 Mad. 505 (suit under Sec. 85 Madras Rent Recovery Act, VIII of 1865); *Kelu Achan v. Thandavan*, A.I.R. 1933 Mad. 340 (suit under O. XXI, r. 63, C. P.Code.).
5. *Dinshaw v. Amrit Lal*, (1931) I. L. R. 10 Pat. 379; *contra*, *Radharani v. Purna Chandra*, (1929-30) 34 C. W. N. 671, 672.

(4) *When Receiver need not obtain leave to sue :*

(i) In all suits for rent instituted in any of the Mofussil Courts of the Madras Presidency, it is not necessary for the receiver appointed by any of these Courts to obtain leave to sue¹.

(ii) In all suits for rent where a receiver of immovable property is appointed by any of the High Courts of Calcutta, Madras and Rangoon, it is not necessary for the receiver to obtain leave to sue, whether the suit is instituted on the original side of any of these Courts or in any Mofussil Court under any of the said High Courts².

(5) *Leave when to be obtained :* It was at one time held by the Calcutta High Court that the leave of the Court was a condition precedent to the institution of a suit against a receiver³, but subsequently this view has been dissented from and it has been held that the defect of obtaining leave prior to the institution of the suit can be cured by subsequent leave⁴.

(6) *Effect of want of leave :* If a suit is instituted against a receiver without sanction previously obtained (where such sanction is necessary) and no such leave is subsequently obtained, the proceedings initiated must be invalid.⁵ If the object of the suit is to interfere with the possession of the receiver, the party suing without the leave of the Court is guilty of contempt of Court, but in a proper case, the Court may grant the plaintiff leave to pro-

1. See Form of Order under the Rules framed by the Madras High Court under Sec. 122 of the C. P. Code, substituting Form No. 9, App. F., Sch. I, C. P. Code.

2. See, Rules 5 and 7 of Chap. XXI of the Cal. High Court O. S. Rules, Order XX, r. 13 of the Mad. High Court O. S. Rules, Rules 203 and 206 of the Rang. High Court O. S. Rules. Note the difference between the above Calcutta and Rangoon Rules and Form I, App. F., and Form 10 prescribed respectively under the said Rules.

3. *Pramatha Nath v. Khelra Nath*, (1905) I. L. R. 32 Cal. 270.

4. *Banku Behari v. Harendra*, (1910-11) 15 C. W. N. 54 ; *Sarat Chandra v. Apurba*, (1910-11) 15 C. W. N. 925 ; *Maharaja of Burdwan v. Apurba*, (1910-11) 15 C. W. N. 872 ; *Rustomjee v. Frederic*, (1919) I. L. R. 46 Cal. 352 ; *Srihari v. Satya Charan*, A. I. R. 1926 Cal. 1040 ; *Karooth alias Lakshmiamma v. Manavikraman*, (1920) I. L. R. 43 Mad. 793.

5. *Srihari v. Satya Charan*, A. I. R. (1926) Cal. 1040.

ceed with the suit. In a case where there are joint receivers with power to bring and defend suits, a suit by one against the other without leave specially obtained from the Court is not liable to dismissal¹.

(7) *Effect of want of objection that no leave obtained* : As a general rule, a suit instituted without leave, where leave is necessary, is liable to be dismissed even though no objection is taken as to want of such leave². But it may well be that the Court may not be appraised of want of leave because no objection as to want of leave is taken in the written statement or at the commencement of the hearing. In a Madras case, it was held that a suit against a receiver without leave of the Court should be dismissed and not remanded to the lower Court for obtaining the necessary leave, specially when such an objection was taken by the defendant in his written statement and was disregarded by the plaintiff³. But in a Calcutta case, where no objection was taken as to want of leave until the close of hearing, it was held that the plea had been waived⁴. But in a still later case, where a suit was instituted against a receiver without the leave of the Court and no objection was taken as to want of such leave, and a decree was made against the receiver, on appeal, the Calcutta High Court remitted the case to the trial Court for a retrial of the suit on the plaintiffs obtaining the sanction of the proper Court to continue the suit against the receiver⁵.

- (e) *Suits against Receivers : Notice under Sec. 80, C. P. Code* : Receiver appointed by Court is a public officer and is entitled to notice under Sec. 80 of the Civil Procedure Code if the suit against him is in respect of acts done in his official capacity.

Illustrations :

(i) A receiver of certain mortgaged properties was sued after his discharge for accounts on allegations of misappropriation, improper collections, etc. *Held*, the acts complained of were done by the said receiver in his official capacity

1. *Satya Kripal v. Satya Bhupal*, (1913-14) 18 C. W. N. 546.
2. *Dunne v. Kumar Chandra*, (1903) I. L. R. 30 Cal. 593, 597.
3. *Venkatasubramiah v. Nambura Ramiah*, (1914) 24 I. C. 62.
4. *Satya Kripal v. Satya Bhupal*, *supra* ; cf. *Sanyasiah v. Atchanna*, (1922) 42 M. L. J. 339.
5. *Srihari v. Satya Charan*, A. I. R. 1926 Cal. 1040.

and he is entitled to notice under Sec. 80, C. P. Code even though he had been discharged : *Per Rankin C. J. in Radharani v. Purna*, (1920-30) 34 C. W. N. 671.

(ii) A. sued, without notice under Sec. 80, C. P. Code, a common manager appointed under Sec. 95 of the Bengal Tenancy Act on a mortgage executed by the predecessor of the said common manager. Objection was taken that no notice under Sec. 80, C. P. Code had been given. *Held*, by the Judicial Committee, that no notice was necessary on the grounds, (a) that there is no dispute as to the validity of the mortgage or as to the amount due under it, (b) that the mortgage was not executed by the manager-defendant and that omission to pay the amount of the mortgage was not an illegal omission and cannot be said to be an act purporting to be done by the common manager in his official capacity : *Revati v. Jutindra*, (1933-34) L. R. 61 I. A. 171.

(iii) A. B. sued a receiver for recovery of arrears of rent and cesses with damages. One of the objections of the defendant in his written statement was that the suit was not maintainable because no notice under Sec. 80, C. P. Code had been served upon him. *Held*, the omission of the receiver to pay rent is not an act purporting to have been done by him in his official capacity : *Purna Chandra v. Official Assignee*, (1937) 65 C. L. J. 561.

(f) *Abatement of suit :*

Where a receiver ceases to hold the office pending a suit, filed by him, the suit does not abate, but can be continued by his successor in office¹, or by the person who has been ascertained to be entitled to the property². If during the pendency of a suit the receiver is discharged and the party on whom the interest devolved did not apply to carry on the proceedings and a decree is made in favour of the receiver, the decree would not on that account be a bad decree but would enure for the benefit of the party on whom the interest devolved, such party not having applied for carrying on the proceedings³.

III. *Receivers in Insolvency proceedings :* See heading 'Insolvent'.

Trade Unions⁴ : A Trade Union registered under the Indian Trade Unions Act, 1926, is a body corporate and may sue or be

1. *Akula Paradesi v. Dhelli Jagannadha*, (1905) I. L. R. 28 Mad. 157 (where during the pendency of a suit a receiver was replaced by another receiver).
2. *Macleod v. Kissan*, (1906) I. L. R. 30 Bom. 250, 257 (case under Sec. 372 of the C. P. Code of 1882, now O. XXII, r. 10).
3. *Bepin Behari v. K. S. Bonnerjee*, (1921-22) 26 C. W. N. 361 ; *Rai Charan v. Biswa Nath*, (1914) 20 C. L. J. 107.
4. For definition, see S. 2 (L).

sued by its registered name¹. The change in the name of a registered Trade Union shall not affect any rights or obligations of the Trade Union or render defective any legal proceeding which might have been continued or commenced by or against it by its new name. Similarly, on amalgamation of two or more registered Trade Unions shall not prejudice any right of any such Trade Unions or any right of a creditor of any of them².

No registered Trade Union or any officer or member thereof can be sued in any Civil Court in respect of any act done in contemplation or furtherance of a trade dispute to which a member of the Trade Union is a party on the ground only that such act induces some other person to break a contract of employment, or that it is in interference with the trade, business or employment of some other person or with the right of some other person to dispose of his capital or of his labour as he wills³.

A registered Trade Union shall not be liable in any suit or other legal proceeding in any Civil Court in respect of any tortious act done in contemplation or furtherance of a trade dispute by an agent of the Trade Union if it is proved that such person acted without knowledge of or contrary to express instructions given by, the executive of the Trade Union⁴.

No Civil Court shall entertain any legal proceeding instituted for the express purpose of enforcing or recovering damages for the breach of any agreement concerning the conditions on which any members of a Trade Union shall or shall not sell their goods, trans-

1. Sec. 13, T. U. Act, 1926. A suit by a Trade Union through its vice-presidents who were named was held bad : *N. W. Ry. Administration v. N. W. Ry. Union*, A. I. R. 1933 Lah. 203. In England, under the Trade Union Act, 1871, the property of registered Trade Unions should be vested in trustees (Sec. 8) who are authorised to sue or be sued in any action concerning the property right or claim to property of the Trade Unions (Sec. 9). In 1901, it was held in *Taff Vale Ry. v. Amalgamated Society of Railway Servants*, (1901) A. C. 426 that there was nothing to prevent a registered trade union from being plaintiff or defendant in an action of contract. But in contracts affecting the property of the registered Trade Union, the trustees are the proper plaintiffs or defendants : *Curle v. Lester*, (1893) 9 T. L. R. 480.
2. Sec. 26, T. U. Act, 1926.
3. Sec. 18 (1), T. U. Act, 1926.
4. Sec. 18(2), T. U. Act, 1926. This section however, does not afford immunity to trade union or to an officer thereof for an act of deliberate trespass : *Dalmia Cement Ltd. v. Naraindas*, A. I. R. 1939 Sind. 256,

act business, work, employ or be employed. This rule qualifies the enforcement of an agreement in restraint of trade between the members¹.

Once a Trade Union is registered under the T. U. Act, 1926, its registration under any of the Acts specified in Section 14 shall be void².

The T. U. Act does not provide if the Trade Union can sue or be sued in the corporate name after dissolution or after its registration is cancelled and it also does not provide for the effect of dissolution or cancellation of registration on pending suits or proceedings.

After the cancellation of the registration of a Trade Union, it ceases to be a corporate body and its status becomes that of an unincorporated association, so that no suit can be instituted or continued by or against the said trade union in its corporate name. The suit can only be by or against the individual members composing the Trade Union, or, if the number of members is numerous, then recourse may be had to O. I, r. 8, C. P. Code. But if the Trade Union is dissolved and no proceeding is taken under Section 271, Indian Companies Act, 1913, then it seems that in the absence of any provision in the Indian Trade Unions Act or the Civil Procedure Code as regards its corporate existence for the purpose of winding up as in the case of a partnership, the same rule would apply³.

Trustees⁴ : The subject of parties may be considered under two heads :—

1. Suits in respect of public trusts.
2. Suits in respect of private trusts.

1. Sec. 19 and *Proviso*, T. U. Act, 1926.
2. Sec. 14, T. U. Act, 1926.
3. Whether a Trade Union consisting of more than 7 members is an unregistered company within the meaning of Sec. 270, Ind. Comp. Act, 1913, has, it seems, not been the subject of any judicial decision. But the section says that an unregistered company "shall include any partnership, association or company consisting of more than 7 members," and a Trade Union consisting of more than 7 members seems to fall under this definition. This section is very similar to Sec. 337 of the Eng. Comp. Act, 1929. Examples of unregistered companies which have been ordered to be wound up are to be found in Palmer's Coy. Law, 13th Edn., at pp. 415, 416. But a Trade Union does not appear as a case where a winding up order has been made.
4. For definition of 'Trust', see Sec. 3, Ind. Trusts Act, 1882. In India

1. *Suits in respect of public trusts*: Public trusts may be religious or charitable or partly religious and partly charitable. In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust, the Advocate-General or two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate-General may institute a suit and ask for one or more of the reliefs specified in Sec. 92 of the C. P. Code. Suits under the said Section may be instituted except in places, such as Madras, where the said section has been abrogated by special local legislation. Under Section 6 of the Charitable and Religious Trusts Act (XIV of 1920) a suit may be instituted under Section 92 C. P. Code, without the previous consent of the Advocate-General. In case of public religious endowments, suits may be instituted under Section 14 of the Religious Endowments Act, 1863¹. For parties to suits relating to administration of wakfs, see the following enactments :

- (i) Religious Endowments Act, XX of 1863.
- (ii) Charitable Endowments Act, VI of 1890.
- (iii) The Civil Procedure Code, 1908.
- (iv) Official Trusts Act, II of 1913.
- (v) Charitable and Religious Trusts Act, XIV of 1920.
- (vi) Mussalman Wakf Act, XLII of 1923.
- (vii) Bengal Wakf Act, 1934, Bengal Act XIII of 1934.
- (viii) Mussalman Wakf (Bombay Amendment) Act, 1935;
Bombay Act, XVIII of 1934.
- (ix) United Provinces Muslim Wakf Act, 1936, U. P. Act
XIII of 1936.

Joinder of trustees : See O. XXI, rr. 1 and 2, C. P. Code.

the term 'trust' is used in a very wide sense and includes wakfs created for public purposes of a charitable or religious nature: *Syed Ali Hussain v. Akhtari Begum*, (1931) I. L. R. 10 Pat. 506; and the principles and rules of English law are applicable to public and charitable trusts in so far as they are not inconsistent with the rules and practice of the Courts in India: *In re Sabnis, Goregaonkar & Senjit*, I. L. R. (1937) Bom. 843. Trust may be express or constructive. For instances of constructive trusts, see Secs. 80-95, Ind. Trusts Act, 1882. Inter-meddlers may constitute themselves as *de facto* trustees or trustees *de son tort*.

1. See pages 172-175.

2. *Suits in respect of private trusts*: The parties to such suits may be considered under two heads:

A. Where the property is vested in the Official Trustee.

B. In other cases.

A. *Where the property is vested in the Official Trustee*: Official Trustee must act as the sole trustee and it is not lawful to appoint him to be trustee along with any other person¹. The Official Trustee shall be a corporation sole by the name of the Official Trustee of the Presidency for which he is appointed, and as such Official Trustee, shall have perpetual succession and a common seal and may sue and be sued in his corporate name². His rights, powers, privileges and his duties and liabilities are the same as any other trustee acting in the same capacity³ and accordingly the principles of joinder of parties discussed under sub-head 'B' below equally apply to him. If, however, in any suit relief is claimed against him personally, section 80 of the C. P. Code, 1908, shall apply⁴.

B. *In other cases*: The parties to suits under this head may be considered with reference to the following classes of suits:

1. Suits between trustees and third parties.
2. Suits between trustees and beneficiaries.
3. Suits between beneficiaries and third parties.
4. Suits between trustees.
5. Suits by or against trustees *de son tort*.

1. *Suits between trustees and third parties*: In all suits concerning property vested in a trustee, where the contention is between persons beneficially interested in such property and a third person, the rule is that the trustee shall represent the persons so interested, and it shall not ordinarily be necessary to make them parties to the suit, but the Court may, if it thinks fit, order them or any of them to be made parties⁵. Beneficiaries whose interests are affected and whose presence becomes necessary for the proper determination of the points involved in the suit ought to be added as defendants. Thus, the beneficiaries, either all or some, as the case may be, ought to be added in any of the following cases:

1. Sec. 7 (7), The Official Trustees Act, 1913.
2. Sec. 6, —do.—
3. Sec. 7 (2), —do.—
4. Sec. 16, —do.—
5. O. XXXI, r. 1, C. P. Code, 1908.

- (a) Where the dispute involves a breach of trust¹.
- (b) Where the beneficiaries themselves are the accounting parties².
- (c) Where there is a difference of opinion as regards any particular course to be adopted with reference to the trust property among the trustees and beneficiaries,³ or among the beneficiaries *inter se*.
- (d) Generally, where the interests of the beneficiaries are particularly affected.⁴

Where there are several trustees, all the trustees should ordinarily be co-plaintiffs and only such of them as are unwilling to be joined as co-plaintiffs, or have done some act precluding them from being plaintiffs,⁵ should be added as defendants. Similarly in suits against trustees all the trustees except those who reside outside British India must be joined as defendants.⁶

Where one of several trustees dies, disclaims, or is discharged, the surviving trustees may sue or be sued unless the instrument of trust expressly declares otherwise.⁷ If the trust deed expressly requires a minimum number of trustees to exercise authority and the number of continuing or surviving trustees falls short of that minimum the surviving trustees cannot sue or be sued unless trustee or trustees is or are appointed to make up the deficiency.⁸

1. *Gas Light & Coke Co. (Ltd.) v. Towse*, (1887) 35 Ch. D. 519 (suit against trustees where plaintiff claimed specific performance of a contract to renew lease granted under a power, and the questions were whether the covenant to renew was *ultra vires* and whether the rent proposed was the best rent available).
2. *May v. Newton*, (1887) 34 Ch. D. 347.
3. *Butler v. Butler*, (1877) 7 Ch. D. 116 (suit by trustee against others claiming realisation of certain alleged improper investments, where beneficiaries have a right to elect to retain the same).
4. *Merry v. Pownall*, (1898) 1 Ch. 306 (suit by trustee in bankruptcy of settlor claiming to set aside certain limitations in the settlement).
5. *Kokilasari Dasi v. Mohunt Rudranand*, (1907) 5 C. L. J. 527. Cf. Sec. 48, Ind. Trust Act, 1882; *Vedakannu Nadar v. Nanguneri Taluk*, A. I. R. 1938 Mad. 982; *Ram Ghulam v. Shyam Sarup*, (1934) I. L. R. 55 All. 687 (If all the trustees are not impleaded, no decree can be made against any of the trustees).
6. O. XXXI, r. 2, C. P. Code.
7. Cf. Sec. 76 (effect of death or discharge) and Sec. 10 (effect of disclaimer), Ind. Trusts Act, 1882.
8. Sec. 44, Ind. Trusts Act, 1882. Cf. *Raghavachariar v. Chakrapani Naidu*, (1932) M. W. N. 297.

Where, however, the suit includes a claim for which the deceased trustee was personally liable his legal representatives should be included along with the other trustees.

Where a trustee is a minor, subject to the limitations on the right of suit of a minor and his liability to be sued,¹ he can only sue by a next friend or be sued by a guardian *ad litem*². Instances of trustees who are minors are however rare.

Where a trustee is adjudged insolvent, he may sue or be sued in respect of property held by him upon trust for others, in as much as such property is not divisible among his creditors and does not pass to the Official Assignee or Receiver.³ But where (a) the insolvent himself has a beneficial interest, that is to say, where he holds the property on trust for himself and others,⁴ and (b) where a trustee has a claim personally against his co-trustees,⁵ the beneficiary,⁶ or a third party,⁷ such interest or claim vests in the Official Assignee or Receiver, and they are the proper persons to institute suits in respect of them.

2. *Suits between trustees and beneficiaries :*

(i) *Suits by beneficiaries :*

The cases in which the beneficiaries may sue the trustees, will be found in Secs. 23, 57 and 59-62, Indian Trust Act, 1882. As to right of suit, there is no difference between a beneficiary under a voluntary trust and one under a trust for valuable consideration.⁸

The assignee⁹ of a beneficial interest (except that of a married woman¹⁰ during marriage) under a valid contract acquires all the rights of the assignor and may sue the trustees in proper cases. There cannot, however, be an assignment of a mere right to sue.¹¹

Whether all the beneficiaries or some only should join in

1. Sec. heading "Minor", pp. 197-205.
2. Sec. 10, Ind. Trusts Act, 1882, read with O. XXXI, rr. 1 and 3, C. P. Code.
3. Cf. Sec. 52 (1) (a), P-t Ins. Act. and Sec. 28 (2), Prov. Ins. Act.
4. *St. Thomas's Hospital v. Richardson*, (1910) 1 K. B. 271, 278, 279.
5. Sec. 27, Ind. Trusts Act, 1882.
6. Secs. 32 & 33, Ind. Trusts Act, 1882.
7. Sec. 33, Ind. Trusts Act, 1882.
8. *Re Flavell, Murray v. Flavell*, (1883) 25 Ch. D. 89
9. Sec. 69, Ind. Trust Act, 1882.
10. Sec. 58, Ind. Trust Act, 1882.
11. *Hill v. Boyle*, 4 L. R. Eq. 280 ; Transfer of Property Act, Sec. 6(e).

the suit as co-plaintiffs will depend upon the facts of each case. Where the claim affects the interest of a particular beneficiary and not the interest of the others, the beneficiary whose interest is affected alone can sue without adding the other beneficiaries as parties.

In a suit by a beneficiary even where the relief is asked for against one or more of the trustees, it is necessary to join all the trustees except those who reside outside British India as co-defendants.¹

Where one of several trustees dies pending a suit which does not seek to charge them personally in that character, his representatives are not necessary parties, for the trusteeship survives.²

In a suit for a general account against a surviving trustee, it is not ordinarily necessary for plaintiff to make the representative of a deceased trustee a party. But such representative may be added if there are special circumstances rendering it advisable that he should be added.³

Where all the trustees are dead, a suit for breach of trust against the representatives of one who was not the last surviving trustee is not maintainable, unless the representatives of the last surviving trustee are added, or new trustees are appointed and added, as defendants.⁴

In suits against trustees for breach of trust and accounts even third parties may be impleaded as defendants, such as their agents where they had assisted in the fraudulent acts of the trustees.⁵

(ii) *Suits by trustees :*

(a) In a suit by the trustees on behalf of the trust all of them should be parties to the suit, but when the suit is for a personal claim⁶ for reimbursement by any of them, the other trustees are not necessary parties.

(b) So also, in the case of the defendants, unless relief is

1. O. XXXI, r. 2, C.P.Code (*Proviso*).

2. *London Gas Light Co. v. Spottiswoode*, (1851) 14 Beav. 264.

3. Cf. *Re Harrison, Smith v. Allen*, (1891) 2 Ch. 349.

4. *Re Jordan, Hayward v. Hamilton*, (1904) 1 Ch. 260.

5. *Ramanathan v. Annamalai*, (1934) I. L. R. 57 Mad. 1031 (In this case the beneficiary was a minor).

6. As to instances of personal claim, See Sec. 32, Ind. Trusts] Act, 1882.

claimed in the suit against all the beneficiaries¹ all of them need not be joined as defendants, and it would be sufficient to add such of them only against whom the relief is sought.²

3. *Suits between beneficiaries and third parties*: The subject may be considered under two heads :

- (i) *Where the trustees must be joined*: As a general rule, the trustees sufficiently represent the beneficiaries in all legal proceedings. But where the trustees refuse to join in an action or are unable to join (as where their acts and conduct with reference to the estate are impeached), a beneficiary may himself sue³, (a) by making the trustees defendants in addition to any other necessary or proper parties, or (b) sue in the names of the trustees by offering them a proper indemnity and obtaining their consent⁴.

If the trustees refuse to allow their names under any circumstances to be used, the beneficiary may oblige the trustees, on giving them a proper indemnity, to lend their names.

In England, the *cestuis que trust* may apply in the matter of the trust for leave to sue in the names of the trustees and then bring an action in such form after obtaining the said leave⁵. In India, it seems, that the beneficiary

1. e. g., matter of final settlement of accounts.
2. e. g., when possession of any property in the hands of a beneficiary is sought to be obtained on behalf of the trust, or when a re-imbursement is claimed against any particular beneficiary under Sec. 32, Ind. Trusts Act, 1882.
3. *Howdon v. Yorkshire Miners' Association*, (1903) 1 K. B. 308 (action by a single member of the union where the trustees of the union refused to take legal proceedings to restrain the union from a proposed misapplication of the funds); *Meldrum v. Scorer*, (1887) 56 L. T. 471 (In order to guard against a multitude of actions, all the other *cestuis que trust* must be made defendants to the action). In case of improper alienation by the trustee of trust property, the beneficiary may sue the alienee by joining the trustee as a defendant.
4. *Gandy v. Gandy*, (1885) 30 Ch. D. 57 (The trustees cannot be compelled to sue, but they may be willing, when they know that a covenant with them cannot be enforced without their being plaintiffs, to allow their names to be used, on receiving a proper indemnity).
5. See Annual Practice, 1938, p. 247 (note under O. XVI, r. 8, R. S. C.). See *Doe d. Prosser v. King*, (1834) 2 Dowl. 580 (where upon the facts, the Court refused to grant any leave).

has to file a suit in the first instance to compel the trustees to lend their names¹.

Formerly, in England, the Equity Courts held that the mere refusal by the trustee to sue did not entitle the *cestui que trust* to maintain a suit in his own name². To justify such a course special circumstances must be shown tending to disqualify the trustee from suing³. But under the present practice no such distinction is made.⁴

Between the two courses open to the beneficiary, the first, namely, the institution of the suit in the name of the beneficiary by making the trustees as defendants in addition to other necessary defendants, is the more convenient.

- (ii) *Where the trustees need not be joined*: A beneficiary may sue a wrong-doer without joining⁵ any of the trustees in respect of property which is in the actual possession of the beneficiary, the maintainability of such a suit depending upon the fact that as against a wrong-doer possession is title⁶.

4. *Suits between trustees*: If co-trustees commit a breach of trust, if one be less guilty than another and has had to refund the loss, the former may sue to compel the latter, or his legal representative to the extent of the assets he has received, to make good such loss; and, if all be equally guilty, any one or more of the trustees who has not been guilty of fraud and who has had to refund the loss may sue the others to contribute⁶. Any trustee may sue his co-trustees (a)

1. Sec. 61, Ind. Trusts Act, 1882.

2. *Sharpe v. San Paulo Ry. Co.*, L. R. 8 Ch. 597, 609.

3. *Beningfield v. Baxter*, 12 App. Cas. 167. See Lewin on Trusts, 13th Edn., p. 873.

4. See Annual Practice, 1938, p. 247.

5. *Healey v. Healey*, (1915) 1 K. B. 938 (action of detinue by a married woman who had the beneficial use of certain chattels under a settlement against her husband without the joinder of trustees). For the doctrine that as against a wrong-doer possession is title, see *The Winkfield*, (1902) P. 42. Cf. *Baker v. Furlong*, (1891) 2 Ch. 172 (where it was held that the possession of the chattels by a *cestui que trust* in accordance with the provisions of the trust instrument was in law the possession of the trustees who could maintain an action against a wrong-doer for the conversion of the chattels).

6. Sec. 27, Ind. Trusts Act, 1882.

for declaration of his title as trustee when that is denied,¹ (b) for joint possession and management when he is wrongfully kept out,² (c) for inspection of papers, documents, accounts, etc. in the hands of his co-trustees, (d) for accounts when he alleges breach of trust against them³, or (e) for compelling them to do or to refrain from doing some act in relation to the trust.⁴ In some cases it may be found expedient and even necessary to add the beneficiaries as parties, e. g., where the beneficiaries have a right to elect to retain investments, improperly made, on an action by one trustee against the others claiming realization of the investments, the beneficiaries ought to be added as parties⁵.

5. *Suits by or against trustees de son tort*⁶ : As a general rule, trustee *de son tort* has no *locus standi* to maintain an action on behalf of the trust even though it is instituted for the benefit of the trust⁷. In some cases by way of exceptions to the general rule, it has been held that he can sue. Thus in a Calcutta case, a *de facto* shebait who has been recognised by the parties concerned was held entitled to sue.⁸ In a Patna case, a *de facto* manager of debutter properties who was recognised by the persons interested in the endowment was held entitled to sue a lessee for possession, although his appointment was not made in accordance with the provisions of the deed of endowment⁹. A trustee *de son tort* where he has perfected his title to trusteeship by adverse possession is entitled to sue¹⁰. He is entitled to sue a wrong doer who has deprived him of his possession,¹¹ because as against a wrong-doer possession is title.

1. *Appanna Poricha v. Narasing Poricha*, (1922) I. L. R. 45 Mad. 113 (F. B.).
2. *Meenakshi Achi v. Soma Sundaram Pillai*, (1921) I. L. R. 44 Mad. 205, 214 (case of publications).
3. *Jamnadas v. Damodardas*, A. I. R. 1927 Bom. 424 ; *Narayan Thirumupu v. Mootha Podunal*, A. I. R. 1930 Mad. 295.
4. *Re Chertsay Market*, 6 Price 261, 279.
5. *Butler v. Butler*, 7 Ch. D. 116.
6. If one, not being a trustee and not having authority from a trustee, takes upon himself to intermeddle with trust matters or to do acts characteristic of the office of trustee, he may thereby make himself what is called in law a trustee of his own wrong, i. e., a trustee *de son tort* : *Mara v. Browne*, (1896) 1 Ch. 199.
7. *Vedakanna Nadar v. Nanguneri*, A. I. R. 1938 Mad. 982.
8. *Hari Mohon Modak v. Rameshwar*, (1920) 64 I. C. 737, referred to in *Vedakanna Nadar v. Nanguneri*, *supra*, at p. 989.
9. *Radha Krishnaji v. Rameshwar Prashad*, A. I. R. 1934 Pat. 584.
10. *Obiter dictum* in *Brahmayya v. Madhuram*, A. I. R. 1926 Mad. 496.
11. *Kasi Chetty v. Dainasi Kamani Nataraja*, (1913) M. W. N. 181 ; cf. *Narayana Row v. Dharmachar*, (1903) I. L. R. 26 Mad 514,

In suits by a trustee *de son tort*, the *de jure* trustees, if any, and the beneficiaries whose rights are likely to be affected ought to be added as defendants.

A trustee *de son tort* is liable to account as a trustee *de jure* and must be held answerable for all the rents and profits he has received¹. In such suits he may claim indemnity for expenses incurred for the benefit of the estate². In a suit against a trustee *de son tort* for breaches of trust, the *de jure* trustees who have participated in such breaches or have allowed through negligence the committal of such breaches may be joined. A beneficiary or a creditor may file a suit for administration against trustee *de son tort*. Such a suit may be properly framed under O. I. r. 8, of the C. P. Code.

Unincorporated Associations : An unincorporated association is a society of persons associated together for the promotion of a common purpose. Such associations may be formed with a view to profit or for any purpose except the acquisition of gain. Societies formed with a view to profit are of two kinds : (1) Firms, (2) Other unincorporated companies. The fundamental difference between a firm and other unincorporated companies formed for gain is that the individuals composing a partnership are bound together by the ties of friendship and mutual confidence and are not at liberty without the consent of all to retire or to take any new persons as partners ; whilst a company consists of individuals not necessarily acquainted with each other, so that it is a matter of comparative indifference whether changes are effected or not.³

Unincorporated companies having gain for their object must be registered under the Indian Companies Act, if in the case of Banking Companies they consist of more than 10 members, and in the case of other Companies of more than 20 members.

Parties to suits as regards unincorporated associations are dealt with under the following heads :

1. Societies-registered.
2. Partners.
3. Clubs.

(1) **Societies—registered :**

(a) *Suits by or against registered societies may be instituted*

1. *Hennessey v. Bray*, (1863) 33 Beav. 96.

2. *Abkan Sahib v. Soran Bivi Saiba*, (1913) I. L. R. 38 Mad. 260 ;

Narayananan v. Lakshmanam, (1915) I. L. R. 39 Mad. 456.

3. *Lindley on Partnership*, 10th Edn., p. 23.

in the name of the president, chairman, principal, secretary, or trustees as shall be determined by the rules and regulations of the society ; and in default of such determination in the name of such person as shall be appointed by the governing body¹ for the occasion.²

A person having a claim against the society may sue any of the above persons, if on application to the governing body some other officer or person be not nominated to be the defendant.³

No abatement or discontinuance of any suit or proceedings by or against the society shall result by reason of the person by or against whom such suit or proceedings shall have been brought or continued, dying or ceasing to fill the character in the name whereof he shall have sued or been sued, but the same shall be continued in the name of or against the successor of such person.⁴

(b) *Suits between members of a society* : Suits against any member may be instituted by the society for the recovery of any penalty⁵ duly inflicted on him, and so also for any arrears of subscription due from him according to the rules, or for any damages in respect of any unlawful detention of or injury or destruction to any property of the society caused by him, as if such member were a stranger.⁶

(2) **Partners** : See 'Partners', pp 211-240

(3) **Clubs** : "Clubs" are of two varieties :

(a) Members' Clubs.

(b) Proprietary Clubs.

The discussion is confined to Members' clubs.

Members' Clubs : "Members' Clubs" are associations of a peculiar nature. They are societies, the members of which are perpetually changing. They are not partnerships ; they are not associations for gain , and the feature which distinguishes them from other societies is that no member as such

1. As to who constitute the governing body, see Sec. 16, Societies Registration Act, 1860, and as to vesting of property in it, see Sec. 5, (*Ibid*).

2. Sec. 6, (*Ibid*).

3. Sec. 6, *proviso*, (*Ibid*).

4. Sec. 7, (*Ibid*).

5. Sec. 9, (*Ibid*).

6. Sec. 10, (*Ibid*).

becomes liable to pay to the funds of the society or to any one else any money beyond the subscriptions required by the rules of the club to be paid so long as he remains a member. It is upon this fundamental condition, not usually expressed but understood by every one that clubs are formed; and this distinguishing feature has been often judicially recognised. It has been so recognised in actions by creditors and in winding up proceedings.¹

A club is not a legal person nor a corporate body of any sort and cannot therefore sue or be sued in the club name.² A suit by a club through or represented by its secretary is not maintainable even though there was an arrangement that the secretary should sue.³ The suit must be brought by all the members or by one or more of such members as a representative suit under O. 1, r. 8 of the C. P. Code.⁴ The trustees, if any, of an unincorporated association have no more right to sue on behalf of the association without a representation order than an ordinary member.⁵

The enforcement of liability against a members' club present real difficulties. The question whether a contract made by or with an unincorporated association will bind all the members or only some members of the association is one that turns on the general law of principal and agent⁶. No member of a club is liable to creditors for the debts of the club except so far as by contract or dealing he may have made himself personally liable⁷.

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1. *Per* Lord Lindley in *Wise v. Perpetual Trustee Co.*, (1903) A. C. 139.
 2. *Ram Sarup v. Arya Samaj*, (1925) I. L. R. 47 All. 342, followed in *Bhagwan Das v. Pinjrapole Pashu Anuthalaya*, A. I. R. 1927 All. 789; *London Asscn. for Protection of Trade v. Greenlands*, (1916) 2 A. C. 15, 20, 38.
 3. *Michael v. Briggs*, (1890) I. L. R. 14 Mad. 362; cf. *Muhammadan Association of Meerut v. Bakhshi Ram*, (1883) I. L. R. 6 All. 284.
 4. *Mahomed Nathubhai v. Husen*, (1898) I. L. R. 22 Bom. 729; *Atmaram v. Narayan*, (1922) I. L. R. 46 Bom. 132.
 5. *Jarrot v. Ackerley*, (1915) 85 L. J. Ch. 135.
 6. Chitty on Contracts, 19th Edn., p. 484.
 7. *Per* Lord St. Leonards in *Re St. James' Club* (1852) 2 De G. M. & G. 383 (That is mere common sense; for if a member paying his annual subscription and paying for the articles which he orders in the club was also liable to pay the persons who supplied the club with those

Even membership of the committee of a club does not in itself involve personal liability. Thus, in an action by a tradesman against a member of the committee of a club to which he has supplied goods, it was held that mere membership of the committee would not make the defendant liable and the fact that he acted on the committee did not make him liable for the goods which were ordered when he was not present.¹

A creditor may sue individually the members who actually authorised the order. Thus, where the members of a club authorized the secretaries to order coals for them, the contract so made was held to have been made on their credit².

The question is not whether the defendants by their course of dealings have held themselves out as personally responsible to the plaintiff, but whether they had individually authorized the making of the contract³. But a member may make himself liable by ratifying the order given by another member of the club for the benefit of all, although the member who ordered the goods was the debtor in the plaintiff's books⁴.

The Secretary of a club cannot be sued personally upon a contract entered into by him on behalf of the club unless he has expressly accepted personal liability⁵. The question as to whether the secretary is personally liable upon a contract or not will depend upon the construction of the contract itself. Thus, where the secretary executed a pro-

articles who would belong to a club?), referred to in *Wise v. Perpetual Trustee Co.*, (1903) A. C. 139.

1. *Per Wright J.*, in *Draper v. Manvers (Earl)*, (1892) 9 T. L. R. 73 ; cf. *Wylie v. Carlyon*, (1921) 66 Sol. Jo. (W. R.) 6 (where debentures were issued by the committee in favour of a member of the club who had advanced to the club a sum of £10,000).
2. *Cockerell v. Aucompte*, (1857) 2 C. B. N. S. 440.
3. *Todd v. Emly*, (1841) 8 M. & W. 505. Cf. *Lascelles v. Rathbun* (1919) 35 T. L. R. 347 (where the defendant, the commanding officer, was held not liable for the goods supplied to the officers' mess, as he had not given or authorised the order).
4. *Delauney v. Strickland*, (1818) 2 Stark. 416 N. P., considered in *Royal Albert-Hall Corpn. v. Winchilsea*, (1891) 7 T. L. R. 362, C. A.; cf. *Harper v. Granville-Smith*, (1891) 7 T. L. R. 214.
5. *N. W. P. Club v. Sadullah*, (1898) 1 L. R. 20 All. 497.

missory note in his capacity as secretary of a club, he will not be personally liable in a suit upon the note¹. But if it is sought to make the secretary and the other members of the club liable for the debt on the basis that they authorised the loan then the suit has got to be brought on the original consideration² and not on the note. In a case where the secretary represented to the creditor that he had been duly authorized by the members of the committee to make the promissory note and on the faith of the representation the creditor lent money to the secretary on a promissory note executed by him in his capacity as the secretary, the creditor may bring a suit on the original consideration impleading the secretary and the members of the committee who actually authorized the loan, and in that suit plaintiff should claim judgment against the said members including the secretary and also claim, in the alternative, damages against the secretary for misrepresentation as to his authority³.

It is not always easy to ascertain the names of the individual members who are personally liable. In such cases, the procedure frequently followed is for the plaintiff to bring a representative suit under O. I, r. 8, C. P. Code which is substantially the same as O. XVI, r. 9, R. S. C. But there are difficulties in the way of a representative suit against a fluctuating body. It often happens that the members of a club at the time of the institution of the suit are not those who authorized the acts giving rise to their personal liability. The foundation of a representative suit is that there must be "identity of position as between the representing and the represented defendants", i. e., "unless all the persons so to be represented by the named defendants stood in the same position *vis-a-vis* the plaintiff as the named defendants, they would not be really represented by them, and therefore could not come within the meaning of the rule. All the defendants by representation must have the same interest in the cause ; otherwise no representation order can be made." Thus,

1. Cf. *Sadasuk Janki Das v. Maharaja Sir Kishan Pershad*, (1918-19) 46 I. A. 33.

2. Cf. *Shanmuganatha v. Srinivasa*, (1917) I. L. R. 40 Mad. 727.

3. Cf. Sec. 235, Ind. Cont. Act, 1872 ; *Venkaṭacharyulu v. Ramkrishna*, A. I. R. 1930 Mad. 439.

in a case where an action was commenced in 1936 for goods supplied in 1921 to the Chilton Collieries Lodge of the Durham Miners' Association, an unincorporated association, the plaintiff issued a writ against the Chairman, Treasurer, Financial Secretary and General Secretary of the Lodge, and obtained an order under R. S. C., O. XVI, r. 9 that the four named defendants should be sued as representing all the members of the association, it was held by the Court of Appeal that the membership of the association had fluctuated considerably and that at the time of the issue of the writ, out of 841 members only 19 were members at the time when the goods were ordered, and that some of the members were infants who had no voting power in the association and as such the representation order should not have been made. *Greer L. J.* observed as follows: "It is indisputable that only the persons who as members of the Lodge had authorized the orders given by the secretaries in 1921 could be made liable in an action for goods sold and delivered. The statement of claim asks for two declarations, (i) that the present members of the Lodge, i. e., the 841 individuals who were by representation made defendants to the action by the registrar's order, are liable to pay the sum of £135/18/- as the balance of the price of goods ordered by the 1921 secretaries on their behalf and with their authority, and (ii) a declaration that the defendants are entitled to resort to the fund of the Lodge, i. e., the funds of the 841 members for payment of the sum so claimed to be due from these members. It is plain that all the defendants by representation have not the same interest in the cause. The majority of these defendants named, if they had been named as defendants would have been entitled to prove that the goods were not ordered by them or with their authority as they were not the members of the Lodge in 1921, others might have been able successfully to plead the Statute of Limitation by proving that they had no part or lot in the payments that were made from time to time, while others may have no answer to the claim"¹.

1. *Barker v. Allanson*, (1937) 1 All. E.R. 75, 78, 79, following *London Association for Protection of Trade v. Greenlands Ltd.*, (1916) 2 A. C. 15 and distg. *Ideal Films, Ltd. v. Richards*, (1927) 1 K. B. 374. Read the observations of Lord Blanesburgh in *Kumaravelu v. T. P. Ram-*

It is clear from the judgment in the above case that a representation order cannot be made in the case of a claim where all the members of the unincorporated body at the time of the institution of the suit are not liable. There were other objections also raised in the above case, viz., that some of the members might have pleaded the Statute of Limitation, whilst to some a defence of infancy was open. But the first proposition by itself is a good ground for refusal of a representation order.

In an earlier case,¹ where an action was brought by an architect for money due for professional services rendered to an unincorporated religious society and as representatives of that society four persons were impleaded as defendants, and after a defence was delivered, the plaintiff with a view to bind the society and its property took out a summons under O.XVI, r. 9, R. S. C., asking that the writ and all the subsequent proceedings be amended by describing the defendants as being "sued on their own behalf and on behalf of all other members of the society" and further asking that the abovenamed defendants be directed to defend the action "on behalf of or for the benefit of all persons so interested", Vaughan L. J., and Buckley L. J. refused the application on the grounds—(a) that it was not shown that the defendants were the proper persons to defend on behalf of the absent parties, and (b) that the society's property could not be proceeded against otherwise than in the presence of all the members of the society. "It is simply an action of debt" Buckley L. J. observed, "against a large number of individuals and no judgment could be obtained which could be representative against all of them. There could only be a judgment against each of them." Kennedy L. J. observed, "Day by day, if this is a large body, one member is going out and another coming in. The body is continually changing, and to give a judgment against all the members for debt would be to include the case of an incoming member, who would be made liable though he was not a member at the

aswami, (1933) L. R. 60 I. A. 278 as to the conditions of a representative suit.

1. *Walker v. Sur*, (1914) 2 K.B. 930, expd. in *Andiappan v. Subbayya*, A. I. R. 1932 Mad. 163.

date of the contract and in the case of an outgoing member you would have to take the state of things at the date of the judgment. A judgment could not very well be given against one who had ceased to be a member, and yet they are all supposed to be those persons who are said to be represented. If this order stands, they would, I suppose, be anybody who at the date—I do not know whether it would be at the date of the commencement of the action or of the judgment—is a member of the society."

Applying the principles of the case of *Walker v. Sur*, the Madras High Court held that where a suit under O. I, r. 8 of the C. P. Code is brought against persons who are managers appointed of a certain community and invested with powers of borrowing and dealing with common property and where the suit is based on a promissory note executed by these persons and alleged to be for the purposes of the community, O. I, r. 8, C. P. Code can be applied in as much as these persons are fit persons to represent the society and there is no difficulty with regard to proceeding against the property because these persons represent the others with respect to the property.¹

The case of *Walker v. Sur* has also been considered in a recent Madras case², and it has been held that the procedure pertaining to representative suits is inapplicable to actions of debt, to money claims or to liabilities in contract or in tort; but representative suit will lie as much in respect of a declaration as injunction. In this case the defendants were sued under O. 1, r. 8 of C. P. Code as representing a large number of villagers. In the plaint it was alleged that the said villagers combined in order to deny the plaintiff's title and to take unlawful possession of the land. The plaintiff sued for a declaration of title, for possession, injunction and mesne profits. The defence was that the right of the whole community extended to the whole land and the right of each member was similar to the right of every other. Upon these facts, Venkatta Subba Rao and Abdul Rahaman J.J. held that

1. *Per Curgenven J., in Andiappan v. Subbaya*, A.I.R. 1932 Mad. 163, following *Sahib Thambi v. Hamid*, (1913) I. L. R. 36 Mad. 414; and *Ideal Films Ltd. v. Richards*, (1927) 1 K. B. 374.
2. *Ratnaswami v. Prince of Arcot's Endowments*, I. L.R. (1938) Mad. 1094, following *Hardie & Lane Ltd. v. Chiltern*, (1928) 1 K. B. 663.

there could not be any decree for mesne profits against the 150 odd villagers in as much as no villager was in occupation of more than a fractional share of the whole land ; but as regards the plaintiff's claim for declaration and possession, the plaintiff was entitled to the same, because—(a) the facts were common giving rise to the same liability with regard to each member, (b) there could be no difficulty in executing the decree against the person either on the record or absent ; the liability of one individual did not differ from the liability of another, and (c) that the absent members had no defences separate and distinct from those of the named defendants and of each other.

It is submitted that each of the two principles laid down in the above case, namely, (a) that a representative suit will not lie in respect of a money claim, (b) that such suit will lie in respect of a declaration or injunction, are somewhat too wide. As has been pointed out by the Court of Appeal in *Barker's case*¹, that a representation order cannot be made in respect of a money claim only when all the members of an unincorporated body are not liable and that although the relief claimed may be a declaration, if the cause of action on which the Court will base its declaration is a claim for the price of goods sold, the Court will not make any representation order unless all the members of the unincorporated body are liable. It is clear that the general propositions laid down in the Madras case are not without qualifications.

In *Barker's case*, Scott L. J. referred to a wholly different type of cases as regards the liability of the members of an unincorporated association whose rules might authorize the officers of the Lodge in their discretion, instead of granting money allowances to the members, with a further provision that the cost of paying for the goods should be a charge on the Lodge funds and defrayed by the members for the time being when money was wanted for such payments irrespective of the question whether they had been members or not at the time when the goods were bought. In such cases, his Lordship pointed out that different considerations would arise.

1. *Barker v. Allanson*, (1937) 1 All E. R. 75.

Suits between members or between a member and the club :
The plaintiff member of the committee is entitled to contribution against any other member of the committee who authorized or assented to and ratified the act of the committee in incurring a loan and which was recovered from the plaintiff¹. But it has been held that the members of a club are not personally liable to indemnify the trustees of a club where there is no rule imposing such liability upon them.²

Relations between a member and the club are governed by the rules of the club. Thus, a member may invoke the aid of the Court to restrain the Committee from contravening the rules or to prevent the rules being altered³. Even where the rules provide for the expulsion of a member, the expelled member may sue for an injunction restraining the committee from excluding him from the club and will succeed in such suit if he shows either that the rules are contrary to natural justice, or that what has been done was contrary to the rules or that there had been *mala fides* or malice in arriving at the decisions.⁴

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1. *Mountcashell (Earl) v Barber*, (1853) 14 C. B. 53.
 2. *Wise v. Perpetual Trustee Co.*, (1903) A. C. 139.
 3. *Harrington v. Sendall*. (1903) 1 Ch. 921 (In this case, the annual subscription prescribed by the rules of the club which contained no provision for amendment or alteration thereof was increased by a resolution passed by a majority of members present at a general meeting. A member who refused to pay the increased subscription was expelled, and in his action the Court interfered by injunction restraining the expulsion).
 4. *Of. Dawkins v. Antrobus*, (1881) 17 Ch. D. 615 ; *Young v. Ladies' Imperial Club*, (1920) 2 K. B. 523 ; *Richardson-Gardner v. Freemantle*, (1870) 24 L. T. 81 ; *Ambalal v. Phirox*, A. I. R. 1939 Bom. 35.

CHAPTER X

CAUSES OF ACTION.

The subject of this Chapter is considered under the following heads :

1. Cause of action—what is—
2. Cause of action in contract and in tort.
3. Concurrent or alternative causes of action.
4. Joinder of causes of action.
5. Splitting up of cause of action.
6. Cause of action and place of suing.
7. Cause of action not arising before suit, effect of—
8. Cause of action and limitation.

1. *Cause of action—what is*—The words “cause of action” have never been defined by the Indian Legislature. In England the words came to connote a definite meaning. Lord Esher M. R. quoted with approval the definition of that expression given in the earlier case of *Cooke v. Gill*¹, as “every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court, but it does not comprise every piece of evidence which is necessary to prove each fact but every fact which is necessary to be proved”.² The facts to be proved (*facta porbanda*) must be alleged (*allegata probanda*), but the evidence by which the said facts are to be proved (*facta probantia*) must not be pleaded³.

1. (1873) L. R. 8 C. P. 107.

2. *Read v. Brown*, (1888) 22 Q. B. D. 128, 131 C. A., folld. in *Murti v. Bhola Ram*, (1834) I. L. R. 16 All. 165 (F. B.); *Samarendra v. Pyarecharan*, (1934) I. L. R. 61 Cal. 1023; *Engineering Supplies Ltd. v. Dhandhanias & Co.*, (1931) I. L. R. 58 Cal. 539; *Guardian Assurance Co. Ltd. v. Thakur Shiva Mangal* I. L. R. (1937) All 234; *Official Receiver of the Estate of Mohandas Chataandas v. Naraindas Lotaram*, A. I. R. 1926 Sind 31; *Rani Amrit Kunwar v. (Maharaja) Gur Charan Singh*, A. I. R. 1934 All. 226; *Beni Madhab Sikdar v. Sarat Chandra*, A. I. R. 1937 Cal. 643; *Sheo Kumar v. Bechan Singh*, A. I. R. 1940 Pat. 76.

3. O. VI, rr. 2, 10, 11, 12, C. P. Code; *Phillips v. Phillips*, (1878) 4 Q. B. D. 127, 133; *Guardian Assurance Co. Ltd., v. Thakur Shiva Mangal* *supra*; *William Charles v. W. & T. Avery Ltd.*, (1933-34) 38 C. W. N. 938; *Ramprasad Chimanlal v. Hazarimull*, (1931) I. L. R. 58 Cal. 418 (where Lord-Williams J. condemned the practice of including in the pleading either directly or indirectly by reference

Prior to 1882, the Courts in India accepted the definition of the the expression 'cause of action' as given by the English Courts.

The Civil Procedure Code of 1882, Section 17, merely said that suits might be instituted within the local limits of whose jurisdiction the cause of action arose. It was not, however, clear whether it meant a place where the whole of the cause of action or only a part of it had arisen. Accordingly, the *Amending Act VII of 1888* added the following Explanation III to Section 17 of the Code of 1882 :—

"In suits arising out of a contract the cause of action arises within the meaning of this section at any of the following places, namely :—

- (i) the place where the contract was made ;
- (ii) the place where the contract was to be performed or performance thereof completed ;
- (iii) the place where in performance of the contract any money to which the suit relates was expressly or impliedly payable."

In some cases it was held that in cases of contract the three categories specified in the Explanation were exhaustive. In other cases, the Courts still interpreted the words 'cause of action' in the light of the English definition.

From *Section 20 of the Code of 1908*, the old categories have been deleted and the words "the cause of action, wholly or in part, arises" have been substituted.

The reason for, and the effect of, the omission of the Explanation from the Code of 1908 have been canvassed in several cases. In 1924 a Division Bench of the Rangoon High Court¹ held that the framers of the Code of 1908 omitted the said Explanation merely because they considered it necessary to mention the particular instances enumerated in the Explanation in as much as they had enunciated the general rules based on that Explanation. After alluding to the sense in which the words 'cause of action' have been used in O. II, rule 2, and O. IX, rule 9, of the Code, the said High Court proceeded to consider if the words 'cause of action'

to some document annexed, the evidence by which material facts are to be proved); *Thakur Prasad v. Mohammed Musa*, A. I. R. 1925 Pat. 410.

1. *Jupiter General Insurance Co. Ltd. v. Abdul Aziz*, (1923) I. L. R. 1 Rang. 231 ; cf. *Salig Ram v. Chaha Mal*, (1912) I. L. R. 34 All. 49, 53,

as used in Section 20 were intended to be as wide in meaning, as they must be, if the definition in *Read v. Brown*¹ is to be applied to them, and came to the conclusion that "for the purpose of Section 20 of the Code, the words 'cause of action,' so far as suits on contracts are concerned, include the making of the contract and the performance or completion of performance of the contract and the payment of money under the contract, and that in cases based on contract of insurance, they do not include the loss or damage of the property insured, which in the words of Holloway J., in *DeSouza v. Coles*² is merely a cause of the cause, and is not even proximate cause, since the real cause of action is the failure to pay the money due under the contract and the primary cause of that cause is the contract itself, the loss or destruction of the property being only a secondary cause which is purely accidental being due merely to the nature of the particular kind of contract under consideration".

In a recent case, the Allahabad High Court has held that section 20 of the Code must be interpreted as it is³. According to the said High Court the result of the deletion of the Explanation introduced by the Amending Act of 1888 is to restore the position as in 1882 and the Courts are now free to interpret section 20 in the light of the words used there irrespective of the categories specified previously. Therefore the words 'cause of action' should be understood to mean as defined in the English Courts and accepted in India. Thus, in a case of insurance against burglary it was held that burglary was part of the cause of action, and the Court within the local limits of whose jurisdiction the burglary was committed would have jurisdiction to entertain the suit. In the case of a life assurance the death of the assured is part of the cause of action⁴.

Save and except the Rangoon High Court, all the other High Courts in India have applied the words 'cause of action' in the light of the English definition; and the Judicial Committee have also in a case arising under section 103 of the Code of 1882, corresponding to O. IX, rule 9 of the present Code, by defining 'cause of

1. (1888) 22 Q. B. D. 128.

2. (1866-68) 3 Mad. H. C. R. 384.

3. *Guardian Assurance Co. Ltd., v. [Thakur Shiva Mangal]*, I. L. R. (1937) All. 234.

4. *Light of Asia Insurance Co. Ltd., v. Bai Chanchal*, (1932) A. I. R. Bom. 392.

action' as the "media upon which the plaintiff asks the Court to arrive at a conclusion in his favour", lent its support to the acceptance of the English definition in India¹.

The cause of action has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint².

Estoppel is a rule of evidence and is not a cause of action and cannot be properly set out in a plaint³. It may, if established, assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact essential to establish the cause of action, or by preventing a defendant from asserting the existence of some facts the existence of which would destroy the cause of action. On the other hand, *waiver is contractual and may constitute a cause of action*. It is an agreement to release or not to assert a right. Thus, if an agent, with authority to make such an agreement on behalf of his principal, agrees to waive his principal's rights, then (subject to any other questions such as consideration) the principal will be bound, but he will be bound by contract and not by estoppel⁴.

2. *Cause of action in contract and in tort*:—Personal causes of action may arise out of contract or out of wrongs independent of contract. An action of tort is an action based on facts which constitute a breach of duty on the part of the tort-feasor, whether the relationship out of which the duty arises results from a contract or not; if, however, the relationship does not give rise to the duty which is broken, but it is necessary to refer to the contract in order to establish such duty, then the action is said to be founded on contract.⁵ The rule has been laid down clearly in a recent case by

1. *Mt. Chand Kour v. Partab Singh*, (1887-88) L. R. 15 I. A. 156; *Shivkumar v. Bombay Life Assurance Co. Ltd.*, A. I. R. 1934 Sind. 76; cf. *Bengal Provident and Insurance Co. v. Kamini Kumar*, (1917-18) 22 C. W. N. 517.
2. *Mt. Chand Kour v. Partab Singh*, *supra*; *Mahomed Haji Hamed v. Jule and Gunny Brokers Ltd.*, A. I. R. 1932 Bom. 42 (Clause 12 of the Letters Patent is also confined to the cause of action or causes of action set forth in the plaint).
3. *Banumal v. Newandmal*, A. I. R. 1921 Sind. 159 (F. B.).
4. *Dawson's Bank Ltd. v. Nippon Menkwa Kabushiki Kaisha*, (1934-35) L. R. 62 I. A. 100.
5. Halsbury, 2nd Edn., Vol. 32, p. 160, Art. 227.

Greer L. J., thus : "Where the breach of duty arises out of an obligation undertaken by a contract, the action is founded on contract ; but where that which is complained of arises out of a liability independent of the personal obligation undertaken by a contract, an action brought in respect of this is founded on tort even though there may have been a contract between the parties."¹

Illustrations :—

(a) Cause of action in Contract :—

(i) Where a plaintiff, at the request of defendant, hired defendant's hackney carriage to convey her and her luggage and the defendant promised to convey her and her luggage safely and securely, but the defendant, not regarding his duty, so carelessly and negligently behaved and conducted himself that the plaintiff's luggage was lost ; it was held, the cause of action was in contract and not in tort.²

(ii) Where an architect had undertaken to supervise the erection of the plaintiff's house, and an action was brought against him for not using due care and skill in supervising the erection of the house, it was held that the action was founded on contract.³

(iii) Where the plaintiff caused to be delivered to the defendants, as common carriers of goods for hire, a parcel of goods to be carried from one place to another for reward, but the defendants did not safely and securely carry and deliver the same but so carelessly conducted themselves that it was lost, it was held that the action was founded on contract.⁴

(iv) Where the plaintiff sued defendants, a firm of stock-brokers, claiming damages for breach of his instructions as to the purchase of certain shares whereby he sustained loss, it was held that the action was founded on contract and not in tort.⁵

(b) Cause of action in Tort :—

(i) Where the plaintiff claimed the return of a picture or its value, and damages for its wrongful detention, it was held that the action was founded on tort.⁶

(ii) Where an action was brought by a railway passenger against the company caused by the negligence or misfeasance of a servant of the company, it was held that the action was founded upon tort and not upon the contract even though the passenger had taken a ticket.⁷

1. *Jarvis v. Moy, Davies & Co.*, (1936) 1 K. B. 399.

2. *Baylis v. Lintott*, (1873) L. R. 8 C. P. 345, appld. in *Bryant v. Herbert*, (1878) 3 C. P. D. 189.

3. *Steljes v. Ingram*, (1903) 19 T. L. R. 534.

4. *Fleming v. Manchester & Sheffield Ry. Co.*, (1878) 4 Q. B. D. 81.

5. *Jarvis v. Moy, Davies & Co.*, *supra*, *refd. Groom v. Croker*, (1938) 2 All E. R. 394.

6. *Bryant v. Herbert*, (1878) 3 C. P. D. 189, appld. *Steljes v. Ingram, supra*.

7. *Taylor v. Manchester, Sheffield & Lincolnshire Ry. Co.*, (1895) 1 Q. B. 134, appld. *Lyles v. Southend-on-Sea Corpn.*, (1905) 2 K. B. 1.

(iii) Where the plaintiff, vendor of goods, delivered them to defendants, a railway company, as carriers for reward, the goods being consigned to the intending purchasers, and before the goods had been delivered to the consignees or claimed by them from the defendants, plaintiff discovered that the consignees were insolvent, and as unpaid vendor, gave notice to defendants not to deliver the goods to the consignees but to hold them to the plaintiff's order, and before the goods were delivered to the consignees, plaintiff required the defendants to re-deliver them to him, but the defendants refused to do so and delivered them to the consignees, who absconded without paying for the goods, in an action for damages against the defendants, it was held that the action was founded in tort and not on contract¹.

(iv) Where plaintiff, a dealer, bought a hydraulic press from the defendant, an auctioneer, at a sale under conditions of sale requiring payment before delivery, and time was allowed for payment, and payment was tendered within the time allowed, but defendant refused to deliver the press, having contracted to resell it and if in fact reselling it subsequent to the tender, in an action for damages it was held that the action was for wrongful conversion subsequent to and independent of the contract passing the property, and it was, therefore, an action of tort².

3. *Concurrent or alternative causes of action*: In personal actions, it is often the case, that the same wrong is both a breach of contract and a tort. Thus where a person voluntarily binds himself by a contract to perform some duty which already lies upon him independent of any contract, the breach of such a contract is also a tort. In such cases the plaintiff may sue either in contract or in tort. "He must however make his choice of remedies and cannot have a double compensation for the same matter, first, as a breach of contract, and then as tort; at the same time the rule that the defendant's liability must not be increased by varying the form of the claim is not here applicable, since the plaintiff may rely on the tort notwithstanding the existence of doubt whether there be any contract, or if there be, whether the plaintiff can sue on it"³.

Where a person has the option to sue either in tort or in contract, if he should select the former mode of redress, he may no doubt recover exemplary damages; but if he should choose to seek redress in the form of an action for breach of contract, he lets in all the consequences of that form of action. One of these consequences is that he is to be paid adequate compensation in money for the loss of that which he would have received had his contract been kept and no more⁴.

1. *Pontifex v. Midland Ry. Co.*, (1877) 3 Q. B. D. 23.
2. *Cohen v. Foster*, (1892) 61 L. J. Q. B. 643.
3. Salmond on Tort, 9th Edn., p. 10; *Mulsing Dowlatram (Firm) v. Fatehchand*, A. I. R. 1936 Sind. 229.
4. Per Lord Atkinson, in *Addis v. Gramophone Co. Ltd.*, (1909) A. C. 488.

Illustrations :

(i) Where a physician harms his patient by negligently administering a deleterious drug, he is guilty of both a breach of contract and a tort. "It is breach of contract, because the physician has impliedly promised to use due care and skill in the treatment of his patient, and it is also a tort because, apart from contract altogether, no one has a right to do another physical harm by giving him poison."¹

(ii) Where the plaintiff employed the defendant, a dentist, for reward, to extract a tooth by his painless process, but the tooth was so unskilfully extracted that portions of it were left in the plaintiff's jaw whereby illness, pain and suffering were caused to the plaintiff, in an action for damages, it was held that the action could lie in tort for negligence as well as in contract for breach of the undertaking².

(iii) Where the plaintiff, a young child, just about the age up to which children were entitled to pass free, travelled with his mother who took a ticket for herself only, in an action for harm suffered in an accident caused through the negligence of the defendants, it was held that the company was liable either on an entire contract to carry the mother and the child (enuring, it seems, for the benefit of both so that the action was properly brought by the child) or independently of contract, because the child was accepted as a passenger and thus cast a duty on the company to carry him safely³.

We have dealt with cases where there may be two causes of action with a common plaintiff. There are cases where the contractual duty may be owed to one person, and a duty independently of contract to another.

Thus where a surgeon is employed by the father for reward to operate upon his child, he owes a contractual duty to the father to use due care and skill. If he fails in that duty, he is also liable for tort against the child⁴.

1. Pollock on Tort, 14th Edn., pp. 433, 434.

2. *Edwards v. Mallan*, (1908) 1 K. B. 1002.

3. *Austin v. Great Western Ry. Co.*, (1867) L. R. 2 Q. B. 442, 445, 447, *conad.* in *Foulkes v. Metro. Dist. Ry. Co.*, (1890) 48 L. J. C. P. 555. Both cases are referred to in *Shiam Narain Tikkoo v. Bombay, Baroda & Central India Ry.*, (1919) I. L. R. 41 All. 488. Cf. *East Indian Ry. Coy. v. Kalidas*, (1900-01) L. R. 28 I. A. 144 (case of death of plaintiff's son who was killed by an explosion in a railway carriage caused by the bringing into the carriage of a quantity of fire-works by some passengers. The allegation was that the Railway Company did not use proper care and skill in carrying. *Held*, the Railway Company was not liable in damages unless they were guilty of negligence in permitting the fire-works to be brought into the carriage).

4. *Pippin v. Sheppard*, (1882) 11 Price, 400. *Gladwell v. Steggall*, (1839) 5 Bing. N. C. 733.

The boundary line between contract and tort is somewhat obscured by the recognition of certain *quasi-contracts*, the breach of which is really a mere tort, and of certain *quasi-torts* which are in reality mere breaches of contract¹.

Quasi-contracts : There are certain cases in which it is permissible to waive the tort and sue instead for the breach of a *quasi-contract*—a contract fictitiously implied by law. A tort can only be waived in favour of a breach of contract when either there were at the time of the commission of the tort contractual relationship between the parties and the tort complained of was also a breach of contract, or when the same act or omission creates a position which brings the parties into what the party suffering the wrong is entitled to regard as a contractual relationship². Thus, if a man takes goods to which he has no right and sells them and recovers the price as money had and received by the defendant to the use of the plaintiff, the defendant being fictitiously assumed to have rightfully received the money from the plaintiff, and to have failed to have paid to him³. Where the defendants went to the house of the plaintiffs for the purpose of searching for money and one of the defendants also entered and found in a cupboard a sum of money, which he took away, and it was subsequently paid into a bank by both defendants to their joint account and the money was proved to belong to plaintiffs, it was held that the plaintiffs might waive the trespass and recover the amount in an action against both defendants for money had and received to his use⁴.

Quasi-torts : Since the abolition of Forms in England, fictitious or *quasi-torts* have disappeared with the procedure to which they owed their origin⁵.

4. *Joinder of causes of action*—Under the Civil Procedure Code of 1908, a plaintiff has got an extensive power of joining several causes or action in the same suit. Order II, rule 3, provides—

“Save as otherwise provided a plaintiff may unite in the same suit several causes of action against the same defendant or the same defendants jointly ; and any plaintiffs having

1. Salmond on Tort, 9th Edn., p. 12.

2. *Per Bailhache J.*, in *Bristol Channel Steamers Ltd. v. R.*, (1924) 131 L. T. 608.

3. *Lamine v. Dorrell*, (1705) 2 Ld. Raym., 1216.

4. *Neate v. Harding*, (1851) 6 Exch. 349.

5. See Salmond on Tort, 9th Edn., pp. 12-14.

causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit."

The above rule is to be read subject to the provisions of O. I, rr. 1 and 3 of the Code, which relate not merely to joinder of parties but to joinder of parties and causes of action¹.

Under Order I, rule 1 of the Code, all persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons, any common question of law or fact would arise."

The rule as to joinder of causes of action is subject to the limitation that where it appears to the Court that any causes of action joined in one suit cannot be conveniently tried or disposed of together, the Court may order separate trials or make any other order as may be expedient².

The result of the above rules may be summarised as follows :—

Same plaintiff, same defendant : Where there is one plaintiff and one defendant, any number of different causes of action whether they sound in contract or in tort may be included in the same proceedings. To this rule there are the following exceptions :—

- (i) No cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immovable property except—
 - (a) claim for mesne profits or arrears of rent in respect of the property claimed or any part thereof ;
 - (b) claims for damages for breach of any contract under which the property or any part thereof is held ; and
 - (c) claims in which the relief sought is based on the same cause of action.

Provided that nothing in the above rule shall be deemed to prevent any party in a suit for foreclosure or redemption from asking to be put into possession of the mortgaged property³.

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1. *Ramendra v. Brajendra*, (1918) I. L. R. 45 Cal. 111, 132, 133 ; *Harendra v. Purna*, (1928) I. L. R. 55 Cal. 164, fold. in *Bhagvan Gokulji & Co. v. Balku Babaji*, (1932) 33 Bom. L. R. 1291.
 2. O. II, r. 6, C. P. Code ; *Subramanian v. T. R. M. T. S. T. Firm*, A. I. R. 1935 Rang. 209.
 3. O. II, r. 5, C. P. Code. Cf. *Bhagvan Gokulji & Co. v. Balku Babaji*, (1932)

- (ii) No claim by or against an executor, administrator or heir, as such, shall be joined with claims by or against him personally, unless the last mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor, administrator or heir, or are such as he was entitled to, or liable for jointly with the deceased person whom he represents.

Note : In England, under O. XVIII, r. 5, R. S. C., another exception to the general rule is specially provided for, namely, 'Claims by a trustee in bankruptcy, as such, may not except by leave of the Court or a Judge be joined with any claim by him in any other capacity.' In India there is no rule corresponding to the English rule, but such joinder will be at the discretion of the Court under O. II, r. 6 of the Code.

Different plaintiffs, same defendant : Under the C. P. Code of 1882, all persons could be joined in one suit as plaintiffs, provided that the right to relief, alleged to exist in such plaintiffs, arose from the same cause of action. Under the present rule, (O. I, r. 1 read with O. II, r. 3)—

- (1) where there are two or more plaintiffs and two or more causes of action, they may be joined in one suit if the right to the relief and causes of action—
 - (a) arise from the same act or transaction or series of acts or transactions, and
 - (b) there is a common question of law or fact though the plaintiffs may not be jointly interested in all the causes of action¹.
- (2) But if the right to the relief claimed does not arise from the the same act or transaction or series of acts or transactions, or if there is no common question of law or fact, then two or more plaintiffs cannot join in one suit unless they are jointly interested in the causes of action.

Same plaintiff, different defendants : Under O. II, r. 3, read with O. I, r. 1, C. P. Code—

- (1) Two or more defendants may be joined as parties in one suit though there are two or more causes of action provided the right to relief claimed arises from the same act or

33 Bom. L. R. 1921 ; *Harendra v. Purna*, (1928) I. L. R. 55 Cal. 164 ; *Ramautar Singh v. Brij Kishore*, A. I. R. 1933 Pat. 653 ; *Hiranand Lalchand v. James Finlay & Co.*, A. I. R. 1934 Sind 176 ; *Basharat Beg v. Hira Lal*, A. I. R. 1932 All. 401.

1. *Stroud v. Lawson*, (1888) 2 Q. B. 44, 52, 54.

transaction or series of acts or transactions and there is a common question of law or fact; and this is so although they may not all be jointly interested in all the causes of action.

- (2) But if the right to the relief claimed does not arise from the same act or transaction or if there be no common question of law or fact they cannot be so joined unless they are jointly interested in the causes of action¹.

5. *Splitting up of cause of action*: The intention of the Legislature is that as far as possible all matters in dispute between the parties should be disposed of in one and the same suit². Accordingly, O. II, r. 2 of the C. P. Code provides that—

- (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.
- (2) Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.
- (3) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

Explanation.—For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action”.

The above rule is directed to securing the exhaustion of the relief in respect of a cause of action, and not to the inclusion in one and the same action of different causes of action, even though they arise out of the same transaction.³ The first part of the clause makes it incumbent on the plaintiff to include the whole of his claim in his action. The second portion makes it incumbent on him to ask for the whole of his remedies. The final paragraph

1. Mulla's C. P. Code, 10th Edn., p. 495.

2. Cf. O. II, r. 1, C. P. Code.

3. *Sheokumar v. Bechan Singh*, (1939) 184 I. C. 714; *Shridhar v. Godulal*, (1939) 41 Bom. L. R 1223.

is not intended to be an illustration of the foregoing provisions but a substantive enactment, making an obligation and a collateral security for its performance (which would otherwise be two independent causes of action) one cause of action for the purposes of the rule. Thus where the plaintiff sued upon promissory notes but the suit failed owing to material alterations on the notes and the plaintiff afterwards sued for a part of the consideration (for which the promissory notes had been given) on the basis of an award, it was held by the Judicial Committee that although the claims in the two actions arose out of the same transaction they were in respect of different causes of action and that, consequently, the second action was not brought contrary to Section 34, Ceylon Civil Procedure Code (which is in the same terms as O. II, r. 2 of the Indian Code) and could be maintained¹.

In the language of two earlier cases decided by the Judicial Committee, the rule requires that every suit shall include the whole of the claim arising out of the cause of action. It does not say that every suit shall include every cause of action or every claim which the party has².

Omission to sue : The word 'intentionally' does not qualify the words 'omits to sue' in O. II, r. 2 (2) as it does the word 'relinquishes'. But it has been held that the expression "omits to sue" involves intention. It is *ejusdem generis* with intentional relinquishment³. The Judicial Committee have held that "a right which a litigant possesses without knowing or ever having known that he possesses it can hardly be regarded as a 'portion of his claim' within the meaning of Section 7 of Act VIII of 1859"⁴ (now O. II, r. 2). On the face of available knowledge, an accidental omission will be an omission within the meaning of the rule⁵. But in a case where the suit has not been heard but a claim has been omitted by inadvertence, an amendment will be allowed⁶.

1. *Payana Reena v. Pana Lana*, (1913-14) L. R. 41 I. A. 142.

2. *Rajah of Pillapur v. Sri Rajah Venkata*, (1884-85) L. R. 12 I. A. 116, fold. in *Amanat Bibi v. Imdad Husain*, (1887-88) L. R. 15 I. A. 106.

3. *Ram Harakh v. Ram Lal*, (1916) I. L. R. 38 All. 217, 222.

4. *Amanat Bibi v. Imdad Husain*, (1887-83) L. R. 15 I. A. 106; *Chandikamba v. Veswanadhamayya*, A. I. R. 1936 Mad. 699; *Muhammad Hafiz v. Muhammad Zakariya*, (1921-22) L. R. 49 I. A. 9.

5. *Moonshee Buxloor Ruheem v. Shumsounnissa Begum*, (1886-87) 11 M. I. A. 551, 605.

6. *Upendra v. Janaki*, (1918) I. L. R. 45 Cal. 305.

Relinquishment : A plaintiff may intentionally relinquish a portion of his claim and, once he does so, he cannot afterwards sue in respect of the portion so relinquished.

Thus where Rs. 2,500/- is due to the plaintiff and he files a suit in the Presidency Small Causes Court for Rs. 2,000/- abandoning Rs. 500/- as in excess of the jurisdiction of the Court, he cannot file a fresh suit for Rs. 500/-. But in a case where a suit so instituted was transferred to the High Court on the application of the defendant, liberty was given to the plaintiff to amend the plaint by adding thereto such statements as might be necessary to show that the plaintiff's claim abandoned in the Small Causes Court was to be revived in the High Court¹.

Omission to sue for one of several reliefs : If a plaintiff omits, except with the leave of the Court, to sue for any relief to which his cause of action entitled him, he cannot claim it in a subsequent suit. Thus on a suit for reconveyance of certain properties succeeding, a subsequent suit for an account of rents and profits of the said properties received up to the reconveyance was held barred by O. II, r. 2 of the Code². Where a beneficiary was entitled to a charge on the trustee's property which vested in the Official Assignee and he brought a suit for personal judgment for amount due to him without obtaining the leave of the Court to reserve his other remedy by way of charge, it was held that he lost his right to enforce the charge³.

The bar to the subsequent suit under this rule will operate even when the reliefs taken separately and alone would be cognizable in different jurisdictions. Thus where a wife sued her husband for maintenance in a Court within whose jurisdiction he was residing but had no property situate within it, and obtained a personal decree against him, a subsequent suit against the husband in the Court within whose jurisdiction the properties were situate, for a declaration of charge on the properties in respect of the maintenance decree, was held to be barred under this rule⁴.

As a matter of prudence, the plaintiff will do well to make the application for leave even before he files his plaint or at least along with his plaint but this does not mean that the Court has no power to grant leave unless the application is so made. A question of this

1. *Ram Lall v. Bhajahari*, (1896-97) 1 C. W. N. 32.

2. *Naba Kumar v. Radhashyam*, (1930-31) 35 C. W. N. 977 (P. C.).

3. *Official Assignee of Bombay v. Abdul Hayee*, A. I. R. 1933 Bom. 437.

4. *Rama Rao v. Venkayamma*, A. I. R. 1931 Mad. 705.

kind can as well be dealt with by the Court during the pendency of the suit as before its institution.¹

6. *Cause of action and place of suing* : Under Sec. 20 of the C. P. Code, subject to certain limitations, a suit may be instituted where the cause of action arose wholly or in part. Under clause 12 of the Letters Patent for the High Courts of Calcutta, Bombay and Madras, and clause 10 of the Letters Patent of the High Court of Rangoon, the High Court in the exercise of its ordinary original civil jurisdiction is empowered to entertain and try suits other than suits for land or other immovable properties, if the cause of action shall have arisen, either wholly, or in case the leave of the Court shall have been first obtained, in part, within the local limits of the ordinary original jurisdiction of the said High Court. Except as regards leave, the provisions in Sec. 20 of the Code correspond to those in the Letters Patent. The subject of place of suing with reference to the cause of action may be considered under the following heads :

A. In contract.

B. In tort.

C. In other cases.

A. *In contract* : In suits based on contract, the cause of action ordinarily consists of the making of the contract, and of its breach, so that the suit may be filed either at the place where the contract was made or at the place where it should have been performed². But there may be other essential facts constituting the cause of action, the happening of which may have a bearing on the jurisdiction of the Court to entertain a particular suit. For example, in cases based on contracts of insurance, the loss or destruction of the property insured is part of the cause of action, and therefore, the Court within the local limits of whose jurisdiction the loss has occurred will have jurisdiction to entertain the suit. The same rule shall apply in the case of insurance against burglary.³ It should be noted that parties cannot confer jurisdiction on Court by agreement, when it does not possess it, *i. e.*, without reference to the place where the contract is made or the place where the contract is to be performed.⁴

1. *Venkayya v. Venkata Rao*, A. I. R. 1938 Mad. 979.

2. *Champaklal Mohonlal v. Nectar Tea Co.*, (1933) I. L. R. 57 Bom. 306 ;
Briju Pandey v. Gangee Ahir, A. I. R. 1939 Pat. 294.

3. *Guardian Assurance Co. Ltd. v. Thakur Shiva Mangal*, I. L. R. (1937) All. 234 (For fuller discussion see heading 'Cause of action—what is—'supra).

4. *Asiatic Petroleum Co. v. Hafiz*, A. I. R. 1929 Sind 227.

(a) *Place of making the contract* : A contract is made when an offer of one party is accepted by the other. If the offer of one party and the acceptance thereof are made in different places, the place of acceptance is the place where the contract is made. In other words, a contract is made in the place where it was concluded by the assent given by the person to whom the proposal was communicated.¹ When the proposal and acceptance are made by means of letters the contract must be deemed to have been made at the place where the letter of acceptance is posted, and not where it is received.²

(b) *Place of performance of contract* :

(i) *Where place of performance is specified in the contract* : A suit on a contract can be brought in India in the Court which has territorial jurisdiction over the place where the contract has to be performed.³ The place of performance is the place which appears upon the face of the contract, either in express terms or by necessary implication.⁴

(ii) *Where no place of performance is specified in the contract* : Under the English common law rule, where no place of performance is specified, either expressly or by implication,⁵ the debtor must seek out his creditor.⁶ The only

1. *Per Rankin C. J.*, in *Engineering Supplies Ltd. v. Dhandhanias & Co.*, (1931) I. L. R. 58 Cal. 539.
2. *(The Firm) Hira Nand Murti Dhar v. (The Firm) Gurmukh Rai Radhakishan*, A. I. R. 1923 Lah. 427 ; cf. *Sitaram Marwari v. Thompson*, (1905) I. L. R. 32 Cal. 884, 890 ; *Bengal Insurance and Real Property Co. v. Velayammal*, I. L. R. (1937) Mad. 930 ; *Muhammad Esuff Rowther v. M. Hateen & Co.*, A. I. R. 1934 Mad. 581 ; *Ahmad Bux v. Fazal Karim*, (1939) M. W. N. 1171 (The offer is made at the place where it is received).
3. *De Souza v. Coles*, (1868) 3 Mad. H. C. R. 384 ; *Gopee Kisto v. Nilcomul* (1874) 22 Suth. W. R. 79 (2) ; *Ohampakkal v. Nectar Tea Co.*, (1933) I. L. R. 57 Bom. 306 ; *Sm. Tuslimon Bibi v. Abdul Latif*, (1935-36) 40 C. W. N. 392.
4. *Soniram Jeetmull v. R. D. Tata & Co.*, (1926-27) L. R. 54 I. A. 265, folld. in *Propagation of Gospel etc. v. Samorao Naidu*, A. I. R. 1938 Mad. 977 ; *Sm. Tuslimon Bibi v. Abdul Latif*, *supra*.
5. *Dobson v. Benjal Spinning & Weaving Co.*, (1897) I. L. R. 21 Bom. 126, 134 (case showing the circumstances from which the place of performance was implied).
6. *Per Bowen L. J.*, in *The Eider* (1893) Prob. 119 ; cf. *Haldane v. Johnson*, (1853) 8 Exch. 689 ; *Poole v. Tumbridge*, (1837) 2 M. & W. 223 ; *Fessard v. Mugnier*, (1865) 18 C. B. N. S. 286.

limitation to this rule is that the creditor must reside within the realm.¹

Under the Indian law where performance has to be made without the application of the promisee, and no place is fixed for the performance of the promise, whether the promise is to deliver goods or to pay money,² it is the duty of the debtor to apply to the creditor to appoint a reasonable place for the performance of the promise, and to perform it at such place. The observations of Sir Lawrence Jenkins in a Bombay case,³ that Section 49 of the Contract Act is exhaustive and that in India there is no scope for the application of the common law rule that a debtor must seek out his creditor, have been doubted by Lord Sumner in *Soniram Jeetmull v. R. D. Tata & Co.*⁴ and his Lordship has pointed out that if Sir Lawrence Jenkins' view are correct, then where there is no place for performance fixed by the agreement and the debtor does not apply to the creditor to fix a reasonable place for performance, there would be no place for performance at all and the debtor would be able to better his position by himself being in default, that is to say, by omitting to apply to the creditor for fixing the place for performance, whereas if he had so applied the reasonable certainty is that the place of performance would have been fixed at the creditor's place of residence.

It should, however, be noted that *Soniram's* case was not decided on the basis of the common law rule but upon the basis that therein the place of performance appeared on the face of the contract by clearest implication though not in express terms. To the argument as to the importation of the technical rule of English law into the jurisprudence of India his Lordship gave the simple answer that "*it was a mere implication of the meaning of the parties.*"

In an earlier case⁵ where the plaintiff resided at Secunderabad and the defendant resided at Hyderabad and there was no promise to repay the loan at Secunderabad, their lordships of the Judicial Committee held that the Secunderabad Court had no jurisdiction because there was no implied promise to repay the loan at Secun-

1. *Bansilal Abirchand, v. Ghulam*, (1925-26) L. R. 53 I. A. 58.

2. *Soniram Jeetmull v. R. D. Tata & Co.*, (1926-27) L. R. 54 I. A. 265, 271.

3. *Putlappa v. Vira Bhadrappa*, (1905) 7 Bom. L. R. 993.

4. *Soniram Jeetmull v. R. D. Tata & Co.*, *supra*, discussed in *Nathubhai v. Chhabildas*, (1935) I. L. R. 59 Bom. 365.

5. *Bansilal Abirchand v. Ghulam*, *supra*.

derabad and added that "even by British law the duty of a debtor to find and pay his creditor is only imposed upon him when the creditor is within the realm. And the plaintiff has not contended that if there be any such duty at all imposed by Indian law upon a debtor it extends in this respect further than in England. Accordingly, so far as the principal debtor is concerned, there is no obligation upon him, either express or implied, to make any payment to the plaintiff at Secunderabad."

The significance of the words "where the creditor resides within the realm" and their applicability to India were considered by Tyabji J. in a Bombay case.¹ In that case the defendant was a resident of Sachin and the plaintiff of Surat and the question was whether the money borrowed was repayable at Surat so that the Surat Court should have jurisdiction over the suit. Referring to the above Privy Council case, His Lordship observed: "Taken literally the restriction on the debtor's duty would not be adverse to the creditor here; for the creditor resides within the realm, it is the debtor who resides outside British India. It may be reasonable to take the rule referred to by Lord Blanesburgh as implying that the duty of the debtor to find out his creditor cannot be stretched so as to require the debtor to travel across the seas. If the debtor need not cross the seas when he is within the realm, and the creditor beyond, is the converse to hold? Is the creditor bound to cross over to the debtor when the debtor is beyond the realm? See *Haldane v. Johnson*, (1853) 8 Ex. 689. In any case the rule must be applied to India with the modification necessitated by the altered circumstances in India, and being within or beyond the realm is a different consideration where the realm consists of an island like England and where the territories of the Native States and British India (as in the case) adjoin each other. The question that the Court has ultimately to decide is whether the appointment by the creditor of his own residence as the place for payment, would be reasonable in cases in which the defendant resides outside British India. For this purpose obviously no hard and fast rule can be laid down. The true view seems to be this: the defendant failed in his duty to apply for a place for payment: it is reasonable to think that if he had applied, the plaintiff would have appointed Surat, where he resides; his bringing the suit in Surat corroborates this view. The rule referred to by Lord Blanesburgh indicates one of the circumstances affecting

1. *Nathubhai v. Chhabildas*, (1935) I. L. R. 59 Bom. 365.

the question whether the place appointed by the promisee for payment is a reasonable place. Though the defendant was residing outside British India he was residing in Sachin, quite near Surat, where the suit was brought and where consequently the plaintiff by implication required payment to be made. The defendant might have wished the Court to find that he had not failed to apply as required by Section 49; or that another place had been appointed for payment; or that there was a contract express or implied by the circumstances or by custom, that the plaintiff could not appoint Surat as the place for payment; or that any similar defence is open to him. In that case it would have been for defendant to adduce evidence on his defence."

Where both the debtor and the creditor reside within the realm no difficulty arises as regards the applicability of the maxim "*the debtor must find out the creditor*" to India.¹

Classes of contracts to which the maxim applies :—

In this connection it is well to bear in mind the observations of Wallis A. C. J., in an Allahabad case: "The maxim that a debtor must find his creditor is unfortunately frequently quoted and sought to be applied to circumstances to which it has no relation at all. There is a great difference between three classes of contracts in relation to which this maxim may be discussed. There is the ordinary case of *purchaser and vendor*, to which of course it is, in the main generally applicable. If a purchaser in Allahabad applies to a tradesman in Calcutta to sell him goods, the purchaser in Allahabad must pay the vendor in Calcutta unless some other arrangement is made. The second class is a class of *principal and agent* which may also colloquially be described as *master and servant*. It frequently happens that a large establishment dealing, say, in carpets at Mirzapore, or cotton in Agra, or some other large commercial centre, has branch businesses presided over by managers who are in a sense agents. They are agents to pledge their principal's credit; they are frequently paid by commission on results. But in such cases as those, it may often be, that the place at which the agent or the branch manager is, by his contract

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1. *Sm. Tushimon Bibi v. Abdul Latif*, (1935-36) 40 C. W. N. 392, folld. in *Srilal Singhania v. Anant Lal*, I. L. R. (1940) 1 Cal. 323 (When in a promissory note no place is fixed for payment, the Common Law rule applies and it is the duty of the debtor to seek out the creditor and pay the debts to him).

or unwritten understanding with his principal, bound to account and bound to pay and discharge his liabilities is the head place of business. But it is a very different matter in a case of this kind where the defendant is not a servant at all of the plaintiff, is totally independent of, and is merely a contractor earning his living generally as a commission agent. Unless the contractor clearly indicates the contrary, an agent of this kind who becomes a factor entrusted with goods of his principal with wide powers, has no doubt under the appropriate section of the Contract Act, eventually to account to his principal, but the accounting must necessarily be where all the business is transacted"¹.

As to how far the maxim,—*‘the debtor must seek the creditor’*—is applicable to *suits on negotiable instruments*, is a question of some nicety. Where a promissory note is executed at the place where the debtor resides, and no place of payment is mentioned, the maxim, according to the Nagpur High Court, does not apply and the suit must be filed in the Court within whose jurisdiction the debtor's place of residence or business is, and the Court within whose jurisdiction the creditor resides has no jurisdiction to try the suit. This is because section 70 of the Negotiable Instruments Act declares that a promissory note or a bill of exchange, not made payable as mentioned in sections 68 and 69, must be presented for payment at the place of business, if any, or at the usual residence, of the maker, drawee or acceptor thereof, as the case may be.² The Rangoon High Court seems to be of the same opinion in that it says that the maxim does not apply where the suit is not on the promissory note but on the original consideration.³ A different view is expressed by the Lahore High Court which says that where a pro-note does not specify any place where the payment is to be made, it should be presumed that the payment is to be made at the usual place of the business of the creditor and the cause of action for a suit based on a pro-note arises at that place. This is because under section 64 of the Negotiable Instrument Act, the consequences of non-presentment of a promissory note does not discharge the maker of the note and, therefore, the mere fact that the promissory note was liable to be presented to the debtor

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1. *Tika Ram v. Daulat Ram*, (1924) I. L. R. 46 All. 465 (case of a pucca adatia), dissenting from *Motilal v. Surajmal*, (1906) I. L. R. 30 Bom. 167; cf. *Devidatt v. Shriram*, (1932) I. L. R. 56 Bom. 324; *Bhamboo v. Ram Narain*, (1928) I. L. R. 9 Lah. 455.
 2. *Per Subhedar A. J. C.*, in *Gopikisan v. Jethmal*, A. I. R. 1935 Nag. 144.
 3. *Palaniappa v. Subbiah*, A. I. R. 1937 Rang. 433.

at a particular place, under section 70, does not imply that the amount due on the pro-note is payable at that place.¹

Instances of Place of suing in suits on Contract :—

The following are instances of the place of suing with reference to the place where the cause of action in suits on contract either wholly or in part, arises :—

(i) *Assignment of debt* : An assignment of debt is part of the assignee's cause of action and the assignee may sue at the place of assignment.²

(ii) *Breach of Contract* : A suit for damages for breach of contract can be brought either where the contract was made or where its breach was committed. In such a suit brought on the original side of the High Court, where no leave has been obtained under clause 12 of the Letters Patent, it must be established that the contract as well as the breach have taken place within the local limits of the Court.³

In a suit for damages for breach of contract to ship goods *c. i. f.* to Calcutta, where the goods were rejected at Calcutta, it was held that the rejection was part of the cause of action and that the suit could be filed in the High Court at Calcutta with leave under clause 12 of the Letters Patent.⁴

Where A. agreed at Madras to employ B., on behalf of his business at Surat, but after the agreement is made, refuses to employ him or cancels the agreement, the Surat Court has jurisdiction to try the suit for damages for breach of the contract as the contract was intended to be performed in Surat, and *prima facie*, the place of performance is a place for the breach of contract.⁵

(iii) *Contract of agency* : In suits against agents for accounts, the cause of action arises at the place where the

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1. *Nanu Mal v. Firm Shubbamal*, A. I. R. 1939 Lah. 18, follg. *Ghanias Lal v. Karam Chand*, (1929) I. L. R. 10 Lah. 755. Cf. *Raman Chettiyyar v. Gopalachari*, (1908) I. L. R. 31 Mad 223 (in which it was held that the maxim does not apply because of Sec. 17, Exp. 3 of the C. P. Code, 1882). Cf. *Srilal Singhania v. Anantlal*, I. L. R. (1940) 1 Cal. 323.
 2. *Read v. Brown*, (1888) 22 Q.B.D. 128 ; *Harnathrai v. Churamoni*, (1932-33) 37 C. W. N. 1139.
 3. *Doya Narain v. Secy. of State for India*, (1887) I. L. R. 14 Cal. 256 ; *Sheshagiri v. Nawab Askur*, (1904) I. L. R. 27 Mad 494.
 4. *Engineering Supplies v. Dhandhanias*, (1931) I. L. R. 58 Cal. 539.
 5. *Champaklal v. Nectar Tea Co.*, (1933) I. L. R. 57 Bom. 306.

contract of agency was made or the place where accounts were to be rendered and payment was to be made by the agent.¹ A commission agent is entitled to file a suit for the recovery of the amount due to him in respect of the business due by him as agent at the place where he carries on his business. The presumption in such cases is that a part of the cause of action arises in the place where the agent carries on his business as he is required to do a part of the work of agency in that place.² A suit by a principal against a commission agent, who has agreed to execute an order placed with him by correspondence, must be instituted at the place where the commission agent carries on his business, and the principal cannot sue him at the place from where he sent the order.³

(iv) *Contract of bailment* : In case of bailment, part of the cause of action arises at the place where the goods bailed are stored.⁴

(v) *Contract of betrothal* : A suit for breach of a contract of betrothal may be instituted where the breach takes place.⁵

(vi) *Contract of marriage* : A suit for breach of contract to marry may be filed at the place where the marriage should have been celebrated.⁶

(vii) *Contract of insurance* : In a contract of insurance, of goods, the Rangoon High Court has held that the loss or damage of the goods is no part of the cause of action.⁷ But the Allahabad High Court has held otherwise. According to the said High Court, in a case of insurance against burglary, part of the cause of action arises at the place where the burglary takes place.⁸ The Bombay High Court has held that in case of an Insurance policy payable at death,

1. *Ram Das v. Dhanpat*, (1925) I. L. R. 6 Lah. 153.
2. *(Firm) Thakurdas v. (Firm) Uttamsing*, A. I. R. 1937 Sind 317; *Firm Hazuri Mal v. Rang Ilahi*, A. I. R. 1926 Lah. 287.
3. *Bhamboo Mal v. Ram Narain*, (1928) I. L. R. 9 Lah. 455.
4. *Ganesh Prasad v. Bansidhar*, (1917) 41 I. C. 904 (All.).
5. *Bhagsingh v. Labhsingh*, (1916) 37 I. C. 114 (Punj.).
6. *Mathura Prasad v. Satya Narayan*, (1922) 65 I. C. 812.
7. *Jupiter General Ins. Co. v. Abdul Aziz*, (1923) I. L. R. 1 Rang. 231.
8. *Guardian Assurance Co. Ltd. v. Thakur Shiva Mangal*, I. L. R. (1937) All. 234.

part of the cause of action arises at the place of the death of the assured.¹

In the case of insurance policies, an offer may be a part of the cause of action, but where an insurance company had its head office at C., and its agents had no authority to accept proposals of insurance but only to get the proposal form duly filled and to send to the head office at C. for disposal, and where the assured filled the form at E. and it was sent by the company's agent to the head office, in a suit filed at E., by the widow of the assured on the latter's death for the recovery of the policy money, it was held by the Madras High Court that the offer was made at C. and accepted at C. and the cause of action therefore arose entirely at C. and could not be said to have arisen at E. from the circumstances that when the half-yearly premium became payable, the company instead of sending its demand to the assured, directed its local agent to collect the money from him.²

(viii) *Contract of partnership*: A suit for dissolution of partnership may be instituted at the place where the partnership is entered into³, or at the place where the partnership business is carried on⁴. When partnership business is carried on at two places, the cause of action arises at both the places and the Courts have jurisdiction to entertain the suit for dissolution in either of these places⁵. A suit for dissolution is not a suit for recovery of immovable property within the meaning of the Section 16 of the Code⁶, nor is it a suit for land within the meaning of clause 12 of the Letters Patent⁷.

1. *Light of Asia Insurance Co. v. Bai Chanchal*, A. I. R. 1932 Bom. 392; *Shivkumar v. Bombay Life Assce. Co.* A. I. R. 1934 Sind. 76; cf. *Bengal Provident and Ins. Co. v. Kamini Kumar*, (1917-18) 22 C. W. N. 517.
2. *Bengal Insurance & Real Property Co. v. Velayammal*, I. L. R. (1937) Mad. 990.
3. *Gur Dyal v. Sukhnandan*, A. I. R. 1929 All. 236; cf. *Luckmee Chund v. Zorawur Mull*, (1860) 8 Moo. I. A. 291.
4. *Durga Das v. Jai Narain*, (1919) I. L. R. 41 All. 513. Cf. (Firm) *Raghunath Rai Rambilas v. (Firm) Surajmal*, A. I. R. 1936 Pat. 6.
5. *Thimmappa v. Balakrishna*, A. I. R. 1926 Mad. 427.
6. *Durga Das v. Jai Narain*, *supra*.
7. *Kellie v. Fraser*, (1877) I. L. R. 2 Cal. 445.

(ix) *Contract of sale* : Delivery of goods under a contract is an essential part of the contract between the parties and hence a suit may be filed at the place where the goods are to be delivered¹. Where a contract of sale is made at one place and the price is to be paid at another place, the suit may be filed at either of these places². When a contract was made at Nasik and the seller sent the goods to the buyer by rail from Delhi, it was held that part of the cause of action arose at Delhi and that the Delhi Court had jurisdiction in as much as the goods were made over to the railway company at Delhi and section 39 of the Ind. Sale of Goods Act would apply³. Where payment for goods purchased by the plaintiff, or on his behalf by somebody else, was to be made at place T. by bills drawn against and presented to the plaintiff at place T., it was held that part of the cause of action arose at T. and, therefore, a suit for an amount due for short fall in goods ordered and for damages on account of inferiority of quality of those goods would lie in the Court within the jurisdiction of which place T. was situated. The fact that by endorsement of the bills the defendant got payment at place R. will not make any difference, because the place of payment is the place where the bills are presented and where they are met or dishonoured⁴.

(x) *Negotiable instruments* :—

(a) *Bills of Exchange* : The drawing of a bill of exchange is a part of the cause of action⁵. A bill may be sued on at the place where it is accepted. Thus, where J. N. of Delhi drew a hundi in favour of the Bank of Bengal in its Delhi branch on the plaintiff firm in Calcutta for the sum of Rs. 2,500/- and the said hundi was to be accepted by the plaintiff firm in Calcutta for the accommodation of, and was to be debited to, the defendant firm in case of payment by the plaintiff firm, and the plaintiff firm did accept the hundi in Calcutta and did pay the amount of

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1. *Sheo Charan v. Taj Bhai*, (1917) I. L. R. 39 All. 368 ; *Abdur Rashid v. Sizing Materials Co.*, (1920) I. L. R. 42 All. 480.
 2. *Mohanlal v. Abdul Rahim*, A. I. R. 1930 Nag. 90.
 3. *Mukandi Lal v. Nur Elahi Abdul Ali*, A. I. R. 1934 Lah. 44.
 4. *Venkatachalam v. Rajaballi*, A. I. R. 1935 Mad. 663 (F. B.).
 5. *Rampurtab v. Prensukh*, (1891) I. L. R. 15 Bom. 93 (case of hundi) ; *Basant Ram v. Kolahal*, (1877) I. L. R. 1 All. 392.

the hundi in Calcutta, in a suit by the plaintiff firm against the accommodation party, instituted on the original side of the Calcutta High Court, it was held, that part of the cause of action arose within the jurisdiction of the said High Court¹.

The non-acceptance of a bill payable at the fixed date, or the dishonour of the bill on presentation, forms part of the cause of action².

The obligation of the indorser of a bill to pay the amount of the bill to the holder (in case the drawee makes default) arises in the place where the hundi has been indorsed by him. Thus, where a hundi indorsed and delivered in Ajmere was payable in Bombay, where it was dishonoured, it was held, that the cause of action of the holder against the indorser did not arise wholly in Bombay³.

(b) *Promissory Notes* : The place of making of a promissory note is an essential part of the cause of action. A statement of the place of execution is not essential to the validity of a negotiable promissory note, nor are the parties precluded from dating it, with reference to a place differing from that at which it is actually made, if for any purpose of theirs they consider it necessary to do so. Where, therefore, a negotiable note is dated with reference to a specified place and the justice of the case does not necessitate a different conclusion, the parties should be presumed to have agreed to that place being taken to be the place of the contract⁴.

A suit on a promissory note is properly instituted at the place where payment is to be made⁵.

1. *Ramchander v. Ganapatram*, (1920) I. L. R. 47 Cal. 583.
2. *Mulchand v. Suganchand*, (1876-77) I. L. R. 1 Bom. 23, 43 (suit by holder against indorser—held, dishonour by non-payment by drawee formed part of the cause of action); *Ram Ranji v. Pralhaddas Subkarn*, (1896) I. L. R. 20 Bom. 133 (case of dishonour by non-acceptance—suit by indorser of hundi against drawer).
3. *Suganchand v. Mulchand*, (1872) 9 Bom. H. C. R. 270 (It is to be noted that the language used in the head-note is somewhat ambiguous).
4. *Meenakshi Ginning etc. Co. v. Myle Sreeramulu*, (1905) I. L. R. 28 Mad. 19 (suit by indorsee of a promissory note).
5. *Mahanth Damodar Das v. Benares Bank Ltd.*, (1920) 5 P. L. J. 536; *Briju Pandey v. Gangu Ahir*, A.I.R. 1939 Pat. 294.

Where a promissory note is actually executed at one place, but delivered at another¹, or is agreed to be paid at a third place², part of the cause of action arises at one of these places. The place of assignment of a promissory note is the place where a part of the cause of action arises.

Where a promissory note was made at Manbhum and was assigned at Calcutta, in a suit instituted on the original side of the Calcutta High Court, after leave obtained under clause 12 of the Letters Patent, Panckridge J. held, that the leave obtained ought to be revoked, partly because 'the circumstances of assignment suggest collusion for the purpose of creating jurisdiction'³. In another case, the same learned Judge revoked the leave obtained by the plaintiff on the ground "that the balance of convenience demands that the litigation should be conducted either in the Court within whose jurisdiction the defendant resides or in the Court within whose jurisdiction the document sued upon was executed⁴. In another case of the same High Court, Cunliffe J., while agreeing with the view of the law expressed by Panckridge J., differed from what appeared to have been the general trend of his observations with regard to the treatment of the holders or assignees of the negotiable instruments who are suing in the High Court under the jurisdiction dealt with in clause 12, in these terms: "It seems to me that if you are going to discriminate between plaintiffs and defendants who are interested in negotiable instruments on the grounds of hardship or even on the ground of legitimate collusion to assign, you are striking at the whole root of the law of negotiability as laid down not only in the Negotiable Instruments Act but in the time-honoured principle of the Law Merchant." At the same time his Lordship pointed out that on the facts before him he was not at all convinced that the assignment, admittedly for value, was brought about simply for the purpose of embarrassing the defendant and for the purpose of bringing the case within the jurisdiction of the original side of the High Court, and in as much as the note was executed

1. *Winter v. Round*, (1863) 1 M. H. C. R. 202; *Panjab Co-operative Bank v. Ishar Das*, A. I. R. 1937 Lah. 800.
2. *Laljee Lall v. Hardey*, (1883) I. L. R. 9 Cal. 105.
3. *Kalooram Agarwalla v. Jonistha Lal*, (1935-36) 40 C. W. N. 161.
4. *Daulatram v. Maharajlal*, (1935-36) 40 C. W. N. 164.

quite close to Calcutta there could not be any question of difficulty in bringing witnesses up¹.

It is difficult to reconcile the views expressed by his Lordship Cunliffe J. and to gather if his decision would have been the same even if hardship would have been caused to the defendant. The case, however, was actually decided both by his Lordship and by the Court of Appeal upon the basis that no hardship would be caused to the defendant if the suit was to be tried on the original side of the High Court. The net result of the above cases, therefore, seems to be that the discretion vested in the Court to grant or not to grant leave under clause 12 of the Letters Patent may be exercised even in the case of a suit on negotiable instruments, but to justify the Court to refuse leave or to revoke the leave already obtained, a very strong case of hardship, and a preponderating balance of convenience to have the suit tried elsewhere, must be shown.

B. *In Tort*: Under the C. P. Code, a suit for compensation against a tort-feaser for wrong committed in British India can be instituted either where he resides or carries on business or personally works for gain, or where the wrong was committed.² For wrongs committed outside British India by defendants residing in British India, Sec. 20 of the Code shall apply.³

Since the word 'resides' applies to natural persons and not to 'legal entities', such as the Government or a company, a suit against the latter can be brought only where the tort was committed.⁴

The damage resulting from the tort will also furnish a cause of action.⁵

1. *Radhika v. Bhabani*, (1935-36) 40 C. W. N. 717; *affid.*, on appeal, in *Bhabani v. Radhika*, (1935-36) 40 C. W. N. 1349.
2. Sec. 19, C. P. Code, 1908 (which deals with actionable wrongs to the person or to movable property); *Macmillan v. Shamsul Ulama M. Zaka*, (1895) I. L. R. 19 Bom. 557, 564 (wrong done to the person); cf. *Gokuldas v. Chagan Lal*, A. I. R. 1928 Cal. 887 (suit on the original side of the Calcutta High Court against one of the tort-feasors who resided within the local limits of the said Court); *Kheshta Pal v. Pancham Singh*, (1915) I. L. R. 37 All. 446 (infringement of trade-mark).
3. *Govindan Nair v. Achutha Menon*, (1916) I. L. R. 39 Mad. 433.
4. *Govindarajulu Naidu v. Secy. of State*, (1927) I. L. R. 50 Mad. 449.
5. *Alexander Brault v. Indra Krishna Kaul*, (1933) I. L. R. 60 Cal. 918 (suit for malicious prosecution).

C. *In other cases :*

- (i) *Administration suits :* In an administration suit, undertaking to administer forms part of the cause of action. Thus, in a suit brought on the original side of the Madras High Court by three executors and trustees against the fourth executor and trustee praying for his removal and for the administration of the estate by the Court, it was held, that assuming the defendant was at the time of the institution of the suit outside Madras, the Madras High Court had jurisdiction because of the defendant's undertaking given to that Court, when he applied for and obtained probate, to administer the estate, such undertaking being at least a most material part of the cause of action in the suit for administration.¹

In a suit where the plaintiffs alleged that they and one I. G. were members of a joint Hindu family owning property and that, I. G. having died, they were entitled to the property by survivorship, and asked, for a declaration that the probate proceedings did not affect the plaintiffs, and for the administration of the estate left by the testator, it was held, that the plaintiffs did not claim determination of any right to or interest in immovable property within the meaning of Sec. 16, C. P. Code, so that the mere fact that part of the property to be administered is situate in a particular district will not give the first Court jurisdiction. The question of jurisdiction has therefore to be determined by Sec. 20. Such a suit lies in the Court at the place where the probate is taken out.²

- (ii) *Custody of Minor—suit for—*Where a minor is removed from the plaintiff's custody and guardianship from A to L., a suit for custody of minor can be filed at either of the said places.³
- (iii) *Divorce :* In a petition for dissolution of marriage the jurisdiction of the Court will depend upon the question of domicile, and the petitioner has a right to choose as his

1. *Srinivasa Moorthy v. Venkata Varada Ayyangar*, (1906) I. L. R. 29 Mad. 239, 277. Read the judgment of Ameer Ali J., in *Vedabala Devi v. The Official Trustee of Bengal*, (1934-35) 39 C.W.N. 1154, on the question whether a suit for administration of trusts declared by will or deed, for construction and determination of effect or validity of such trusts, is a "suit for land."
2. *Shiv Ram v. Mt. Ishri*, A. I. R. 1926 Lah. 456.
3. *Sarat Ohandra v. Forman*, (1890) I. L. R. 12 All. 213, 217.

forum, either the place where the parties are actually residing, though separately, at the time of presenting the petition, or the place where the parties last resided together.¹

In nullity suits, the Courts in India shall have jurisdiction if the petitioner or the respondent resides in India at the time of presenting the petition. It is not necessary that the domicile of the parties should be Indian.²

In suits for judicial separation, the jurisdiction of the Court depends on residence of the petitioner and it is not necessary that the respondent too should be residing in India at the time of presenting the petition.³ The High Court within whose jurisdiction the parties reside, or last resided together, is competent to try separation suits.⁴

(iv) *Restitution of conjugal rights* : A suit by a husband against his wife for restitution of conjugal rights can be brought in the Court within whose jurisdiction the husband resides.⁵

(v) *Setting aside decrees on the ground of fraud* : A suit to set aside a decree on the ground of fraud can be brought in the Court within the limits of whole jurisdiction the fraud is committed and the fraudulent decree is obtained.⁶ The Court within whose jurisdiction a part of the fraud is committed will have jurisdiction to entertain the suit.⁷

(vi) *Setting aside documents on the ground of fraud* : A suit to set aside a document on the ground of fraud will lie where the fraud was committed or where the fraudulent document takes effect against the plaintiff's interest.⁸

7. *Cause of action not arising before suit, effect of*—The cause of action must be antecedent to the suit,⁹ otherwise the suit will fail

1. Sec. 10, Ind. Divorce Act, 1869. *Grant v. Grant*, A. I. R. 1937 Pat. 82 ; *Kershaw v. Kershaw*, A. I. R. 1930 Lah. 916.
2. *Wenkenbach v. Wenkenbach*, (1936-37) 41 C. W. N. 269.
3. *De Souza v. De Souza*, A. I. R. 1935 Bom. 121.
4. *Georgucopulas v. Georgucopulas*, (1902) I. L. R. 29 Cal. 619.
5. *Lalitagar v. Bai Suraj*, (1894) 18 Bom. 316 ; *Venugopal v. Lakshmi Ammal*, A. I. R. 1936 Mad. 288.
6. *Dan Dayal v. Munna Lal*, (1914) I. L. R. 36 All. 564.
7. *Nistarini v. Nundo Lal Bose*, (1903) I. L. R. 30 Cal. 369, 381, 382.
8. *Nittala Achayya v. Nittala Yellamma*, A. I. R. 1923 Mad. 109, 111.
9. *Ramjoy Modak v. Durga Charan*, (1929) 50 C. L. J. 328 ; *Rai Charan v. Biswa Nath*, (1914) 20 C. L. J. 107 ; *Mahant Gobind Ramanuj Das v. Rani Dabendrabala* (1919) 4 P. L. J. 387.

for want of a cause of action.¹ Ordinarily, the decree in a suit should accord with the rights of the parties as they stand at the date of its institution. There are, however, exceptions to this general rule; and Courts may take cognizance of matters arising since the institution of a suit where it is shown that the original relief claimed has, by reason of subsequent change of circumstances, become inappropriate or that it is necessary to base the decision of the Court on the altered circumstances in order to shorten litigation or to do complete justice between the parties.²

8. *Cause of action and limitation* : The expression "cause of action", in its comprehensive sense, comprises the entire bundle of material facts which it is necessary for the plaintiff to allege and prove to entitle him to succeed. It comprises both the right and its infringement. In its limited sense, the expression is used to include the facts constituting the infringement of the right but not also those constituting the right itself³. Ordinarily, "cause of action" or the "right to sue" accrues when the last act necessary for constituting a cause of action is done or happens⁴. In the words of the Judicial Committee, there can be no "right to sue" until there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted⁵.

Commencement of limitation : Ordinarily, limitation runs from the earliest time at which an action could be brought⁶. Unless the cause of action for a suit has arisen, limitation for such suit cannot begin to run⁷. Thus, in a suit for libel, limitation runs from the date the libel is published (Art. 24, Lim. Act); on a bond subject to a condition, when that condition is broken (Art. 68).

1. *Gulzar Singh v. Kalyan Chand*, (1893) I. L. R. 15 All. 399.
2. *Per Mookerjee J*, in *Nuri Mian v. Ambika Singh*, (1917) I. I. R. 44 Cal. 47, 55, following *Rai Charan Mandal v. Biswa Nath*, (1914) 20 C. L. J. 107. *Ishwari Prasad v. Dulhin*, A. I. R. 1927 Pat. 422; *Pandurang v. Ramchandra*, (1930) I. L. R. 54 Bom. 902.
3. *Haramoni Dassi v. Hari Churn*, (1895) I. L. R. 22 Cal. 833, 839.
4. *Salima Bibi v Sheikh Muhammad*, (1896) I. L. R. 18 All. 131, 137.
5. *Bolo v. Koklan*, (1929-30) L. R. 57 I. A. 325.
6. *Dwijendra v. Joges*, (1924) 39 C. L. J. 40, 55.
7. *Seeti Kutti v. Kunhi Pathumma*, (1917) I. L. R. 40 Mad. 1040 (F. B.).

But to this general rule there are exceptions. Under the express provisions of the Schedule to the Limitation Act, in some cases limitation runs from a time before the right to sue accrues, and in some cases, after the right to sue has accrued.

Exceptions : The following are instances of cases where limitation commences to run before the right to sue, strictly speaking, accrues :

(i) In a suit for money lent under an agreement that it shall be payable on demand, time runs from the date when the loan is made and not from the date of demand (Art. 59).

(ii) In a suit against a depositary or pawnee to recover movable property deposited or pawned, time runs from the date of deposit, even though the deposit be for a fixed term (Art. 145)¹, and not from the date on which the debt is payable.

The following are instances of cases where limitation commences to run after the right to sue, strictly speaking, has accrued :

(i) In a suit by a seaman for his wages, limitation runs from the end of the voyage and not from the time wages have accrued (Art. 101).

(ii) In a suit based on mutual, open and current account, limitation runs from the close of the year in which the last item admitted or proved is entered in the account and not from the date of the last entry when mutual dealings between the parties came to an end (Art. 85).

(iii) In a suit to enforce a right of pre-emption, although the right arises as soon as the sale takes place, limitation runs from the date when the purchaser takes under the sale, sought to be impeached, physical possession of the whole of the property sold, or, where the subject of the sale does not admit of physical possession, when the instrument of sale is registered (Art. 10).

Continuous running of time : "When once time has begun to run, no subsequent disability or inability to sue stops it"².

1. *Gangineni Kondiah v. Gottipati Pedda*, (1910) I. L. R. 33 Mad. 56.
2. Sec. 3, Ind. Lim. Act, 1908. 'Disability' means want of legal capacity to act as has been provided for in section 6, namely, minority, insanity, etc. : *Jiraj v. Babaji*, (1905) I.L.R. 29 Bom. 68. 'Inability' means 'personal inability' : *Poorno Chunder v. Sassoon*, (1898) I. L. R. 25 Cal. 496, 504, F. B.

This section is based on the general principle that when once time has commenced to run, it will continue to do so unless it is stopped by virtue of an express statutory provision¹.

Under certain circumstances, however, a party may get a fresh cause of action by way of revival of an old claim.

Under the *proviso* to section 3, Ind. Limitation Act, where letters of administration to the estate of a creditor have been granted to his debtor, the running of the time prescribed for a suit to recover the debt shall be suspended while the administration continues².

Revival of a suspended right to sue: As already stated, ordinarily, time begins to run from the earliest time at which an action can be brought, but after time has commenced to run, there may be a revival of a right to sue, when a previous satisfaction of the claim is nullified with the result that the right to sue which had been suspended is re-animated³. Thus where the respondent being indebted to the appellant agreed to convey certain property to him, setting off the debt against part of the price, and disputes arose as to whether the sale deed had been executed in accordance with the contract, the respondent unsuccessfully sued to enforce it and the appellant then sued to recover the debt and was met by the plea of limitation, the Judicial Committee held that the time began to run only when the agreement became wholly ineffectual (*i.e.*, when the respondent's suit was dismissed) and that from that date a fresh obligation was imposed upon the debtor to pay his debt.⁴ Where a debtor who satisfied by payment his creditor's claim for balance of money due, sued to annul the satisfaction on the ground of coercion and obtained a decree for refund, in a suit by the

1. *Skinner v. Naunihal Singh*, (1928-29) L. R. 56 I. A. 192.

2. *Cf. Lala Soni Ram v. Kanhaiya Lal*, (1912-13) L. R. 40 I. A. 74; *Skinner v. Naunihal Singh*, *supra*; *Gobinda Lal v. Nalini Kanta*, (1925) I. L. R. 52 Cal. 63.

3. *Dwijendra v. Joges*, (1924) 39 C. L. J. 40.

4. *Mt. Basso Kuar v. Lala Dhum Singh*, (1887-89) L. R. 15 I. A. 211; *cf. Mt. Ranee Surno Moyee v. Shooshee Mokhee*, (1868) 12 Moo. I. A. 244; *Muthu Korakkai Chetti v. Madar Ammal*, (1920) I. L. R. 43 Mad. 185, 208, 209, F. B. (Whenever proceedings are being conducted between the parties *bona fide* in order to have their mutual rights and obligations in respect of a matter finally settled, the cause of action or an application for a suit, the relief claimable wherein follows naturally on the results of such proceedings, should be held to arise only on the date when those proceedings finally settle such rights and liabilities).

creditor upon the original claim, it was held that the annulment gave creditor a fresh cause of action and time began to run from the date of annulment.¹

His Lordship Mukerji J. of the Calcutta High Court is of opinion that apart from the provisions of the Limitation Act itself, there is no principle which can be legitimately invoked to add to or supplement its provisions and that the Judicial Committee in applying the principle of suspension of limitation have not purported to engraft any foreign principle into the law of limitation for the time being in force.²

The Madras High Court has held that so long there is no legal impediment to filing of the suit, no equitable grounds for suspension of a cause of action can be added to the provisions of the Limitation Act.³ The Allahabad High Court also has held that the cases in which the running of limitation can be suspended are contained in the sections of the Limitation Act and the period of limitation cannot be suspended once it has begun to run unless that suspension is itself provided for in the Act.⁴

Exclusion of time ; Under Section 9 time runs when the cause of action accrues and when once time has begun to run, no subsequent disability or inability to sue stops it. But the Indian Limitation Act itself provides for exclusion of time in two cases :

(1) Exclusion of time as regards starting point of limitation.

(2) Exclusion of time in computing the period of limitation.

(1) *Exclusion of time as regards starting point of limitation.*

This may be considered under two sub-heads :

(a) Where commencement of limitation is suspended :

Section 12 (1) provides—"In computing the period of limitation prescribed for any suit, appeal or application, the day from which such period is to be reckoned shall be excluded."

Section 6 provides—" (1) Where a person entitled to institute a suit or make an application for the execution of a decree is, at

1. *Muthuveerappa v. Adaikappa*, (1920) I. L. R. 43 Mad. 845 ; following *Mt. Ranee Surno Moyee v. Shooshee Mokhee*, (1868) 12 Moo. I. A. 244.
2. *Sarat Kamini v. Nagendra*, (1924-25) 29 C. W. N. 973, 981.
3. *Satya Narayana Brahman v. Seethayya*, (1927) I. L. R. 50 Mad. 417.
4. *Ram Charan Sahu v. Goga*, (1927) I. L. R. 49 All. 565 ; following *Lala Soni Ram v. Kanhaia Lal*, (1912-13) L. R. 40 I. A. 74.

the time from which the period of limitation is to be reckoned, a minor, or insane, or an idiot, he may institute the suit or make the application within the same period after the disability has ceased, as would otherwise have been allowed from the time prescribed therefor in the third column of the first schedule."

"(2) Where such person is, at the time from which the period of limitation is to be reckoned, affected by two such disabilities, or where, before his disability has ceased, he is affected by another disability, he may institute the suit or make the application within the same period, after both disabilities have ceased, as would otherwise have been allowed from the time so prescribed."

"(3) Where the disability continues up to the death of such person, his legal representative may institute the suit or make the application within the same period, after the death, as would otherwise have been allowed from the time so prescribed."

"(4) Where such representative is at the date of the death affected by any such disability, the rules contained in sub-sections (1) and (2) shall apply."

Section 7 provides—"Where one of several persons jointly entitled to institute a suit or make an application for the execution of a decree is under any such disability, and a discharge can be given without the concurrence of such person, time will run against them all; but, where no such discharge can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others or until the disability has ceased."

Section 8 provides—"Nothing in section 6 or in section 7 applies to suits to enforce rights of pre-emption, or shall be deemed to extend, for more than three years from the cessation of the disability or the death of the person affected thereby, the period within which any suit must be instituted or application made."

Section 17 provides—" (1) Where a person who would, if he were living, have a right to institute a suit or make an application, dies before the right accrues, the period of limitation shall be computed from the time when there is

a legal representative of the deceased capable of instituting or making such suit or application."

"(2) Where a person against whom, if he were living, a right to institute a suit or make an application would have accrued, dies before the right accrues, the period of limitation shall be computed from the time when there is a legal representative of the deceased against whom the plaintiff may institute or make such suit or application."

"(3) Nothing in sub-sections (1) and (2) applies to suits to enforce rights of pre-emption or to suits for the possession of immovable property or of an hereditary office."

Section 18 provides—"Where any person having a right to institute a suit or make an application has, by means of fraud, been kept from the knowledge of such right or of the title on which it is founded, or where any document necessary to establish such right has been fraudulently concealed from him, the time limited for instituting a suit or making an application—

(i) against the person guilty of the fraud or accessory thereto, or

(ii) against any person claiming through him otherwise than in good faith and for valuable consideration, shall be computed from the time when the fraud first became known to the person injuriously affected thereby, or, in the case of the concealed document, when he first had the means of producing it or compelling its production."

(b) Where fresh period of limitation commences :

Section 19 provides—"(1) Where, before the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by some person through whom he derives title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed."

"(2) Where the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed ; but, subject to the provisions of the Indian

Evidence Act, 1872, oral evidence of its contents shall not be received."

"Explanation I.—For the purposes of this section an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come, or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to a set-off, or is addressed to a person other than the person entitled to the property or right."

"Explanation II.—For the purposes of this section "signed" means signed either personally or by an agent duly authorised in this behalf."

"Explanation III.—For the purposes of this section an application for the execution of a decree or order is an application in respect of a right."

Section 20 Provides—“(1) Where interest on a debt or legacy is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt or legacy, or by his agent duly authorised in this behalf, or where part of the principal of a debt is, before the expiration of the prescribed period, paid by the debtor or by his agent duly authorised in this behalf, a fresh period of limitation shall be computed from the time when the payment was made :

Provided that, save in the case of a payment of interest made before the 1st day of January, 1928, an acknowledgment of the payment appears in the hand-writing of, or in a writing signed by, the person making the payment."

"(2) Where mortgaged land is in the possession of the mortgagee, the receipt of the rent or produce of such land shall be deemed to be a payment for the purpose of subsection (1)."

"Explanation.—Debt includes money payable under a decree or order of Court."

Section 21 provides—“(1) The expression "agent duly authorised in this behalf" in sections 19 and 20, shall, in the case of a person under disability, include his lawful guardian, committee or manager, or an agent duly authorised by such

guardian, committee or manager to sign the acknowledgment or make the payment."

"(2) Nothing in the said sections renders one of several joint contractors, partners, executors or mortgagees chargeable by reason only of a written acknowledgment signed or of a payment made by, or by the agent of, any other or others of them."

"(3) For the purposes of the said sections.

(a) an acknowledgment signed, or a payment made, in respect of any liability, by, or by the duly authorised agent of, any widow or other limited owner of property who is governed by the Hindu law, shall be a valid acknowledgment or payment, as the case may be, as against a reversioner succeeding to such liability; and

(b) where a liability has been incurred by, or on behalf of, a Hindu undivided family as such, an acknowledgment or payment made by, or by the duly authorised agent of, the manager of the family for the time being shall be deemed to have been made on behalf of the whole family."

(2) *Exclusion of time in computing the period of limitation* : The cases which provide for exclusion of time in computing the period of limitation are cases of virtual suspension—cases "in which limitation theoretically continues to run, though certain periods during which it so runs are not deemed to be any portions of the prescribed time of limitation."

Proviso to Section 9 : "Where letters of administration to the estate of a creditor have been granted to his debtor, the running of the time prescribed for a suit to recover the debt shall be suspended while the administration continues."

Section 13 : In computing the period of limitation prescribed for any suit, the time during which the defendant has been absent from British India and from the territories beyond British India under the administration of the Government shall be excluded¹.

1. This section is in no way affected or qualified by Sec. 9 : *Hanmantram v. Bowles*, (1834) I. L. R. 8 Bom. 561, 569, 570. The section will apply to cases where the defendant was absent altogether from British India at the time of the accrual of the cause of action as well as to cases where he leaves British India after the period of limitation commenced to run : *Atul Kristo Bose v. Lyon & Co.*, (1887) I. L. R. 14 Cal. 457,

Section 14 : (1) In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding¹, whether in a Court of first instance or in a Court of Appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action and is prosecuted in good faith² in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it.

(2) In computing the period of limitation prescribed for any application, the time during which the applicant has been presenting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of Appeal, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it.

Explanation I.—In excluding the time during which a former suit or application was pending, the day on which that suit or application was instituted or made, and the day on which the proceedings therein ended, shall both be counted.

Explanation II.—For the purposes of this section, a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding³.

Explanation III.—For the purposes of this section mis-

463. Where the defendant is absent from British India on several occasions, all such periods of absence should be excluded : *Ismailji Haji Halimbhai v. Ismail Abdul*, (1921) I. L. R. 45 Bom. 1228. The plaintiff must strictly plead and prove that the defendant was absent from British India during the period for which exemption is claimed : *Periyanna Pillai v. Arasu Thevan*, (1910) 9 Ind. Cas. 568 (Mad.).

1. The section does not apply to prior proceedings in foreign courts : *Harj Singh v. Muhammad Said*, (1927) I. L. R. 8 Lah. 54 ; *Ohanmalupa v. Abdul Vahab*, (1911) I. L. R. 35 Bom. 139 ; *Rajanna v. Narayan*, A. I. R. 1923 Nag. 321.
2. The question whether a person acted in good faith is one of fact : *Kala Singh v. Gehna Singh*, (1932) I. L. R. 14 Lah. 106. The question whether an inference of good faith is reasonable or is warranted by the facts proved is one of law : *Fazlul Jamil v. Hetaluddin*, A. I. R. 1927 Pat. 256.
3. Cf. *Somshikharswami v. Shivappa*, A. I. R. 1924 Bom. 39.

joinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction.

Section 15 : (1) In computing the period of limitation prescribed for any suit or application for the execution of a decree, the institution or execution of which has been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn, shall be excluded¹.

(2) In computing the period of limitation prescribed for any suit of which notice has been given in accordance with the requirements of any enactment for the time being in force, the period of such notice shall be excluded².

Section 16 : In computing the period of limitation prescribed for a suit for possession by a purchaser at a sale in execution of a decree, the time during which a proceeding to set aside the sale has been prosecuted shall be excluded.

Extension of time : The sections of the Ind. Lim. Act, 1908, which deal with extension of time are as follows :

Under the following sections a certain amount of time is excluded for the purpose of computing the starting point of limitation.

Section 12 : In computing the period of limitation prescribed for any suit, the day from which such period is to be reckoned shall be excluded.³

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1. *Jyoti Prakash v. Mukti Prakash*, (1924) I. L. R. 51 Cal. 150.
 2. *North Western Ry. v. Ram Dhanshib*, (1917) 38 I. C. 600 (Notice under Sec. 80, C. P. Code); *Chhaganlal v. Municipality of Thana*, (1932) I. L. R. 56. Bom. 135; *B. & N. W. Ry. v. Ramsarup*, A. I. R. 1922 Pat. 549 (Notice under Sec. 77, Railways Act). Where claim is against joint defendants and notice is required in case of some only of the defendants, the period of notice should be excluded for the whole suit: *Mahomed Sharif v. Nasir Ali*, (1930) I. L. R. 53 All. 44; *Khanderao v. Chanmallappa*, A. I. R. 1924 Bom. 364 (Where notice under Bombay Court of Wards Act was required only in respect of some of the defendants); *E. I. Ry. v. Rahimullah Ilahi Bakhsh*, (1928) I. L. R. 9 Lah. 519; *B. & N. W. Ry. Co. v. Ramsarup*, *supra*.
 3. For analogous rule, see Sec. 9 of the General Clauses Act, and Sec. 110 of the Transfer of Property Act, 1882.

Section 6¹:

(a) Where a person entitled to institute a suit or make an application for the execution of a decree is, at the time from which the period of limitation is to be reckoned, a minor, or insane, or an idiot, he may institute the suit or make the application within the same period after the disability has ceased, as would otherwise have been allowed from the time prescribed therefor in the third column of the first schedule.

(b) Where such person is, at the time from which the period of limitation is to be reckoned, affected by two such disabilities, or where, before his disability has ceased, he is affected by another disability, he may, institute the suit or make the application within the same period, after both disabilities have ceased, as would otherwise have been allowed from the time so prescribed.

(c) Where the disability continues up to the death of such person, his legal representative may institute the suit or make the application within the same period, after the death, as would otherwise have been allowed from the time so prescribed.

(d) Where such representative is at the date of the death affected by any such disability, the rules contained in sub-sections (a) and (b) shall apply.

Section 7: "Where one of several persons jointly entitled to institute a suit or make an application for the execution of a decree is under any such disability, and a discharge can be given without the concurrence of

1. *Rebala Ramana v. Rebala Babu*, (1914) I. L. R. 37 Mad. 186. This section applies only to cases dealt with by the Act itself and not to cases for which a period of limitation is prescribed by other Acts. Thus the provisions of this section do not apply to a case where a decree is barred by Section 48, C. P. Code: *Prem Nath v. Chatarpal*, (1915) I. L. R. 37 All. 638; *Kartie Chandra v. Bata Krishna Roy*, I. L. R. (1937) 2 Cal. 373; but see, *Moro Sadasiv v. Visaji*, (1892) I. L. R. 16 Bom. 536 and *Venkata Perumal v. Velayudhu*, A. I. R. 1915 Mad. 449. The disability referred to in the section must exist at the time from which the period of limitation is to be reckoned: *Kalika Buksh Singh v. Ram Charan*, (1918) I. L. R. 40 All. 630. A person who was an embryo at the time when the cause of action accrued cannot get the benefit of this section: *Muhammed Khan v. Ahmad Khan*, (1929) I. L. R. 10 Lah. 713.

such person, time will run against them all ; but, where no such discharge can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others or until the disability has ceased¹.

Section 8: "Nothing in section 6 or in section 7 applies to suits to enforce rights of pre-emption, or shall be deemed to extend, for more than three years from the cessation of the disability or the death of the person affected thereby, the period within which any suit must be instituted or application made²."

CHAPTER XI.

JURISDICTION.

The plaintiff must select the Court in which he will sue. In other words, he ought to see that the Court in which the suit is to be brought shall have 'jurisdiction' to 'entertain, try and determine' the same. The limits of a Court's jurisdiction are imposed by the Statute, Charter or Commission under which the Court is constituted and may be excluded or restricted by the like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited³. The limitations of a Court's jurisdiction may be (1) as to the subject matter ; (2) as to person ; (3) as to the pecuniary value of the suit ; (4) as to the place, that is, the area over which the jurisdiction extends.

The subject of this chapter is confined to the original civil jurisdiction of the different Courts and is considered under the following heads :—

1. The general rule affecting jurisdiction applicable to all Courts.
2. Federal Court of India—jurisdiction of—
3. High Courts (O. S.)—jurisdiction of—

1. See Ills. under the said section, and *Mannarawami Iyer v. Ramaswami*, A. I. R. 1929 Mad. 394 ; *Kandasami Naiken v. Irusappa*, (1918) I. L. R. 41 Mad. 102.
2. This section serves as an exception to sections 6 and 7.
3. Hals., 2nd Edn., Vol. VIII Art. 1176, p. 531 ; cf. *Dwarka Prasad v. Jai Barham*, A. I. R. 1922 Pat. 322 ;

4. Courts subordinate to the High Courts other than Courts of Small Causes—jurisdiction of—

5. Presidency Small Cause Courts—jurisdiction of—

6. Provincial Small Cause Courts—jurisdiction of—

7. Jurisdiction of Courts over non-resident foreigners.

8. Jurisdiction of Courts over aliens.

9. Jurisdiction of Courts over Princes, Chiefs, Ambassadors and Envoys.

10. Jurisdiction of foreign Courts.

11. Objections to, and waiver of, jurisdiction.

12. Pleading jurisdiction.

1. *The general rule affecting jurisdiction applicable to all Courts :—*

Section 9 of the Civil Procedure Code, 1908, provides that the Courts shall (subject to the provisions therein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.¹

The *Explanation* added to this section reads as follows :—
“A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.”²

(a) *Jurisdiction expressly barred* : The jurisdiction of a Court may be expressly barred by any enactment for the time being in force.³ Such express bar may be with reference to all Courts or to particular Courts. Thus, under section 11 of the C. P. Code, no Court shall try a suit in which

1. *Bajrang Bahadur v. Beni Madho*, A. I. R. 1932 Oudh 199 (F. B.).
2. A suit is of a civil nature if the principal question in the suit is one relating to a civil right, although the determination of such question depends incidentally on the decision of questions as to religious rites and ceremonies: *Hukum Chand v. Maharaj Bahadur*, (1933-34) L. R. 60 I. A. 313. Suits in which the principal question is a caste question are not suits of a civil nature : *Murari v. Suba*, (1882) I. L. R. 6 Bom. 725. So where the principal question relates to religious rites or ceremonies : *Vasudev v. Vamnaji*, (1881) I. L. R. 5 Bom. 80 ; *Aiyanaachariar v. Satagopachariar*, A. I. R. 1939 Mad. 757 ; *Narayana Mudali v. Periya Kalathi Mudali*, A. I. R. 1939 Mad. 494. For other cases on the subject, see notes under Sec. 9 in Mulla's C. P. Code.
3. *Gir Har Sarup v. Bhagwan Din*, A. I. R. 1935 Oudh 96.

the matter in issue is *res judicata*. Again, under section 47 of the Code, no suit is maintainable for determination of any question relating to the execution, discharge or satisfaction of the decree arising between the parties to the suit in which the decree was passed or their representatives.

There are various enactments which prevent particular Courts from entertaining particular classes of suits. Thus, a Presidency Small Cause Court has no jurisdiction to entertain suits concerning the assessment or collection of revenue or suits for the recovery or partition of immovable property or for the determination of any other right to or interest in immovable property and also other classes of suits specified in section 19 of the Presidency Small Cause Courts Act 1882.¹

- (b) *Jurisdiction impliedly barred* : The jurisdiction of a Court is impliedly barred, as where, by any enactment for the time being in force, exclusive jurisdiction is conferred on another Court, or where a special tribunal is established to deal with a particular case. There are also other classes of suits the cognizance of which is impliedly barred by general principles of law, e. g., suits relating to acts of state and public policy.
- (i) *Exclusive jurisdiction of particular Courts* : When exclusive jurisdiction is conferred on a particular Court to deal with a particular subject-matter of a suit, the jurisdiction of the Courts which otherwise would have jurisdiction to try such suits is impliedly barred. Thus, under Sec. 92 of the C. P. Code, in the case of an alleged breach of a public, religious or charitable trust, the suit must be filed in the principal Civil Court of original jurisdiction or in any other Court empowered in that behalf by the Local Government within the local limits of whose jurisdiction the whole or any part of the subject-matter of

1. For other cases, cf. Sec. 15, Prov. Small Cause Court Act IX of 1887; refer Electricity Act IX of 1910, Sec. 56; Factories Act XXV of 1934, Sec. 81; Forest Act XVI of 1927, Sec. 74; Income Tax Act XI of 1922, Sec. 67; Ancient Monuments Protection Act VII of 1904, Sec. 24; The Railways Act IX of 1890, Sec. 41; Sea Customs Act VIII of 1878, Sec. 181-C; The Ports Act XV of 1908, Sec. 68-A; The Lunacy Act IV of 1912, Sec. 97; The Bombay Pensions Act XXIII of 1871, Sec. 4.

the suit is situate. This impliedly excludes the jurisdiction of the Courts which otherwise would have jurisdiction to entertain such a suit.

- (ii) *Special Tribunals* : Where a special tribunal, out of the ordinary course, is appointed¹ by an Act to determine questions as to rights which are the creation of that Act, then, except so far as otherwise expressly provided or necessarily implied, that tribunal's jurisdiction to determine these questions is exclusive and the Civil Court cannot take cognizance of such matters.² The fact that a person has no other remedy is also no answer to the objection that no action lies in the ordinary Civil Courts to challenge the act of a statutory authority.³

The Civil Court however has power to enquire into the question whether a special tribunal created for a special purpose has acted within the limits strictly defined by the enactment which created it.⁴ It can assume jurisdiction where the tribunal is guilty of clear misconduct or lack of good faith⁵, or where the rules framed under the Act creating the special tribunal are impeached as *ultra vires*.⁶ It cannot assume jurisdiction where the tribunal refuses or

1. To oust the jurisdiction of the Civil Court the tribunal so constituted must have been brought into existence : *Lachmi Chand v. Ram Pratap*, (1935) I. L. R. 14 Pat. 24.
2. *Bhaishankar v. Municipal Corpn. of Bombay*, (1907) I. L. R. 31 Bom. 604, fold. in *Dey v. Bengalee Y. M. Co-op. Cr. Society*, A. I. R. 1938 Rang. 392 F. B. (where the Legislature provided for settlement of disputes touching the business of co-operative societies by arbitration); *Niaz Ahmed v. Abdul Latif*, (1935) A. L. J. 1111; *Mahedar Rahaman Mia v. Kantichandra*, (1934) I. L. R. 61 Cal. 980; *Secretary of State v. Kameshwar Singh*, (1936) I. L. R. 15 Pat. 246 (Where the Statute provides a particular form of remedy, that remedy is exclusive and the jurisdiction of the Civil Court is barred by implication); *Ohedi Ram v. Oh. Ahmad Shafi*, (1933) I. L. R. 8 Luck. 295; *Ganesh Mahadev v. Secy. of State* (1919) I. L. R. 43 Bom. 221; *Vithoba Chimnaji v. Govindrao*, A. I. R. 1933 Nag. 193 (F. B.).
3. *Secretary of State v. Meyyappa Chettiar*, I. L. R. (1937) Mad. 211.
4. *Tikaram v. Ganpat Sahai*, A. I. R. 1938 Nag. 373.
5. *Panchapakesa v. Secy. of State*, A. I. R. 1939 Mad. 17.
6. *Vithoba Chimnaji v. Govindrao*, A. I. R. 1933, *supra*.

neglects to exercise jurisdiction, because there cannot be two parallel jurisdictions.¹

(iii) *Act of State* : An act of state is an act which the King executes in the exercise of his absolute and extra-ordinary power. It is an act of high power standing outside of and above not only the ordinary judicial but also the executive regime. No suit lies in respect of an act which is an act of state.²

(iv) *Public Policy* : ³ Courts are debarred from entertaining any claim which is against public policy. Thus, no suit lies for damages for defamatory statements made by a witness relating to the enquiry on which he is called as a witness, the policy of the law being that for the sake of administration of justice witnesses giving evidence on oath should not have before their eyes the fear of being harassed by suits for damages.⁴

2. *Federal Courts—jurisdiction of*—The jurisdiction of the Federal Court is exclusive and is set out in Section 204 of the Govt. of India Act, 1935, which runs as follows :—

“(1) Subject to the provisions of this Act, the Federal Court shall, to the exclusion of any other Court, have an original jurisdiction in any dispute between any two or more of the following parties, that is to say, the Federation, any of the Provinces or any of the Federated States, if and in so far as the dispute involves any question (whether of law or fact) on which the existence or extent of a legal right⁵ depends :

Provided that the said jurisdiction shall not extend to

(a) a dispute to which a State is a party, unless the dispute—

(i) concerns the interpretation of this Act or of an Order in Council made thereunder, or the extent of the

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1. *Obiter dictum* of Courtney Terrel C. J., in *Lachmi Chand v. Ram Pratap*, (1935) I. L. R. 14 Pat. 24.
 2. *Oma Parshad v. Secy. of State*, I L. R. (1937) Lah. 380 ; *Nasiruddin Ahmed v. Secy. of State*, A. I. R. 1935 Bom. 439. For other cases, see under heading “Justification” in Special Defences, Chap. XV.
 3. For definition, see *Fender v. St. John Mildmay*, (1938) A. C. 1.
 4. *Baboo Gunnesb Dutt v. Mugneeram*, (1873) 11 B. L. R. 321, 328 ; *Chidambara v. Thirumani*, (1887) I. L. R. 10 Mad. 87 ; *Bhikumber v. Becharam*, (1888) I. L. R. 15 Cal. 264.
 5. Cf. *United Provinces v. Governor-General in Council*, A.I.R. 1939 F. C. 58.

legislative or executive authority vested in the Federation by virtue of the Instrument of Accession of that State ; or

(ii) arises under an agreement made under Part VI of this Act in relation to the administration in that State of a law of the Federal Legislature, or otherwise concerns some matter with respect to which the Federal Legislature has power to make laws for that State ; or

(iii) arises under an agreement made after the establishment of the Federation, with the approval of His Majesty's Representative for the exercise of the functions of the Crown in its relations with Indian States, between that State and the Federation or a Province, being an agreement which expressly provides that the said jurisdiction shall extend to such a dispute ;

(b) a dispute arising under any agreement which expressly provides that the said jurisdiction shall not extend to such a dispute.

“(2) The Federal Court in the exercise of its original jurisdiction shall not pronounce any judgment other than a declaratory judgment.”¹

It will appear from the above that the Federal Court cannot entertain any suit brought before it by a subject or any suit brought before it by the Federation or an officer of the Federation against a subject.² A subject or citizen must seek relief in the ordinary Courts and can later appeal to the Federal Court if the High Court certifies that the case involves a substantial question of law as to the interpretation of the Government of India Act, 1935, or any Order in Council made thereunder.³ A litigant, however,

1. The Federal Court cannot give any consequential relief. Under Sec. 210 of the Govt. of India Act, 1935, all authorities civil and judicial, throughout the Federation are enjoined to act in aid of the Federal Court. This includes giving effect to the Court's declaration.
2. Parliamentary Debates, April 1, 1935. Cf. Secs. 205 and 225, Govt. of India Act, 1935.
3. Sec. 205, Govt. of India Act, 1935 ; *Pashupati Bharti v. Secy. of State*, A. I. R. 1938 F. C. 1 (The certificate is a condition precedent to the exercise of jurisdiction by the Federal Court).

who, apart from Sec. 205 of the Govt. of India Act, 1935, would have a right of appeal to the Privy Council is not deprived of that right by the refusal of the High Court to grant a certificate.¹

In regard to such States as enter the Federation, its jurisdiction will be limited by Instruments of Accession, for, outside those Instruments, is the field of Paramountcy which is wholly outside Federal competence².

Should disputes arise between a Federated State and a Statutory Railway Authority, they will be referred to a Railway Tribunal; its President will be a judge of the Federal Court and an appeal on a question of law will lie to the Court itself³.

The Federal Court can exercise advisory jurisdiction when the Governor-General makes a reference to it on a question of law⁴. The Court's opinion, however, is not binding on the Governor-General. Certain other functions have been given to the Federal Court. In inter-provincial disputes regarding water supplies the Court can assist any commission of experts⁵.

3. *High Courts (O. S.)—Jurisdiction of*—For the purposes of the Government of India Act, 1935, the High Courts in Calcutta, Madras, Bombay, Allahabad, Lahore and Patna, the Chief Court in Oudh, the Judicial Commissioner's Courts in the Central Provinces and Berar, in the North West Frontier Provinces and in Sind, shall, in relation to British India, be deemed to be High Courts⁶. The High Court of Rangoon is the High Court for Burma. Section 223 of the Government of India Act, 1935, reserves the existing jurisdiction of the High Courts subject to the provisions of Part IX of the Act, to the provisions of any Order in Council made under that or any other Act and to the provisions of any Act of the appropriate Legislature enacted by virtue of powers conferred on that Legislature by the Act.

The original civil jurisdiction of the chartered High Courts

1. *Pashupati Bharti v. Secy. of State*, A. I. R. 1938 F. C. 1.
2. Sec. 6 (9), read with Sec. 204, Govt. of India Act, 1935.
3. Secs. 194, 196, Govt. of India Act, 1935.
4. Sec. 213, Govt. of India Act, 1935.
5. Sec. 131 (4), Govt. of India Act, 1935.
6. Sec. 219, Govt. of India Act, 1935.

may be, 'Ordinary Original Civil Jurisdiction', or 'Extraordinary Original Civil Jurisdiction'.

The High Courts of Calcutta, Bombay, Madras and Rangoon have, by virtue of their respective charters, got Ordinary Original Civil Jurisdiction. All the High Courts including the High Courts of Calcutta, Bombay, Madras and Rangoon have got Extraordinary Original Civil Jurisdiction. Besides the Ordinary, and Extraordinary, Original Civil Jurisdiction, all the High Courts have got Testamentary and Intestate Jurisdiction ; each of the High Courts of Calcutta, Bombay, Madras, Patna and Rangoon has got Admiralty Jurisdiction¹ ; and each of the said High Courts and the Lahore High Court are invested with Matrimonial Jurisdiction.

The Ordinary Original Civil Jurisdiction : The expression "ordinary jurisdiction" embraces all such jurisdiction as is exercised in the ordinary course of law and without any steps being necessary to assume it ; and that it is opposed to "extraordinary jurisdiction" which the Court may assume at its discretion upon special occasions and by special orders².

The limitations of the ordinary original civil jurisdiction of the High Courts of Calcutta, Bombay, Madras and Rangoon are prescribed by their respective charters.

As regards territorial jurisdiction, it is confined within such limits as from time to time may be declared and prescribed by any law made by competent legislative authority for India.³

As regards subject-matter, section 226 of the Government of India Act, 1935, provides that until otherwise provided by Act of the appropriate Legislature, no High Court shall have any original jurisdiction in any matter concerning the revenue, or concerning any act ordered or done in the collection thereof according to the usage and practice of the country or the law for the time being in force.

Subject to the above exceptions, each of the said High Courts in the exercise of its ordinary original civil jurisdiction is empowered

1. For the foundation of the Admiralty Jurisdiction, see *Madras Steam Navigation Co. v. Shalimar Works Ltd.*, (1915) I. L. R. 42 Cal. 85.
2. *Narivahoo v. Turner*, (1888-89) L. R. 16 I. A. 156, 162.
3. Cl. 11, Letters Patent, Cal., Bom., and Mad. High Courts and Cl. 9, Letters Patent, Rang. High Court. Sec. 109 of the Govt. of India Act, 1915, gives power to the Governor-General in Council to alter the local limits of the jurisdiction of High Courts.

to receive, try and determine suits of every description,¹ if, in the case of suits for land or other immovable property,² such land or property shall be situated, or in all other cases if the cause of action shall have arisen either wholly, or, in case the leave of the court shall have been first obtained,³ in part, within the local limits of the ordinary original civil jurisdiction of the said High Court, or if the defendant⁴ at the time of the commencement of the suit shall dwell, or carry on business or personally work for gain within such

1. Cl. 12, Letters Patent, Cal., Bom., and Mad. High Courts, and Cl. 10, Letters Patent, Rang. High Court, read with Sec. 223, Govt. of India Act, 1935.
2. "Suits for land or other immovable property" means suits in which, having regard to the issues raised in the pleadings the decree or order will affect directly the proprietary or possessory title to land or other immovable property; *Per* Page J., in *Goculdas v. Chaganlal*, (1927) I. L. R. 54 Cal. 655. Cf. *Velliappa Chettiar v. Saha Govinda Doss*, (1929) I. L. R. 52 Mad. 809 (F. B.); *Hatimbhai v. Framroz*, (1927) I. L. R. 51 Bom. 516.
3. In granting leave to sue, the Court is not precluded from taking the question of convenience into consideration: *Seshagiri v. Nawab Askur Jung*, (1907) I. L. R. 30 Mad. 438. The leave to sue is a condition precedent to jurisdiction: *De Souza v. Coles*, (1867) 3 Mad. H. C. R. 384. It is confined to the cause of action or causes of action set forth in the plaint at the time when the leave was granted: *Rampartab v. Prem-sukh*, (1891) I. L. R. 15 Bom. 93. Hence if an amendment which would alter the cause of action, is made, it necessarily follows that fresh leave should be obtained in respect of the altered cause of action: *Motilal v. Shankar Lal*, A. I. R. 1939 Bom. 345. When leave asked for at the time of the presentation of the plaint is subsequently granted, such leave dates back to the date of presentation of the plaint, so far as the practice of the Calcutta High Court on the original side is concerned: *Obiter dictum* of Lord-Williams J., in *Amulya v. Suproakash*, (1938-39) 43 C. W. N. 1015. Where a defendant who does not reside within the jurisdiction and against whom the cause of action has arisen in part only is added after the institution of the suit, fresh leave must be obtained at the time of the application for adding him as a party: *Rampartab v. Foolibai*, (1896) I. L. R. 20 Bom. 767.
4. "Defendant" means all the defendants where there are more than one. It is not sufficient that one of the defendants dwells or carries on business within the said jurisdiction: *Hadjee Ismael v. Hadjee Mahomed*, (1874) 13 B. L. R. 91. The Secretary of State does not dwell or carry on business or personally work for gain within the meaning of the Clause. He cannot therefore be sued in a chartered High Court unless the cause of action has arisen either wholly or in part within jurisdiction: *Rodricks v. Secy. of State*, (1913) I. L. R. 40 Cal. 308; *Govindarajulu v. Secy. of State*, (1927) I. L. R. 50 Mad. 449.

limits ; except that the said High Court shall not have such original jurisdiction in cases falling within the jurisdiction of the Small Cause Court at each of the Presidency towns of Calcutta, Bombay, Madras and Rangoon, in which the debt or damage or value of the property sued for, does not exceed one hundred rupees.

Where plaintiff has several causes of action against a defendant, such causes of action not being for land or other immovable property,¹ and any of the said High Courts (of Calcutta, Bombay, Madras or Rangoon) shall have original jurisdiction in respect of one of such causes of action, it shall be lawful for the said High Court to call on the defendant to show cause why the several causes of action should not be joined together in one suit, and to make such order for trial of the same as to the High Court shall seem fit.²

Concurrent jurisdiction of the High Courts and the Presidency Small Cause Courts : So far as the three Presidency towns of Calcutta, Bombay and Madras are concerned, all suits of a civil nature of which the value does not exceed two thousand rupees excepting suits of which the cognizance of the Presidency Small Cause Court is expressly barred, have to be filed in the Small Cause Court but section 21 of the Presidency Small Cause Court Act confers on the High Court concurrent jurisdiction over two classes of suits, viz., (1) where the suit to which an officer of the Small Cause Court is, as such, a party, except suits in respect of property taken in execution of its process or the proceeds or value thereof and, (2) when the amount or value of the subject-matter exceeds one thousand rupees. Section 22 of the said Act provides that if any suit cognizable by the Small Cause Court other than a suit to which section 21 applies, is instituted in the High Court, and if in such suit the plaintiff obtains, in the case of a suit founded on contract, a decree for any matter of an amount or value of less than one thousand rupees, and in the case of any other suit, a decree for any matter of an amount or value of less than three hundred rupees, no costs shall be allowed to the plaintiff ; and if in any such suit the plaintiff does not obtain a decree, the defendant shall be entitled to his costs as between attorney and client. The foregoing rules shall not apply to any

1. *Tukoiirao v. Sowkabai*, (1929) I. L. R. 53 Bom. 251 (The rule contemplates joinder of separate causes of action, one of which at least should have arisen within the original jurisdiction of the High Court).
2. Cl. 14, Letters Patent, Cal., Bom., and Mad., and Cl. 12, Letters Patent, Rang., High Court.

suit in which the Judge who tries the same certifies that it was one fit to be brought in the High Court¹.

Even in suits instituted in Small Cause Courts in which the amount or value of the subject-matter exceeds one thousand rupees a judge of the High Court has the power to order removal of the cause into the High Court upon certain conditions.²

In Madras, by virtue of the Madras City Civil Court and Presidency Small Cause Courts Amendment Act V of 1916, all suits cognizable by the Court of Small Causes of Madras whereof the amount or value of the subject-matter exceeds one thousand rupees may, at the election of plaintiff, be instituted in the Madras City Civil Court. And where an application is made to the High Court of Madras under section 39 of the Presidency Small Cause Courts Act, the High Court may either remove the suit to its own file or transfer the same to the Madras City Civil Court.

Jurisdiction to transfer suits from the Presidency Small Cause Court: See heading "Concurrent jurisdiction of the High Court (O. S.) and the Presidency Small Cause Court", above.

Jurisdiction to transfer suits under Section 225, Government of India Act, 1935: If in any suit pending in an inferior Court, any question of the validity of any Federal or Provincial Act is involved, the High Court³ has, and shall exercise, the power to transfer the suit to itself for trial, provided—

(i) the suit is one which the High Court has power to transfer to itself, and

(ii) in relation to a Federal Act, an application is made by the Advocate-General for the Federation and, in relation to a Provincial Act, by the Advocate-General for the Federation or the Advocate-General for the Province.

Jurisdiction to issue injunction restraining a party from proceeding with a suit in another Court: A judge of the High Court exercising original civil jurisdiction has power under its general equity jurisdiction independently of the Civil Procedure Code, to grant an injunction restraining a person from proceeding with a suit in

1. *Manmotha Kumar Bose v. Abu Jafer Mohamed*, (1929) I. L. R. 56 Cal. 484; *Ismail Ariff v. S. J. Leslie*, (1896) I. L. R. 24 Cal. 399; *Sukumari Ghose v. Gopimohan*, (1916) I. L. R. 43 Cal. 190.
2. Sec. 39, Presidency Small Cause Courts Act.
3. The High Court here means all the Courts mentioned in Sec. 219, Govt. of India Act, 1935.

another Court if the person sought to be restrained is within the jurisdiction of the Court.¹

4. *Courts subordinate to the High Courts other than Courts of Small Causes* : Outside the Presidency towns, there are a number of Courts of different grades, established almost all by local Acts. They are generally, the District Courts, the Subordinate Judge's Courts and the Munsiff's Courts.² These Courts have different pecuniary limits of jurisdiction. The District Judges and Subordinate Judges, except Subordinate Judges of the second class in the Bombay Presidency, possess unlimited pecuniary jurisdiction.

Place of suing : As regards place of suing, the C. P. Code, 1908, provides as follows :—

Section 15 : "Every suit shall be instituted in the Court of the lowest grade competent to try it."

This rule is one of procedure not of jurisdiction.³ Therefore where a suit is instituted in the Court of the Subordinate Judge instead of in the Court of the Munsiff competent to try it, the Subordinate Judge, as a matter of procedure, ought not to entertain the suit, but should return the plaint to the plaintiff to be presented to the Munsiff.⁴ If the Subordinate Judge, instead of returning the plaint, tries the suit notwithstanding objection, it is a case of

1. *Vulcan Iron Works v. Bishumbhur Prosad*, (1909) I. L. R. 36 Cal. 233 ; *Jumna Dass v. Harcharan Dass*, (1911) I. L. R. 38 Cal. 405, both dissenting from *Mungle Chand v. Gopal Ram*, (1907) I. L. R. 34 Cal. 101, (where the High Court restrained a suit previously instituted in the Court at Bareilly) ; *Narayan Vithal Samant v. Jankibai*, (1915) I. L. R. 39 Bom. 604 F. B. (It is not competent to a single judge of the High Court exercising the ordinary original civil jurisdiction of the Court to stay the hearing of a suit pending in a subordinate judge's Court in the mofussil unless authorised to do so by the Rules. But *per* MacLeod J., a single judge sitting on the original side of the High Court is competent to restrain the parties in a suit before him from proceeding with a suit in a subordinate judge's Court in the mofussil and so in effect stay the proceedings).
2. In the Bombay Presidency, the three categories are, the District Courts, Courts of Subordinate Judges of the first class, Courts of Subordinate Judges of the second class.
3. *Nidhi Lal v. Maxhar Husain*, (1893) I. L. R. 7 All. 230 (F. B.) ; *Matra Mondal v. Hari Mohun*, (1890) I. L. R. 17 Cal. 155 ; *Maung Sit Paung v. Maung Tun*, A. I. R. 1925 Rang. 278.
4. Cf. O.VII, r. 10, C. P. Code.

irregularity not affecting the jurisdiction of the Court.¹ But where a suit which ought to have been instituted in a Court of higher grade is instituted in a Court of lower grade, the decree made in such a suit is one without jurisdiction.²

In every case, it is the plaintiff's valuation in his plaint which *prima facie* determines jurisdiction of the Court unless the suit is obviously over-valued and such over-valuation is *mala fide*³. But if the plaintiff over-values or under-values his suit, it is the duty of the Court, on the motion of either party or *ex proprio motu*, to order that the plaint be returned for presentation to the proper Court under O. VII, r. 10, C. P. Code, if the over-valuation or under-valuation is patent on the face of the plaint; but if such over-valuation or under-valuation is not patent on the face of the plaint but objection is taken by the defendant that the suit has been over-valued or under-valued, the Court may require the plaintiff to show that the suit has been properly valued⁴. The plaintiff is not quite free to give an arbitrary valuation and institute the suit in the Court of his own choice⁵. It should, however, be noted that the decree in a suit which ought to have been tried by a Court of lower or higher grade but for over-valuation or under-valuation thereof will not be set aside by the appellate Court unless objection as regards valuation was taken in the Court of first instance or unless the defendant was prejudicially affected by the disposal of the suit on the merits⁶.

In cases where the subject-matter of the suit is not capable of be-

1. Cf. Sec. 99, C. P. Code; *Suryanarayana v. Bullayya*, A. I. R. 1927 Mad. 568.
2. Cf. *Matra Mondal v. Hari Mohun*, (1690) I. L. R. 17 Cal. 155, 160.
3. *Maung Sit Paung v. Maung Tun*, A. I. R. 1925 Rang. 278; *Lakshman v. Babaji*, (1884) I. L. R. 8 Bom. 31; *Madho Das v. Ramji*, (1894) I. L. R. 16 All. 286; *Ishwarappa v. Dhanji*, (1932) I. L. R. 56 Bom. 23.
4. *Appa Rao v. Sobhanadri*, (1901) I. L. R. 24 Mad. 158; *Hamidunissa v. Gopal*, (1896) I. L. R. 24 Cal. 661, 667; *Mt. Parbha v. Lala Suraj*, A. I. R. 1935 All. 157.
5. *Suryanarayana v. Bullayya*, *supra*; *Dayaram Jagjivan v. Gordhandas*, (1907) I. L. R. 31 Bom. 73 (The value must be, where disputed, determined by judicial decision in the suit, such determination being subject to the provisions of Sec. 11 of the Suits Valuation Act VII of 1887).
6. *Sheo Deni v. Tulshi*, (1893) I. L. R. 15 All. 378, 380; *Hamidunissa v. Gopal*, *supra*. Cf. *Rajlakshmi v. Katyayani*, (1911) I. L. R. 38 Cal. 639, 666.

ing estimated at a money value, e. g., suits for restitution of conjugal rights, it is provided by Sec. 9 of the Suits Valuation Act, 1887, that the value of the suit for purposes of jurisdiction is what the High Court may specify by rules made under that section. Where no rules are made, the Calcutta and the Allahabad High Courts in dealing with suits for restitution of conjugal rights, have held that the valuation made by the plaintiff is *prima facie* the true valuation but it is the duty of the Court to decide what should be considered the proper value¹. In the case of suits affecting property, e. g., suits to compel registration of a document or to set aside an adoption, it has been held that the proper valuation would be the interest of the plaintiff in the property that would be affected by the suit².

Section 16 : Subject to the pecuniary or other limitations³ prescribed by any law, suits—

(a) for recovery of immovable property with or without rent or profits.

(b) for partition of immovable property.⁴

1. *Jan Mahomed v. Mashar Bibi*, (1907) I. L. R. 34 Cal. 352 ; *Zair Husain v. Khurshed Jan*, (1906) I. L. R. 28 All. 545.
2. *Ramu Aiyar v. Sankara Aiyar*, (1908) I. L. R. 31 Mad. 89 ; *Balkrishna v. Jankibai*, (1920) I. L. R. 44 Bom. 331 ; *Golan Rahaman v. Sabekjan*, (1926) I. L. R. 53 Cal. 1023 (The sole object of the suit was to get a document registered and the suit was not with regard to any land or interest in land. *Held* : The plaintiff was entitled to put his own valuation).
3. e.g., under Sec. 92 of the C.P.Code, suits as regards public charities have to be instituted in the principal civil court of original jurisdiction or in any other court empowered in that behalf by the Local Government within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate ; under Sec. 32 of the Bombay Civil Courts Act, 1869, suits against Government or an officer of Government in his official capacity, can only be filed in the High Court, or a District Court, of Bombay. The Small Cause Court has no jurisdiction to entertain a suit for the recovery of immovable property.
4. If part of the property sought to be partitioned is situate outside British India, the Court will deal with the property in British India, and decline jurisdiction as to the rest : *Punchanun v. Shib Chunder*, (1887) I. L. R. 14 Cal. 835 (a case decided under cl. 12 of the Letters Patent, but the principle will equally apply to a case covered by this section). If, in a suit for partition of movable and immovable property, the latter is situate outside the jurisdiction of the Court, the plaintiff may be given leave to withdraw the suit so far as it relates to immovable property : *Abdul Karim v. Badrudeen*, (1905) I. L. R. 28 Mad. 216 ; *Assandas v. Kodandas*, A. I. R. 1931 Sind 50 ; *Shiv Ram v. Prahlad Rai*, A. I. R. 1926 Lah. 503.

(c) for foreclosure, sale or redemption in the case of a mortgage of or a charge upon immovable property,

(d) for the determination of any other right to or interest in immovable property¹,

(e) for compensation for wrong to immovable property,

(f) for the recovery of movable property actually under distraint or attachment²,

shall be instituted in the Court within the local limits of whose jurisdiction the property is situate :

Provided that a suit to obtain relief respecting, or compensation for wrong to, immovable property held by or on behalf of the defendant may, where the relief sought can be entirely obtained through his personal obedience, be instituted either in the Court within the local limits of whose jurisdiction the property is situate, or in the Court within the local limits of whose jurisdiction the defendant actually and voluntarily resides, or carries on business, or personally works for gain.

Explanation : In this section "property" means property situate in British India.

Section 17 : Where a suit is to obtain relief respecting, or compensation for wrong to, immovable property situate within the jurisdiction of different Courts³, the suit may be institut-

1. A suit for arrears of rent is covered by Sec. 20 and not Sec. 16 : *Rungo Lall v. Wilson*, (1899) I. L. R. 26 Cal. 204 ; *Kunja v. Manindra*, (1922-23) 27 C. W. N. 542. But a suit for declaration of plaintiff's right to rent comes under cl. (d) of this section : *Keshav v. Vinayak*, (1899) I. L. R. 23 Bom. 22. A suit to recover mortgage debt from the mortgagor personally is not covered by this section : *Vithalrao v. Vaghaji*, (1893) I. L. R. 17 Bom. 570. A suit for dissolution of partnership is not a suit within cl. (d) of this section merely because part of the partnership assets consists of a factory : *Durga Das v. Jai Narain*, (1919) I. L. R. 41 All 513. A suit to establish a right to share in income derived from grants of land situated outside British India but received by the defendant within the local limits of a British Indian Court will lie in such Court : *Kashinath v. Anant*, (1900) I. L. R. 24 Bom. 407.
2. This clause provides an exception to the general rule that movables follow the person : *Companhia de Mocambique v. British South Africa Co.*, (1892) 2 Q. B. 358, 367.
3. The words, "within the jurisdiction of different courts" mean within the jurisdiction of different courts to which the Code applies, *i. e.*, Courts in British India : *Nilkanth Balwant Natu v. Bharathi Swami*, (1930-31) L. R. 57 I. A. 194.

ed in any Court within the local limits of whose jurisdiction any portion of the property is situate¹ :

Provided that, in respect of the value of the subject-matter of the suit, the entire claim is cognizable by such Court.

Section 18 : (1) Where it is alleged to be uncertain within the local limits of the jurisdiction of which of two or more Courts any immovable property is situate, any one of those Courts may, if satisfied that there is ground for the alleged uncertainty, record a statement to that effect and thereupon proceed to entertain and dispose of any suit relating to that property, and its decree in the suit shall have the same effect as if the property were situate within the local limits of its jurisdiction :

Provided that the suit is one with respect to which the Court is competent as regards the nature and value of the suit to exercise jurisdiction.

(2) Where a statement has not been recorded under subsection (1), and an objection is taken before an appellate or revisional Court that a decree or order in a suit relating to such property was made by a Court not having jurisdiction where the property is situate, the appellate or revisional Court shall not allow the objection unless in its opinion there was, at the time of the institution of the suit, no reasonable ground for uncertainty as to the Court having jurisdiction with respect thereto and there has been a consequent failure of justice.

Section 19 : Where a suit is for compensation for wrong done to the person or to movable property, if the wrong was done within the local limits of the jurisdiction of the Court and

1. When once jurisdiction is vested in a Court, it will not be taken away afterwards, even if it is found that the portion of the property being situated within the local limits of the Court which gave it jurisdiction does not belong to the plaintiff as alleged in the plaint, unless the inclusion of that portion is not a *bona fide* one : *Faizuddin v. Mir Yusuf Ali*, A. I. R. 1930 Nag. 189. The "different Courts" mentioned in the section should be Courts in British India. If part of the property is situate within the jurisdiction of a foreign Court, no British Indian Court shall have jurisdiction to entertain the suit as regards the item of property situated within the jurisdiction of the foreign Court : *Karusinga v. Narsinha*, A. I. R. 1938 Bom. 121 ; cf. *Sundar Lal v. Gur Saran Lal*, A. I. R. 1938 Oudh 65.

the defendant resides, or carries on business, or personally works for gain within the local limits of the jurisdiction of another Court, the suit may be instituted at the option of the plaintiff in either of the said Courts.¹

Section 20. Subject to the limitations aforesaid,² every suit shall be instituted in a Court within the local limits of whose jurisdiction—

(a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides,³ or carries on business,⁴ or personally works for gain ; or

1. A Court in British India has jurisdiction to entertain a suit for damages for a personal tort committed by a person beyond the limits of British India, if he resides within the local limits of its jurisdiction at the time of the suit. This rule is in accordance with the principles of Private International Law recognised in England, and the Code of Civil Procedure (Act V of 1908) indicates that the same rule is to be followed by the Courts in British India. When the cause of action alleged in a plaint is a personal tort committed outside the local limits of the jurisdiction of the Courts of British India, unless the act is wrongful according to the law both of British India and of the place where the act is committed, the suit will not be sustainable : *Govindan Nair v. Achutha Menon*, (1916) I. L. R. 39 Mad. 433.
2. See secs. 15 and 16, C. P. Code. The sections are restricted to personal actions.
3. Residence will give jurisdiction even though the cause of action has arisen outside jurisdiction : *Ismailji v. Ismail*, (1921) I. L. R. 45 Bom. 1228. The word 'resides' is equivalent to the word "dwells" which occurs in cl. 12 of the Letters Patent of the Calcutta, Bombay and Madras High Courts : *Gosvami v. Shri Govardhanlalji*, (1890) I. L. R. 14 Bom. 541, 547. The words 'actually and voluntarily resides' refer only to natural persons and not legal entities such as limited companies and Governments : *R. J. Wyllie & Co. v. Secy. of State*, A. I. R. 1930 Lah. 818 ; *Govindarajulu v. Secy. of State*, (1927) I. L. R. 50 Mad. 449.
4. The business need not be carried on personally : *Muthaya v. Allan*, (1882) I. L. R. 4 Mad. 209. It may be carried on through an agent or a manager : *Kripa Ram Firm v. Mangal Sen Firm*, A. I. R. 1922 All. 367. A commission agent is not such an agent : *Khimji v. Forbes*, (1871) 8 Bom. H. C. R. 102 ; nor the manager of a Hindu joint family : *Annammalai v. Murugasa*, (1903) L. R. 30 I. A. 220. The word "business" must be taken to refer to commercial business and not a business of State or Government. The phrase "carries on business or personally works for gain" is not applicable to the Secretary of State or to Government : *Doya Narain v. Secy. of State*, (1887) I. L. R. 14 Cal.

(b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given,¹ or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce² in such institution; or

(c) the cause of action, wholly or in part, arises.³

Explanation I.—Where a person has a permanent dwelling at one place and also a temporary residence at another place, he shall be deemed to reside at both places in respect of any cause of action arising at the place where he has such temporary residence.⁴

Explanation II.—A corporation shall be deemed to carry on business at its sole or principal office in British India or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.⁵

Jurisdiction as regards transfer of suits: The following are the

256, 273; *Govindrajulu v. Secy. of State*, (1927) I. L. R. 50 Mad. 449; *R. J. Wyllie & Co. v. Secy. of State*, A. I. R. 1930 Lah. 818.

1. Leave may be given even after the institution of the suit: *Narayan Shankar v. Secy. of State*, (1906) I. L. R. 30 Bom. 570; or at any time before the plaint is ordered to be returned for presentation to the proper Court: *Wadhmal v. Noor Ahmad*, A. I. R. 1933 Sind 179 (where application for leave was made after the passing of a judgment on a preliminary issue but before the plaint was ordered to be returned).
2. A defendant may be taken to have "acquiesced in such institution", if he does not object, or if he does not apply under Sec. 22: *Ramappa v. Ganpat*, (1906) I. L. R. 30 Bom. 81. The Calcutta High Court has held that where the defendant objected to jurisdiction he could not be deemed to have 'acquiesced' because he failed to apply for a transfer: *Ratan Chand v. Secy. of State*, (1913-14) 18 C. W. N. 1340.
3. See 'Cause of action and place of suing,' Chap. X. The Court, where a suit is instituted, continues to have jurisdiction over the suit although the place where the cause of action arose ceases to be situate within the jurisdiction: *Subramanya v. Swaminatha*, A. I. R. 1928 Mad. 746.
4. See *Sitanath v. Jalindra*, (1930) I. L. R. 57 Cal. 65 (A suit instituted in the Court within the jurisdiction of which the defendant has a permanent residence is properly instituted. The mere fact that the defendant resides with his family and carries on business in a place which is not his permanent place of residence does not oust the jurisdiction of such Court).
5. *Bank of Bengal v. Sarat Chandra*, (1919) 4 Pat. L. J. 141.

relevant provisions in the Code and in the Letters Patent as regards transfer of suits :

Section 22 : Where a suit may be instituted in any one of two or more Courts and is instituted in one of such Courts, any defendant, after notice to the other parties, may, at the earliest possible opportunity and in all cases, where issues are settled at or before such settlement, apply to have the suit transferred to another Court, and the Court to which such application is made, after considering the objections of the other parties (if any), shall determine in which of the several Courts having jurisdiction the suit shall proceed.¹

Section 23 : (1) Where the several Courts having jurisdiction are subordinate to the same Appellate Court, an application under Sec. 22 shall be made to the Appellate Court.

(2) Where such Courts are subordinate to different Appellate Courts, but to the same High Court, the application shall be made to the said High Court.

(3) Where such Courts are subordinate to different High Courts, the application shall be made to the High Court within the local limits of whose jurisdiction the Court in which the suit is brought is situate.²

Section 24 : (1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice,³ the

1. In ordering a transfer the Court ought to look to the balance of convenience. The burden lies very heavily on the defendant to show that consideration of convenience should outweigh the cardinal principle that the plaintiff as the *arbiter lites* has a right to choose his forum : *Roop Chand v. Gokul Chand*, A. I. R. 1924 Lah. 249 (2), followed in *Ry Pratap Simha v. Srinivasagopalachariar*, A. I. R. 1928 Mad. 15.
2. Secs. 22 and 23 do not seem to take effect upon the original jurisdiction of the High Court, because Sec. 23, in pointing out the Courts that are to exercise the powers given by Sec. 22, speaks of Courts subordinate to other Courts ; and the High Court on the original side does not seem to be brought effectively within Sec. 22: *Manindra Chandra v. Lal Mohun*, (1920) I. L. R. 56 Cal. 940 ; *Hindusthan Assurance v. Rai Mulraj*, A. I. R. 1915 Mad. 608 ; but see *Ramaswamy Chettyar v. V. T. Chettyar*, (1934) I. L. R. 12 Rang. 548 (F. B.). Cf. *Vallabbhai v. Chhotatal* A. I. R. 1927 Bom. 79.
3. The general power of transfer under this section may be exercised at any stage of the proceeding and even *suo motu* without an application : *Allahabad Bank v. Raja Ram*, (1933) I. L. R. 14 Lah. 779.

High Court or the District Court¹ may at any stage—

- (a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same,² or
 - (b) withdraw any suit, appeal or other proceeding pending in any Court subordinate to it, and
 - (i) try or dispose of the same ; or
 - (ii) transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same ; or
 - (iii) retransfer the same for trial or disposal to the Court from which it was withdrawn.
- (2) Where any suit or proceeding has been transferred or withdrawn under sub-s. (1), the Court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either re-try it or proceed from the point at which it was transferred or withdrawn.
 - (3) For the purposes of this section, Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court.
 - (4) The Court trying any suit transferred or withdrawn under this section from a Court of Small Causes, shall, for the purposes of such suit, be deemed to be a Court of Small Causes.

Section 151 : Nothing in the C. P. Code shall be deemed to limit or otherwise affect the inherent power of the Court to make

1. A High Court or a District Court may transfer a suit from one Court to another which has pecuniary jurisdiction although it may not have territorial jurisdiction to entertain the suit : *Kishore Lal v. Balkishan*, (1932) I. L. R. 54 All 824 ; *Sita Ram v. Balak Ram*, (1933) I. L. R. 8 Luck. 347 ; *contra* : *Ram Das v. Habib Ullah*, (1932) I. L. R. 53 All. 916 A Subordinate Judge cannot exercise the power of transfer. A senior Subordinate Judge may make an administrative order transferring a case from one of the Subordinate Judges attached to that Court to another. But when once a Judge has taken cognizance of a suit, any order removing the suit from his file is an order of transfer : *Shankarji v. Vrajlal*, (1935) I. L. R. 59 Bom. 466.
2. For grounds of transfer, see, *Hindusthan Assurance v. Rai Mulraj*, A. I. R. 1915 Mad. 608 ; *Tula Ram v. Hariwan Das*, (1883) I. L. R. 5 All 60, 62. A transfer cannot be made from one Court to another, unless the suit has in the first instance been brought in a Court having jurisdiction : *Singara Mudaliar v. Govindaswami*, A. I. R. 1928 Mad. 400.

such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

If it appears that the plaintiff has chosen a forum in utter disregard of the convenience of both parties, for some ulterior object and in abuse of his position as *dominus lites*, the High Court can, in the exercise of its inherent power, determine which of the two Courts having jurisdiction should try the suit. The powers to be exercised are similar to those contemplated by Secs. 22 and 23, C. P. Code. Secs. 22 and 23 of the C. P. Code do not apply to a case in which the question is whether a suit should be tried by a Court subordinate to a High Court or by a High Court on its original side. In the absence of any rule, therefore, providing for a case where transfer to the original side of a High Court from a Court subordinate to the High Court is desired, an order for transfer may in a proper case, be made under Sec. 151 of the C. P. Code.¹

Clause 13 of the Letters Patent : The powers of the High Court in dealing with suits transferred under Cl. 13 of the Letters Patent, would be the powers which, but for the transfer, might have been exercised by the Court, from which the transfer was made.²

5. *Presidency Small Cause Court—jurisdiction³ of—*

(i) *As to subject matter :* The limitations as regards subject-

1. *Datt Singh v. Tejdudd Singh*, (1934) I. L. R. 56 All. 201 ; see *Ramaswami Chettyar v. V. T. Chettyar*, (1934) I. L. R. 12 Rang. 548 F. B. (case of transfer of a suit pending before the original side of a High Court to the Court where the suit ought to be tried.)
2. *Basant v. Narayaniah*, (1913-14) L.R. 41 I.A. 314, fd. in *Singara Mudaliar v. Govindaswami Ohetty*, A.I.R. 1928 Mad 400. (In this case the suit was filed originally in the City Civil Court, Madras, and was transferred to the High Court in the exercise of its extraordinary original civil jurisdiction. Later, an application, to amend the plaint was made, the effect of which was to convert the suit into what the City Civil Court would not have any jurisdiction to entertain. Held : No Court will permit a plaint to be so amended as to oust its jurisdiction to try the suit. The powers of the High Court under Cl. 13 being those of the City Civil Court itself, it follows that the amendment cannot be allowed).
3. For the index by which to determine whether a proposed suit is cognizable by the Small Cause Court, see *Soundaram v. Sennia Naickan*, (1900) I. L. R. 23 Mad. 547 (F. B.). The jurisdiction of the Court depends upon the nature of the suit as originally brought and not upon the character it ultimately assumes : *Lakshmandas v. Anna R. Lane*, (1908)

matter are imposed by Section 19 of the Presidency Small Cause Courts Act, 1882, which runs as follows :

The Small Cause Court shall have no jurisdiction in—

- (a) suits concerning the assessment or collection of the revenue ;
- (b) suits concerning any act ordered or done by the Governor-General in Council or the Local Government, or by the Governor-General or a Governor, or by any Member of the Council of the Governor-General or of the Governor of Madras or Bombay, in official capacity, or by any person by order of the Governor-General in Council or the Local Government ;
- (c) suits concerning any act ordered or done by any Judge or judicial officer in the execution of his office, or any other person in pursuance of any judgment or order of any Court or any such Judge or judicial officer ;
- (d) suits for the recovery of immovable property ;
- (e) suits for the partition of immovable property ;
- (f) suits for the foreclosure or redemption of a mortgage of immovable property ;
- (g) suits for the determination of any other right to or interest in immovable property ;
- (h) suits for the specific performance or rescission of contracts ;
- (i) suits to obtain an injunction ;
- (j) suits for the cancellation or rectification of instruments ;
- (k) suits to enforce a trust ;
- (l) suits for a general average loss and suits on policies of insurance on sea-going vessels ;
- (m) suits for compensation in respect of collisions on the high seas ;
- (n) suits for compensation for the infringement of a patent, copyright or trade mark ;
- (o) suits for a dissolution of partnership or for an account of partnership-transactions ;
- (p) suits for an account of property and its due administration under the decree of the Court ;
- (q) suits for compensation for libel, slander, malicious prosecution, adultery or breach of promise of marriage ;
- (r) suits for the restitution of conjugal rights, for the recovery of a wife, or for a divorce ;
- (s) suits for declaratory decrees ;
- (t) suits for possession of a hereditary office ;

1. L. R. 32 Bom. 356. Where a suit is partly cognizable by a regular Court and partly by a Small Cause Court, the claim is cognizable only by a regular Court : *Ramasami v. Govinda*, (1916) 31 M. L. J. 839. The jurisdiction of the Small Cause Court is not ousted where the question of title arises incidentally : *Narayan v. Balaji*, (1897) I. L. R. 21 Bom. 248, *fd. in Kesrisang v. Naransang*, (1908) I. L. R. 32 Bom. 560. Cf. *Ohhotu v. Jawahir*, (1906) I. L. R. 28 All. 293 ; *Bharat Mahto v. Nisaraki Sheikh*, (1915-16) 20 C. W. N. 1020.

- (u) suits against Sovereign Princes or Ruling Chiefs, or against Ambassadors or Envoys of foreign states.
 - (v) suits on any judgment of a High Court ;
 - (w) suits the cognizance whereof by the Small Cause Court is barred by any law for the time being in force.
- (ii) *As to place* : Section 17 of the Presidency Small Cause Courts Act, 1882, provides that the local limits of the jurisdiction of each of the Small Cause Courts shall be the local limits for the time being of the ordinary original civil jurisdiction of the High Court. See also the next heading.
- (iii) *As to pecuniary value* : Section 18 of the Presidency Small Cause Court Act, 1882, provides—

Subject to the exceptions in Section 19, the Small Cause Court shall have jurisdiction to try all suits of a civil nature, when the amount or value of the subject-matter does not exceed two thousand rupees, and—

- (a) the cause of action has arisen, either wholly or in part, within the local limits of the jurisdiction of the Small Cause Court, and the leave of the Court has, for reasons to be recorded by it in writing, been given before the institution of the suit ; or
- (b) all the defendants, at the time of the institution of the suit, actually and voluntarily reside, or carry on business, or personally work for gain, within such local limits : or
- (c) any of the defendants, at the time of the institution of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, within such local limits and either the leave of the Court has been given before the institution of the suit, or the defendants who do not reside, or carry on business, or personally work for gain as aforesaid, acquiesce in such institution :

Provided that where the cause of action has arisen wholly within the local limits aforesaid, and the Court refuses to give leave for the institution of the suit, it shall record in writing its reasons for such refusal.

Explanation I. When in any suit the sum claimed, is, by a set-off admitted by both parties, reduced to balance not exceeding two thousand rupees, the Small Cause Court shall have jurisdiction to try such suit.

Explanation II. Where a person has a permanent dwelling at one place and also a lodging at another place for a temporary purpose only, he shall be deemed to reside at both places in respect of any cause of action arising at the place where he has such temporary lodging.

Explanation III. A Corporation or Company shall be deemed to carry on business at its sole or principal office of British India, or in respect of any cause of action arising at any place where it has also a subordinate office, at such place.

The concurrent jurisdiction of the High Court and the Presidency Small Cause Court, and the High Court's power to transfer suits are

covered by Secs. 21, 22 and 39 of the Presidency Small Cause Courts Act, and have been already dealt with under 'High Courts (O. S.) jurisdiction of'— Sec. 69 of the said Act provides for references to High Court for opinion.

6. *Provincial Small Cause Court*¹—*jurisdiction of* :—

(a) *As to subject-matter* : Section 15 (1) Prov. Small Cause Courts Act, 1887, provides—

“A Court of Small Causes shall not take cognizance of the suits specified in the second schedule as suits excepted from the cognizance of a Court of Small Causes.”

Note : The exceptions specified in the second schedule to the Act are nearly the same as those specified in Section 19 of the Presidency Small Cause Courts Act.

(b) *As to place* : Section 5 (2) of the Prov. Small Cause Courts Act provides that the local limits of the jurisdiction of the Court of Small Causes shall be such as the Local Government may define, and the Court may be held at such place or places within those limits as the Local Government may appoint.

(c) *As to pecuniary value* : Section 15, sub-sections (2) and (3) provides as follows :

Section 15 (2) : Subject to the exceptions specified in that schedule and to the provisions of any enactment for the time being in force, all suits of a civil nature of which the value does not exceed five hundred rupees shall be cognizable by a Court of Small Causes.

Section 15 (3) : Subject as aforesaid, the Local Government may, by order in writing, direct that all suits of a civil nature of which the value does not exceed one thousand rupees shall be cognizable by a Court of Small Causes mentioned in the order.

7. *Jurisdiction of Courts over non-resident foreigners* : There is no limitation in the C. P. Code or in any other Acts in force in this country excepting foreigners from the jurisdiction of British Indian Courts.² A foreign subject is amenable to the jurisdiction of a British Indian Court if he resides or carries on business, or person-

1. For application of the Prov. Small Cause Courts Act to Courts invested with jurisdiction of Court of Small Causes, see Secs. 32 and 33 of the Act.

2. *Smith v. Indian Textile Co.*, (1927) I. L. R. 49 All. 669.

ally works for gain within the limits of such jurisdiction.¹ It is sufficient if the defendant carries on business through an agent in British India.² He may be sued in a British Indian Court, if the cause of action against him has arisen wholly or in part within the local limits of such Court.³

8. *Jurisdiction of Courts over aliens* : Section 83 of the C. P. Code provides as follows :

"(1) Alien enemies⁴ residing in British India with the permission of the Central Government⁵ and alien friends, may sue in the Courts of British India, as if they were subjects of His Majesty.

"(2) No alien enemy residing in British India without such permission, or residing in a foreign country, shall sue in any of such Courts.

"Explanation. Every person residing in a foreign country the Government of which is at war with the United Kingdom of Great Britain and Ireland, and carrying on business in that country without a license in that behalf under the hand of one of His Majesty's Secretaries of State or of a Secretary to the Central Government shall, for the purpose of sub-section (2), be deemed to be an alien enemy residing in a foreign country.

9. *Jurisdiction of Courts over Foreign and Native Rulers, Ambassadors and Envoys* : Under Section 84 of the C. P. Code,

1. *Janoo Hassan v. Batchu*, A. I. R. 1924 Mad. 158 ('Defendant' in Cl. 12 of the Letters Patent includes foreigners); *Girdhar v. Kassigar* (1893) I. L. R. 17 Bom. 662 (A non-British subject by establishing a business in British India from which business he expects to derive profit accepts the protection of the territorial authority for his business and his property resulting from it, and may be fully regarded as submitting to the Courts of the Country).

2. *Girdhar v. Kassigar*, *supra*.

3. *Baroda State Rly. v. Habib Ullah*, (1931) I. L. R. 56 All. 828 (case under Sec. 20 of the C. P. Code); *Nathubhai v. Chhabildas*, (1935) I. L. R. 59 Bom. 365; *Neelakanda Pillai v. Kunju Pillai*, A. I. R. 1935 Mad. 545.

4. For who are alien enemies, see *Janson v. Driefontein Consolidated Mines Ltd.*, (1902) A. C. 481, 505; *Haji Ali v. Abdul Jalil*, (1920) I. L. R. 1 Lah. 276.

5. Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937,

(1) A foreign State may sue¹ in any Court of British India :

Provided that such State has been recognized by His Majesty or by the² (Central Government) :

Provided, also that the object of the suit is to enforce a private right³ vested in the head of such State or in any officer of such State in his public capacity.

(2) Every Court shall take judicial notice of the fact that a foreign State has or has not been recognised by His Majesty or by the⁴ (Central Government).

Under Section 86 of the C. P. Code.—

(1) Any (*Sovereign*) Prince or (*Ruling*) Chief, (*whether in subordinate alliance with the British Government or otherwise and whether residing within or without British India*), and any ambassador or envoy of a foreign State, may,⁵ (in the case of the Ruling Chief of an Indian State with the consent of the Crown Representative certified by the signature of

1. See Sec. 87, C. P. Code. In England, the suit must be brought in the name by which it has been recognised by His Majesty : *United States of America v. Wagner*, (1867) L. R. 2. Ch. 582.
2. Substituted for "Governor-General in Council" by the Government of India (Adaptation of Indian Laws) Order, 1937.
3. "Private Rights" do not mean individual rights as opposed to those of the body politic or State, but those private rights of the State which must be enforced in a Court of justice, as distinguished from its political or territorial rights, which must from their very nature be made the subject of arrangement between one State and another. They are rights which may be enforced by a foreign State against private individuals as distinguished from rights which one State in its political capacity may have as against another State in its political capacity : *Hajon Manirk v. Bur Sing*, (1835) I. L. R. 11 Cal 17. When the Ruler of the State has severed his connection with the State, the Government can appoint a person to prosecute or institute suit in British Indian Courts and such person has *locus standi* to continue or file suits, and the fact that such an appointment is made after a plaint has been put into Court will not render it ineffective provided that it is put into Court within the period of limitation : *Bachan Singh v. Dharam Arth Bank*, A. I. R. 1933 Lah. 456.
4. Substituted for "Governor-General in Council" by the Government of India (Adaptation of Indian Laws) Order, 1937.
5. Substituted for the words "with the consent of the Governor-General in Council etc." by the Government of India (Adaptation of Indian Laws) Order, 1937.

the political secretary, and in any other case with the consent of the Central Government, certified by the signature of a secretary to that Government) but not without such consent¹, be sued in any competent Court.

(2) Such consent may be given with respect to a specified suit or to several specified suits, or with respect to all suits of any specified class or classes, and may specify, in the case of any suit or class of suits, the Court in which the Prince, Chief, ambassador or envoy may be sued ; but it shall not be given unless it appears to² (the consenting authority) that the Prince, Chief, ambassador or envoy—

- (a) has instituted a suit in the Court against the person desiring to sue him, or
- (b) by himself or another trades within the local limits of the jurisdiction of the Court, or
- (c) is in possession of immovable property situate within those limits and is to be sued with reference to such property or for money charged thereon.

(3) No such Prince, Chief, ambassador or envoy shall be

1. The consent must be obtained before institution of the suit : *Chandulal v. Awad bin Umar Sultan*, (1897) I. L. R. 21 Bom. 351 (a suit against a foreign prince in which it was held that the consent of the G.-G. in Council, not to the suit being instituted, but to its being proceeded with is not sufficient consent) ; *Maharaja Sir Nripendra Narayan v. Maharaja Manindra Chandra Nandy*, (1912-13) 17 C. W. N. 1242 (where an amendment was made after the suit was instituted with the consent of G.-G. in Council. The High Court sent back the case to the lower Court so that the plaintiff might apply to that Court for leave to withdraw the plaint with liberty to bring a fresh suit for the same cause of action and on the new sanction). It is not open to the Court to question the propriety or impropriety of the order of the G.-G. in Council refusing to consent under section 86 : *Mohammad Raza v. Kapurthala Estate*, A. I. R. 1935 Oudh 164. Where a suit is instituted not against the Prince himself, but against a business concern run by the State or a Ruling Prince, it cannot be said that it is one against the Prince himself : *Baroda State Rly. v. Habib Ullah*, (1934) I.L.R. 56 All. 828. The rule of international law that a sovereign authority cannot be personally impleaded in any Court cannot be applied to Princes in India : *Baroda State Rly. v. Habib Ullah*, *supra*.
2. Substituted for "the Government" by the Government of India (Adaptation of Indian Laws) Order, 1937.

arrested under this Code, and, except with¹ (such consent as is mentioned in sub-s. 1) certified as aforesaid, no decree shall be executed against the property of any such Prince, Chief, ambassador or envoy.

(4) ²(The Central Government or the Crown Representative, as the case may be, may by notification in the Official Gazette authorize a Provincial Government and any Secretary to that Government to exercise with respect to any Prince, Chief, ambassador or envoy named in the notification the functions assigned by the foregoing sub-sections to the consenting authority and a certifying officer respectively).

(5) A person may, as a tenant of immovable property, sue, without such consent as is mentioned in this section, a Prince, Chief, ambassador or envoy from whom he holds or claims to hold the property.

Section 87 of the C. P. Code provides as follows :

"A Sovereign Prince or Ruling Chief may sue, and shall be sued, in the name of his State :

Provided that in giving the consent referred to in the foregoing section the³ (Central Government, the Crown Representative or the Provincial Government) as the case may be, may direct that any such Prince or Chief shall be sued in the name of an agent or in any other name.

10. *Jurisdiction of foreign Courts:* A foreign judgment as such has no operation in British India. The only way in which a foreign judgment can be enforced in British India is by bringing an action upon it and/or by executing the foreign judgment in certain specified cases under section 44 of the C. P. Code. A question under sec. 13(a) of the C. P. Code as to whether the foreign Court was a court of competent jurisdiction must be determined in regard to personal actions, not by the territorial law of the foreign State but by the rules of Private International Law. In a personal

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1. Substituted for the words "the consent of the G-G. in Council" by the Government of India (Adaptation of Indian Laws) Order. 1937.
 2. Substituted for the old sub-section by *ibid.*
 3. Substituted for the words "G-G. in Council or the Local Government" by the Government of India (Adaptation of Indian Laws) Order, 1937.

action a foreign Court has jurisdiction in an international sense,¹ if—

(i) the defendant is the subject of the foreign country in which the judgment has been delivered. This is based upon the ground of allegiance, which involves an obligation to comply with the judgments of the courts of that country ;
or

(ii) the defendant was resident in the foreign country at the time when the action was begun against him ; or

(iii) the defendant was served with process while temporarily present in the foreign country ; or

(iv) the defendant in his character as plaintiff in the foreign action himself selected the forum in which he is afterwards sued ; or

(v) the defendant voluntarily appeared in that Court and submitted to its jurisdiction² ; or

(vi) the defendant had contracted to submit to the jurisdiction of the foreign Court.³

1. *Mallappa Yellappa Bennur v. Raghavendra*, A. I. R. 1938 Bom. 173; *Chormal Balchand v. Kasturi Chand*, (1935-36) 40 C. W. N. 591. Cf. *Sheo Tahal Ram v. Binack Shukul*, (1931) I. L. R. 53 All. 747 ; *Thandavan Chettiar v. U. K. Unnalachan*, (1934) I. L. R. 57 Mad. 822 (where it was held that the submission to jurisdiction in case of a foreign Court must be before the foreign Court itself and before the judgment is pronounced).
2. *Kandoth Mammi v. N. Abdu Kalandan*, (1875) 8 Mad. H. C.R. 14 and *Nallatambi Mudaliar v. Ponnuswami Pillai*, (1879) I. L. R. 2 Mad. 400 (cases where the defendants who were sued in a French Court took no exception to the jurisdiction); *Ganga Prosad v. Ganeshi Lal*, (1924) I. L. R. 46 All. 119 (where the defendants themselves appeared and contested the claim in Dhulpur Court); *Shaikh Atham Sahib v. Davud Sahib*, (1909) I. L. R. 32 Mad. 469 (where the defendant appeared in obedience to the process of the foreign court and applied for leave to defend the action without objecting to jurisdiction); *Kaliyugam Chetty v. Chokalinga*, (1884) I. L. R. 7 Mad. 105 (where the defendants appeared in the suit brought in the Pudukottai Court and took no objection to jurisdiction until the case had reached the stage of appeal); *Rama Iyyar v. Krishna Patter*, (1916) I. L. R. 39 Mad. 733 (where the defendant who was sued in a Court in the Cochin State appeared and defended the suit against him on the merits although at the same time he protested against the jurisdiction of the Court).
3. *Burjor v. Ellerman Oily Lines Ltd.*, (1925) I. L. R. 49 Bom. 854 ; *Haji Abdulla v. G. R. Stamp*, A. I. R. 1924 Bom. 381.

Under Sec. 13(b), Courts in this country have a right to examine a foreign judgment to see if it has been given on the merits.¹ The true test for deciding whether a judgment has been given on the merits is whether it has been given as a penalty for any conduct of the defendant or whether it is based on the consideration of the truth or otherwise of the plaintiff's case.² It is the duty of the Court to see that the foreign Court applied its mind to the fact and the law. Thus, where a person whose interest was in conflict with that of a minor was appointed guardian-ad-litem in a suit against the minor in a foreign Court, it was held that the foreign Court decree against the minor offended the rules of natural justice and was not binding on the minor.³ It is not open to the Court trying the suit on a foreign judgment to decide whether the decision of the foreign Court is right or not.

11. *Objections to, and waiver of, jurisdiction* : There is a distinction between inherent want of jurisdiction and irregular assumption of exercise of jurisdiction. Where there is an entire absence of jurisdiction, no action on the part of the plaintiff, no inaction on the part of the defendant can invest the Court with jurisdiction, for jurisdiction cannot be created by waiver or consent.⁴ A judgment of a court without inherent jurisdiction is a nullity.⁵ It may be set aside in proceedings by way of appeal, revision or its nullity may be established by a regular suit.⁶ There is considerable divergence of judicial opinion as to whether a subsisting decree passed without jurisdiction is executable, in other words, can the court to which such a decree is sent for execution refuse to execute it? According to the Bombay High Court, the executing court has no power to question the jurisdiction of the Court which passed the decree under execution.⁷ According to a Full Bench decision of the Calcutta High

1. *Mallappa Yellappa Bennur v. Raghavendra*, A. I. R. 1938 Bom. 173.

2. *Mehar Singh v. Ishar Singh*, A. I. R. 1932 Lah. 649; *Walker v. Walker*, A. I. R. 1935 Rang. 284; *Kulwant v. Dhan Raj*, (1935) I. L. R. 16 Lah. 768 (where opportunity was given to the plaintiff to appear and contest and he voluntarily refrained from doing so).

3. *Popat Virji v. Damodar Jairam*, A. I. R. 1934 Bom. 390.

4. *Ramprosad v. Sricharn*, (1918) 27 C. L. J. 594; cf. *Ledgard v. Bull*, (1885-86) L. R. 13 I. A. 134; *Meenakshi Naidoo v. Subramaniya Sastri*, (1887-88) L. R. 14 I. A. 160.

5. *Rajlakshmi v. Katayani*, (1911) I. L. R. 38 Cal. 639.

6. *Ramani v. Narayanaswami*, A. I. R. 1924 Mad. 697.

7. *Hari Govind v. Narsingrao*, (1914) I. L. R. 38 Bom. 194; but see *Jivappa v. Jeergi*, (1916) I. L. R. 40 Bom. 551 (which says it is open to a British

Court, where a decree presented for execution was made by a Court which apparently had not jurisdiction, either pecuniary or territorial or in respect of the judgment-debtor's person, to make the decree, the executing Court is entitled to refuse to execute it on the ground that it was made without jurisdiction.¹

A Full Bench of the Rangoon High Court², presided over by Sir Arthur Page C. J., have dissented from the Calcutta Full Bench case and have held that "a subsisting decree passed by a duly constituted Court that has not been set aside in proceedings by way of appeal, revision or otherwise by due process of law, is not to be treated as a mere nullity, but is binding and conclusive against the parties thereto duly impleaded in the suit. A Court to which such a decree has been transferred for execution must take the decree as it stands and is not entitled to question the validity of the decree on the ground that the decretal Court had not jurisdiction, territorial, personal or pecuniary, to pass it. Of course it is perfectly open to the executing Court to determine whether the decree which it is asked to execute, is a subsisting and operative decree or not and if such a decree has been superseded and is no longer operative, the executing Court is entitled to refuse execution on that ground. Again, the executing Court can only execute a decree and if what purports to be a decree has been passed by a Court not duly constituted according to the law, such an adjudication is not a decree at all in the eye of the law. Such a decree in the strict sense of the term is a nullity, a mere nothing that need not be set aside, may be disregarded by any Court to which it is presented. So also, is a decree that has been passed against a dead person.....When a duly constituted Court assumes jurisdiction to try a suit, it must be taken thereby implicitly to assent that it possesses the jurisdiction which it is exercising and *prima facie*, it will be presumed that the decrees which it passes have been duly passed in the exercise of jurisdiction in that behalf, with which the Court is invested. No one will pretend of course that such a presumption is irrebuttable, or that if the Court had no inherent jurisdiction to pass a decree, such a decree cannot be set aside in appropriate proceedings as null and void. But if such a decree is not set aside

Court executing a foreign decree to enquire whether a foreign Court has jurisdiction, although it cannot challenge the decree of a British Indian Court).

1. *Gora Chand Halder v. Prafulla Kumar*, (1926) I. L. R. 53 Cal. 166; *fd.* and *distd.* in *Sarat Chandra v. Joy Sankar*, (1930-31) 35 C. W. N. 332.
2. *Nathan v. Samson*, (1931) I. L. R. 9 Rang. 490 (F. B.).

or declared to be void by competent authority its validity cannot be challenged”.

In spite of the Calcutta Full Bench case, His Lordship Mr. Justice Costello of the Calcutta High Court, sitting as a single judge¹, expressed his dissent from the said case and his approval of the Rangoon Full Bench case. His Lordship observed that “the use of the word ‘apparently’ in the Calcutta Full Bench case does indeed create considerable difficulty in the way of understanding the reasons underlying the judgment. Some light is thrown on the ambiguity created by the use of the word ‘apparently’ by a recent decision given by Mukerji and Guha JJ., in *Amalabala v. Sarat Kumari*,² where it was held that the proposition laid down by the Full Bench in *Gorachand v. Prafulla Kumar*³ was that an executing Court would be competent to refuse to execute a decree only when on the face of the decree it would appear that the Court which passed it had no jurisdiction. The Court then surmounted the difficulty discussed by Sir Arthur Page in the Rangoon case by holding that the expression ‘the decree’ signifies ‘the decree and the papers relevant for the purpose of understanding it’. It is to be observed that this decision was given independently of the Rangoon case, and at a time when the report of it had not been published.....I entirely agree with the reasoning upon which that decision of the Rangoon High Court is based and I think it represents a correct enunciation of the law.”

It has already been observed that the objection that the Court has no inherent jurisdiction cannot be waived, and that such objection may be taken at any stage of the proceedings. But defects of jurisdiction arising from an irregular assumption of jurisdiction may be waived by the failure to take objection at a proper stage of the proceedings.⁴

Thus, for cases cognizable by British Indian Courts, *i. e.*, cases where “the place of suing is situate in some area in British India where the Civil Procedure Code runs”, section 21 of the C. P. Code provides that “no objection as to the place of suing shall be allowed by any appellate or revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity

1. *Kali Charan v. Bibhuti Bhusan*, (1933) I. L. R. 60 Cal. 191.

2. (1931) 54 C. L. J. 593.

3. (1926) I. L. R. 53 Cal. 166 (F. B.).

4. *Ratti Ram v. Kundan Lal*, (1914) 26 I. C. 543 ; cf. *Ajam Ibram v. Hava Bibi*, I. L. R. (1939) Bom. 472.

and in all cases where issues are settled, at or before such settlement, and unless there has been a consequent failure of justice¹."

If a suit is entertained against a Sovereign Prince without the consent of the Crown Representative or the Central Government, as the case may be, the case is one of irregular exercise of jurisdiction and if the defendant does not raise any objection to jurisdiction until the suit is ripe for hearing he will be deemed to have waived the objection to jurisdiction². The objection as to place of suing cannot be taken for the first time in appeal, nor can the defendant in a subsequent suit have the decree set aside as a nullity³.

12. *Pleading jurisdiction*: The plaintiff has to state facts showing that the Court has jurisdiction⁴. Thus, in a suit instituted in the Federal Court, the plaint must show that the subject-matter of the suit is within the exclusive jurisdiction of that Court. In a suit for land or other immovable property instituted in the High Court (O. S.), the plaint must show that the property is situate either wholly or in part within jurisdiction⁵. If the plaintiff relies on the place where the cause of action either wholly or in part arose as giving jurisdiction, he must state facts showing that it arose partly or wholly within jurisdiction along with the facts constituting the cause of action and when it arose. The plaintiff must give such particulars as will enable the defendant and the Court to ascertain from the plaint whether in fact and in law the cause of action did arise as alleged or not. Again, if the plaintiff relies on the defendant's residence or the place where the defendant carries on business or works for gain, as giving the Court jurisdiction, such facts must be stated in the body of the plaint. It is not sufficient to state these in the cause-title, because the cause-title is not covered by the verification of the plaint. The defect may however be cured by verifying the cause-title⁶.

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1. Sec. 21, C. P. Code applies to objections regarding territorial jurisdiction only. It does not apply to cases on want of pecuniary jurisdiction or exclusive jurisdiction : *Skinner v. Skinner*, I. L. R. (1937) All. 670.
 2. *Chandulal v. Awad bin Umar*, (1897) I. L. R. 21 Bom. 351 ; *Maharaj Bahadur v. Siva Saran*, (1921) 6 Pat. L. J. 185.
 3. *Annammal v. Sambasiva*, (1919) 37 Mad. L. J. 349 ; *Zamindar of Elliya-puram v. Ohidambaram*, (1920) I. L. R. 43 Mad. 675 (F. B.).
 4. O. VII, r. 1 (f), C. P. Code.
 5. Cl. 12 of Letters Patent for Cal., Bom., and Mad. High Courts.
 6. *Ramprosad Ohimantal v. Hazarimull Lalchand*, (1931) I.L.R. 58 Cal. 418, *fg. Fink v. Baldeo Das*, (1899) I. L. R. 26 Cal. 715.

CHAPTER XII.

GENERAL RULES OF PLEADINGS :

O. VI, r. 2, C. P. Code¹ provides :—

Every pleading shall contain and contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved.

The above rule requires four things :—

(1) **Facts not Law** : It is a well settled rule that matters of law or mere inferences of law should not be pleaded ; for 'it is the duty of the Courts to declare the conclusions and of the parties to state the premises'. A plaintiff must state all the facts which in his opinion gives him a right or imposes on the defendant a duty or a liability and it is for the Judge to discover for himself and to apply the law applicable to the facts pleaded and proved². The allegation of a conclusion of law raises no issue and need not be denied. A pleading, however, is not rendered defective because it contains legal conclusions in addition to the facts material to the case.

A plaintiff should not merely aver that a right or a duty or a liability exists ; for these are conclusions of mixed fact and law. He must set out in his pleading the fact which in his opinion gives rise to such right or creates such duty or liability. 'The allegation of duty is superfluous, where the facts stated show a legal liability and it is useless where they do not.'³ Thus, in a suit for damages for negligence it is not enough for the plaintiff to show that the defendant has been guilty of negligence without showing in what respect he was negligent and how he became bound to use care to prevent injury to others⁴. It is not sufficient for the plaintiff to aver that the defendant did the act complained of wrongfully or without any justification therefor. He must state the facts show-

1. Same as O. XIX, r. 4, R. S. C.

2. *Gaura Telin v. Shriram*, A. I. R. 1926 Nag. 265 ; *Narayandin v. Mahesh*, A. I. R. 1926 Nag. 313.

3. *Brown v. Mallet*, (1848) 5 C. B. 599.

4. *Per Willes J.*, in *Gautret v. Egerton*, (1867) L. R. 2 C. P. 371 ; appld. in *West Rand Central Gold Mining Co. v. Rex*, (1905) 2 K. B. 391.

ing that the act was done wrongfully or without any justification. Expressions such as "wrongfully," "improperly," "without any justification" are now mere epithets of abuse. They were formerly in declarations essential, because under that form of pleading legal rights were stated as facts; but facts alone are stated now¹. It is not sufficient to aver that the plaintiff is entitled to a private right of way over the defendant's land. The plaintiff must show whether he claimed it by prescription or grant. He ought also to allege with reasonable certainty the *termini* of the way and its course².

In a pre-emption suit, it is not sufficient for the plaintiff to plead a right of pre-emption. He must take the ground on which the right is claimed³.

It is not enough for the plaintiff to say simply "under and by virtue of a certain deed I am entitled". He must state what the limitations of the deed are and the other facts so as to enable the Court to determine what his title is.⁴

Where a plaintiff claims by inheritance, it is not sufficient for him to merely aver "I am the heir-at-law". He must show how he is heir, viz., as son or otherwise; and if he does not claim by immediate descent he must show the pedigree. For example, if he claims as nephew, he must show how he is nephew, whether brother's son or sister's son, and account for all who would be nearer in blood.⁵

So too, a defendant must state the facts upon which he relies as his defence. It is not sufficient for him to state "I do not owe the plaintiff the money." He must allege facts which show he does not owe it; e.g., that the goods were never ordered, or were never delivered or that they were not equal to sample.⁶

It is not sufficient in a suit upon a contract for the defendant to merely plead that "the contract is rescinded." He must show whether the parties in express terms agreed to put an end to the contract, or whether an intention to rescind is to be gathered from

1. *Per* Jessel M. R., in *Day v. Brownrigg*, (1878) 10 Ch. D. 294, 302.

2. *Harris v. Jenkins*, (1882) 22 Ch. D. 481. Cf. *Rammanohar v. Methila Prasad*, (1921) 57 I. C. 151 (When a public right of way is claimed, it is not necessary to state the *termini* of the way and its course).

3. *Ruliam v. Ram Chandar*, A. I. R. 1933 Lah. 774 (1).

4. *Per* Cotton L. J., in *Riddell v. Strathmore (Earl)*, (1897) 3 T. L. R. 329.

5. Odgers on Pleading, 11th Edn., pp. 82, 83.

6. Odgers on Pleading, 11th Edn., p. 77.

a long correspondence or a whole series of transactions or whether the plaintiff himself has broken the contract in such a way as to amount to actual repudiation. In other words, the defendant must show in what manner and by what means he contends that it was rescinded.¹

Where a contract is alleged in any pleading, the defendant may deny the same, but such denial shall be construed only as a denial in fact of the express contract alleged or of the matters of fact from which the same may be implied, and not as a denial of legality or sufficiency in law of such contract.² Therefore, all facts tending to show the illegality or the insufficiency in law of any contract must be specifically pleaded. This rule is contained in O. VIII, r. 2, C. P. Code which runs as follows :—

“The defendant must raise by his pleading all matters which show the suit not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence, as if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the plaint, as, for instance, fraud, limitation, release, payment, performance, or facts showing illegality.”

Exceptions to the rule : To the rule that every pleading must state facts and must not state law or inference of law, there are the following Exceptions :—

(a) *Presumptions :* Neither party need in any pleading allege any matter of fact which the law presumes in his favour or as to which the burden of proof lies upon the other side unless the same has first been specifically denied (*e. g.*, consideration for a bill of exchange where the plaintiff sues only on the bill and not on the consideration as a substantive ground of claim³).

(b) Foreign laws of which the court does not take judicial notice must be pleaded, such laws to be included, for the purpose of pleading, in the category of facts. In pleading a foreign statute law it is not sufficient to allege that the laws of the foreign state are of a certain effect but the statute intended to be relied on should be set forth at least substantially as any other fact.

(c) *Mixed questions of law or fact :* Where a question is one of mixed law and fact it is permissible and may be proper to plead both the fact and the legal conclusion. After

1. Odgers on Pleading, 11th Edn., p. 82.

2. O. VI, r. 8, C. P. Code.

3. O. VI, r. 13, C. P. Code.

stating the facts on which the proposition of law is based it is sometimes convenient to allege matter of law in order to make the statement of fact more intelligible and show their connection with each other. Thus, after stating the facts, you may state "The plaintiff is entitled to set off", "the suit is barred by the statute of Limitation", "the plaintiff is estopped from challenging the transaction" and so on.

(d) *Condition precedent* : O. VI, r. 6, C. P. Code provides that any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the plaintiff or defendant, as the case may be ; and, subject thereto, an averment of the performance or occurrence of all conditions precedent necessary for the case of the plaintiff or defendant shall be implied in his pleading¹.

(2) **Material Facts only** : Every pleading must state facts which are material at the present stage of the suit. It is not necessary to plead facts by anticipating the answer of the adversary². A material fact, strictly speaking, is a "fact which is essential to the plaintiff's cause of action or to the defendant's defence—which each must prove or fail³." But "there may be facts which are not material on the main issue whether the plaintiff ought to succeed or not, and which will yet be proved and discussed at the trial, because they affect the amount of damages which he will be entitled to recover. Such facts are called "matters in aggravation of damages" or "matters in mitigation of damages"⁴."

In England, the better opinion in spite of the decision in *Millington v. Loring*⁵ is that matters in aggravation or mitigation of damages are not material facts within the meaning of O. XIX, r. 4, R. S. C. and as such ought not to be pleaded. But as a matter of practice parties are allowed to plead or not to plead such facts at their pleasure⁶.

In England, as regards matters in mitigation of damages, there

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1. For fuller information see the heading 'Condition Precedent': in Special Defences, Chap. XV.
 2. Odgers on Pleading, 11th Edn., p. 90.
 3. Odgers on Pleading, 11th Edn., p. 84.
 4. Odgers on Pleading, 11th Edn., p. 97.
 5. (1886) 6 Q. B. D. 190.
 6. Odgers on Pleading, 11th Edn., p. 98.

is a special rule¹ which provides that "no denial or defence shall be necessary as to damages claimed or their amount, but they shall be deemed to be put in issue in all cases unless expressly admitted". In actions of libel or slander, O. XXXVI, r. 37, R. S. C. requires a defendant, who has not pleaded a justification, to deliver to the plaintiff, seven days at least before the trial, particulars of the facts on which he proposes to rely in mitigation of damages; thus clearly implying that facts in mitigation of damages need not be set out in the defence.²

There are no rules in India corresponding to O. XXI, r. 4 or O. XXXVI, r. 37, R. S. C. In India, the relevant provisions are O. VI, r. 2, C. P. Code, which says that all material facts on which a party relies for his claim or defence should be pleaded in his pleading, and O. VII, r. 1 (e), C. P. Code which provides that a plaint shall contain the facts constituting the cause of action and when it arose. The two rules are of the same import. O. VI, r. 2 is not wider than O. VII, r. 1 (e). It is submitted that although matters in aggravation or mitigation of damages are not material facts in the strict sense they are facts which it is open to either party to prove at the trial and the statement of such facts will have the effect of preventing surprise at the time of hearing. It seems justifiable therefore to adopt, for purposes of pleading in India, specially in the absence of any rule corresponding to O. XXI, r. 4 and O. XXXVI, r. 37, R. S. C., the rule in *Millington v. Loring*,³ namely, material facts are not to be confined to matters which are material to the cause of action, i. e., to facts which must be proved in order to establish the existence of the cause of action but must be taken to include any facts which the party pleading is entitled to prove at the trial.⁴

Matter of inducement, that is, a statement of matter which is introductory to the subject of pleading is material in the sense that it may be necessary to explain or elucidate what follows. If such matter is not related to the essential facts constituting the cause of action, it is to be regarded as surplusage, and whether any matter is surplusage or proper inducement is to be determined by a sound construction of the entire pleading. Matters of inducement should however be reduced to a minimum.

1. O. XXI, r. 4, R. S. C.

2. Cf. *Wood v. Durham (Earl)*, (1838) 21 Q. B. D. 501.

3. (1836) 6 Q. B. D. 190.

4. *Per* Selborne L. C., in *Millington v. Loring*, (1836) 6 Q. B. D. 190; cf. *Lumb v. Beaumont*, (1834) 49 L. T. 772

The question as to whether a particular fact is material or not would depend upon the special circumstances of each case.

Material Facts : Particular Instances :—

In a suit for libel or slander, the plaint must contain the precise words complained of¹, and in addition to setting out the precise words complained of, the pleader should be careful to insert an *innuendo* where the meaning of the words or their application to the plaintiff is not clear.

In a suit on a promissory note, a bill of exchange or a cheque, the holder must allege notice of dishonour to persons specified in Section 93, Negotiable Instruments Act, 1881.

In a suit in which an injunction is claimed, it is material to allege that the defendant "threatens and intends" to repeat the act complained.²

In a suit based on an equitable mortgage, it is material to allege that the defendant deposited the documents of title to immovable property with intent to create a security thereon.³

If a plaintiff's right to sue depends on any statute, he must plead all facts necessary to bring his case within the Statute.⁴

In a suit against the defendant for obstruction to a public right of way, it is material to allege that the defendant obstructed the right of way, and it is immaterial to allege the motive which induced the defendant to do so.⁵

Mode of pleading material facts :—

Certainty : Material facts must be pleaded with certainty, that is, "they should be distinctly stated as facts and not be left to be inferred from vague or ambiguous expressions or from statements of circumstances consistent with a different conclusion."⁶ The object of pleadings is to ascertain definitely the points in controversy between the parties, and this object can only be attained if the parties state their respective cases with precision and with sufficient particularity. Thus, where fraud is intended to be charged, a general averment of fraud is insufficient. The facts must be so stated as to show distinctly that fraud is charged. 'It is not

1. *Harris v. Warre*, (1879) 4 C. P. D. 125, *Darbyshire v. Leigh*, (1896) 1 Q. B. 554, 557.

2. *Stannard v. St. Guiles*, (1882) 20 Ch. D. 190.

3. Sec. 58(f), T. P. Act, 1882.

4. Odgers on Pleading, 11th Edn., p. 93.

5. *Murray v. Epsom Local Board*, (1897) 1 Ch. 35.

6. Bullen & Leake, 8th Edn., p. 8.

allowable to leave fraud to be a matter of inference from the facts pleaded.'

Particulars : In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the Forms in Appendix A to the Code, particulars (with dates and items, if necessary) shall be stated in the pleading.¹ What particulars are to be stated must depend upon the facts of each case. A party who pleads with unnecessary particularity may lay on himself an increased burden of proof.² At the same time, if a party pleads with insufficient details, his opponent may obtain an order for particulars the cost of which may have to be paid by the said party.

Mode of pleading material facts in special cases :—

Denial of Contract : Where a contract is alleged in any pleading, a bare denial of the same by the opposite party shall be construed only as a denial in fact of the express contract alleged or of the matters of fact from which the same may be implied, and not as a denial of the legality or sufficiency in law of such contract.³

Contents of documents : Whenever the contents of any document are material, it shall be sufficient in any pleading to state the effect thereof as briefly as possible, without setting out the whole or any part thereof, unless the precise words of the document or any part thereof are material.⁴

Malice, fraudulent intention, knowledge or other condition of the mind : Whenever it is material to allege malice, fraudulent intention, knowledge or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred⁵. Thus, in pleading knowledge it is sufficient to state, "As the defendant well knew", or "It was to the defendant's knowledge that", or "It was at the time of the said contract made known to the defendant by the plaintiff".

Notice : Whenever it is material to allege notice to any person of any fact, matter or thing, it shall be sufficient to allege such

1. O. VI, r. 4, C. P. Code.

2. Cf. *West v. Barendale*, (1850) 9 C. B. 141.

3. O. VI, r. 8, C. P. Code.

4. O. VI, r. 9, C. P. Code.

5. O. VI, r. 10, C. P. Code.

notice as a fact, unless the form or the precise terms of such notice or the circumstances from which such notice is to be inferred, are material¹.

Implied contract or relation: Whenever any contract or any relation between any persons is to be implied from a series of letters or conversations or otherwise from a number of circumstances it shall be sufficient to allege such contract or relation as a fact, and to refer generally to such letters, conversations or circumstances, without setting them out in detail. And, if in such a case, the person so pleading, desires to rely in the alternative upon more contracts or relations than one as to be implied from such circumstances, he may state the same in the alternative².

(3) **Facts not evidence:** Every pleading must contain a statement of the material facts on which the party pleading relies, and not the evidence by which they are to be proved. "It is an elementary rule in pleading, that, when a state of fact is relied on, it is enough to allege it simply without setting out the subordinate facts which are the means of producing it, or the evidence sustaining the allegation"³. All facts which tend to prove facts in issue will be relevant at the trial, but they are not "material facts" for pleading purposes⁴. The rule that evidence is not to be pleaded applies to admissions as well as to other evidence⁵.

Illustrations :

(a) Where the question in issue is, whether the defendant is a partner of a certain business, the defendant should merely state that at all material times he was a partner of the business. He need not state that he shared in the profits and contributed to the losses in the said business which would tend to show that he was a partner.

(b) In a suit against a company for issuing a fraudulent prospectus, it is unnecessary to set out in the plaint the motives which led to the issuing of the prospectus of the scheme of which it was part, it being sufficient to state generally that the prospectus was, to the knowledge of the defendant, fraudulent⁶.

1. O. VI, r. 11, C. P. Code.

2. O. VI, r. 12, C. P. Code.

3. *Per* Lord Denham, C. J., in *William v. Wilcox*, (1838) 8 A. & E. 314, 331.

4. Annual Practice, 1938, p. 342.

5. *Davy v. Garrett*, (1878) 7 Ch. D. 473.

6. *Herring v. Bischoffsheim*, (1876) W. N. 77.

4. Facts in a Summary form : The material facts must be stated in a summary form, i. e., *briefly, succinctly and in strict chronological order*. The necessary brevity in pleading can be attained by omitting every unnecessary allegation and all unnecessary details. "A pleading is not the place for fine writing but simply for hard, downright business-like assertions". It is desirable to go straight to the point and state facts 'boldly, plainly, clearly and concisely' and to avoid all "ifs", all periphrases and all circumlocution.¹ The active voice is always to be preferred to the passive. Thus, instead of saying "A part payment of Rs.....was made by the defendant ondate," it is better to say, "The defendant made a part payment of Rs.....on.....date."

The same person or thing should be called by the same name throughout the pleading. All participle phrases should be avoided. "Never say that the defendant being so and so did something. Make two sentences of it ; say that he was so and so, and then, that he did something."²

The question whether a fact is material or not, is not always easy to answer. It is well to remember the advice given by Odgers that "if after consideration you are still in doubt whether a particular fact is or is not material, the safer course is to plead it, if you think you can prove it. For if you omit to plead it, and it is held to be material, you cannot strictly give any evidence of that fact at the trial, unless the learned judge will give leave to amend, which will only be allowed upon terms, such as payment of costs, etc."³

1. Odgers on Pleading, 11th Edn., p. 107.

2. Odgers on Pleading, 11th Edn., p. 108.

3. Odgers on Pleading, 11th Edn., p. 85.

CHAPTER XIII.

PLAINT, FORMAL PARTS AND CONTENTS OF—

In Part II Chapters VI, we have discussed three important matters to be considered before drafting a *plaint*, namely, Parties, Causes of action and Jurisdiction. In Chapter XII, we have indicated the Rules of pleading, according to which, every *plaint* must state with precision and in a concise form facts material to the plaintiff's case, not law, nor the evidence by which they are to be proved. This chapter is devoted to an examination of the formal parts and contents of a *plaint*.

Plaint, formal parts of—The formal parts of a *plaint* are its—

- (1) Heading.
- (2) Title.
- (3) Body.

1. **Heading :** Every *plaint* should be headed with the name of the Court in which the suit is brought. Where it is necessary to state the particular jurisdiction of the Court in which the suit is brought, the said jurisdiction ought to be stated below the name of the Court. Thus, where a suit is brought in a Subordinate Civil Court, the heading should run simply thus—

“In the Court of the Subordinate Judge at.....”

or

“In the Court of the First Subordinate Judge at.....”

But where it is necessary to state the particular jurisdiction of the Court, the heading should run as follows—

“In the Federal Court”

“Original Jurisdiction” ;

“In the High Court of Judicature at Fort William in Bengal”.

Ordinary Original Civil Jurisdiction.

or

Extra-ordinary Original Civil Jurisdiction.

or

Admiralty Jurisdiction.

or

Matrimonial Jurisdiction.

or

Testamentary and Intestate Jurisdiction.

The suit is serially numbered after the plaint is presented. But it is the practice of the Subordinate Civil Courts for the plaintiff to state below the name of the Court the nature of the suit and the year of the suit leaving a blank space for the number of the suit to be filled up thus : "Title Suit No..... of 19....." or "Money Suit No..... of 19.....". In the plaints on the Original Side of the High Courts and the Federal Court, only the No. of the suit is to be stated.

2. Title :

- (a) *Names of parties* : Then, at the head of each plaint, the name of every plaintiff, and every defendant as far as it can be ascertained,¹ must be set out. The names together with the description, and place of residence or business are the title, or, the 'cause-title', of the suit. If the plaintiff is unable to give the full name of the defendant, it is better to state in the body of the plaint that, in spite of his best endeavour, the plaintiff could not ascertain the full name of the defendant. Under the rules of the Federal Court, full names of both the plaintiff and the defendant must be given.²

A corporation must sue or be sued in its full corporate name.³ Partners may sue or be sued in the firm name.⁴ Any person carrying on business in a name or style other than his own name, may be sued in such name or style as if it were a firm name.⁵ The name of the next friend or guardian of a minor or a person of unsound mind should be mentioned in the cause-title. An Idol may sue or be sued in the name of its shebaita or in its own name by or through its shebaita.⁶

If there are two or more plaintiffs or two or more defendants, it is convenient to number them serially and arrange them in the order convenient for the presentment of the case.

1. O. VII, r. 1(c), C. P. Code.

2. Federal Court Rules, O. XVIII, r. 4(a).

3. See, 'Corporations' under "Classes of Persons", Chap IX, pp. 119-121.

4. O. XXX, r. 1, C. P. Code ; see 'Partners' under "Classes of Persons", Chap. IX, pp. 211-240.

5. O. XXX, r. 10, C. P. Code.

6. See 'Idol' under "Classes of Persons", Chap. IX, pp. 150-179.

- (b) *Description and place of residence of the parties* : Every plaintiff and every defendant should be so described in the cause-title as to identify him. In personal actions, the term 'description', according to a Madras case,¹ includes age, father's name, caste, etc. In deciding whether a title to which the defendant is entitled ought to be added to the name of the defendant, the Calcutta High Court, at one time, held, that the term 'description' applies rather to the petronymic of the parties summoned, and accordingly, the father's name is required to be stated and not the title of the defendant.²

The Judicial Committee have, however, held, that the term 'description' includes all those titles by which a person is known ; and that if the plaintiff from animosity, pique, or anything in fact but a *bona fide* dispute as to the right to a title, obstinately refused to give his adversary that title by which he is generally recognised, the Court ought not to permit or sanction that species of insult, but will exercise a sound discretion in first, requiring the plaintiff to amend his plaint and afterwards in rejecting the plaint, should the first order be contumaciously disobeyed.³

There is however no hard and fast rule as to what constitutes 'description'. A party may be sufficiently described without any particulars as to father's name or caste. Thus, "A. B., solicitor ofcarrying on business under the name of.....at....." is sufficient description.

The capacity in which the plaintiff sues or the defendant is sued should ordinarily be set out in the body of the plaint,⁴ although it is recognised that the cause-title is the convenient place to state it.⁵ Dual capacity, as where the plaintiff sues in a representative capacity as also in his own right, should be clearly stated if not in the cause-title, at least in the body of the plaint.

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1. *Samayajulu v. Surayya* (1897), 7 M. L. J. 81.
 2. *Kishen Chand v. Meghraj*, (1869) 12 Suth. W. R. 450.
 3. *Maharajah of Vixianagram v. Rani of Bobbili*, (1872) 18 Suth. W. R. 301, reversing *Zamindar of Bobbili v. Zamindar of Vixianagram*, (1866) 3 M. H. C. R. 31, and dissenting from *Kishen Chand v. Meghraj*, *supra*.
 4. O. VII, r. 4, C. P. Code ; *Bidhu Shekhar v. Kuladaprasad*, (1919) I. L. R. 46 Cal. 877 (case of a shebait).
 5. *Kuarmoni Singha v. Wasif-Ali*, (1914-15) 19 C. W. N. 1193 ; *Deolal v. Tularam*, A. I. R. 1928 Nag. 319 ; *Harbax v. Lachman*, (1924) 82 I. C. 201 (n). Cf. Title of Suits, App. A., C. P. Code.

O. VII, r. 1(b) and (c) requires that the place of residence of the plaintiff or the defendant is to be stated in the plaint. It does not say anything about the place where the plaintiff or the defendant carries on business or personally works for gain. Places of residence, however, can only apply to personal actions. It cannot apply to a firm, a corporation or Government. Even in personal actions, the place where a party carries on business or personally works for gain may be, and, often is, stated instead of his place of residence, sometimes as a matter of indifference, sometimes deliberately for the purpose of giving the Court jurisdiction. In the case of a company registered under the Indian Companies Act, the place where the registered office of the company is situate, or where any of the branch offices of the company is situate¹, may be stated according to the necessities of the case. A firm carrying on business at two or more places under different jurisdictions may be sued at one of such places, which is within the jurisdiction of the Court in which the suit is brought, and in such cases the cause-title of the suit should run thus :

"A. B., a firm carrying on business, at.....and other places".

The phrase, "carries on business or works for gain", is inapplicable to the Secretary² of State for India (and likewise to Federation or a Province under the Government of India Act, 1935).

Description of Parties in Particular Cases :—

- (a) The Governor-General in Council³.
- (b) The Federation of India⁴.
- (c) The Province of.....⁵.
- (d) The Secretary of State⁶.
- (e) The Federal Railway Authority⁷.

1. *Bank of Bengal v. Sarat Chandra*, (1919) 4 P. L. J. 141.
2. *Govindarajulu Naidu v. Secy. of State*, (1927) I. L. R. 50 Mad. 449 ;
Doya Narain Tewary v. Secy. of State, (1887) I. L. R. 14 Cal. 256.
3. Sec. 79, C. P. Code, as substituted by the Ad. Or. for the original sec. 79.
4. Sec. 176, Govt. of India Act, 1935. Cf. Sec. 79, C. P. Code, as substituted by the Ad. Or. for the original sec. 79.
5. do. do.
6. Secs. 179, 180, Govt. of India Act, 1935. Cf. Sec. 79 (c), C. P. Code, as substituted by the Ad. Or. for the original sec. 79.
7. Sec. 185, Govt of India Act, 1935.

- (f) A. B. (add description and residence), duly authorised by C. D., a soldier (sailor or airman, as the case may be) actually serving under the Crown at.....¹.
- (g) The Administrator General of.....²
- (h) The Advocate-General of.....³
- (i) The Collector of.....
- (j) The State of.....⁴.
- (k) Maharaja.....of.....⁵.
- (l)the Ambassador of.....⁶.
- (m) A. B., Official Receiver, as Receiver of the estate of.....⁷.
- (n) A. B., Official Assignee, and the assignee of the estate and the effects of C., insolvent.
- (o) The A. B. Company Ltd., having its registered office at.....
- (p) The A. B. Company Ltd. in liquidation, by C. D., the (Official) Liquidator⁸.
- (q) A. B., a Public Officer (or Trustee) of the C. D. Company, having its registered office at.....
- (r) A. B. (add description and residence), C. D., E. F., members of the Union Club of....., an unincorporated society.
- (s) A. B. (add description and residence), and C. D. (add description and residence) on behalf of themselves and other members of the Literary Club of....., an unincorporated society.
- (t) A. B. (add description and residence) on behalf of himself and all other creditors of C. D., late of (add description and residence).
- (u) A. B., (add description and residence) on behalf of himself and all other holders of debentures issued by.....

1. O. XXVIII, rr. 1 and 2, C. P. Code, as amended and substituted by the Ad. Or.
2. See 'Classes of Persons', Chap. IX, p. 71.
3. Cf. r. 2, Chap. VII, Cal. High Court O.S. Rules.
4. Secs. 84 and 87, C. P. Code; *United States of America v. Wagner*, (1867) 2 Ch. App. 582.
5. *Ramesh Chandra v. Maharaja Birendra Kishore*, (1924-25) 29 C. W. N. 287.
6. Sec. 86, C. P. Code.
7. *R. K. Banerjee, Official Receiver v. S. M. N. Ahmed*, A. I. R. 1935 Rang. 327.
8. Sec. 179, Ind. Comp. Act.

-Company Ltd., having its registered office at.....
- (v) A. B., a minor, (add description and residence) by C. D., (add description and residence), his next friend.
 - (w) A. B. (add description and residence), a person of unsound mind (or of weak mind) by C. D. (add description and residence), his next friend.
 - (x) A. B. (add description and residence) shebait of Idol (or Thakur) Sree Sree....., located at.....
 - (y) Thakur Sree Sree....., located at.....by its shebait A. B. (add description and residence),
 - (z) A. B., a firm, carrying on business at.....¹.
 - (a₁) A. B. and C. D., carrying on business in partnership under the name of.....at.....
 - (b₁) A. & Co., carrying on business at.....².
 - (c₁) A. B. (add description and residence) by his constituted attorney C. D. (add description and residence).
 - (d₁) A. B. (add description and residence), executor of C. D., deceased.
 - (e₁) A. B. (add description and residence), administrator to the estate of C. D., deceased.
 - (f₁) A. B. (add description and residence) as executor to the estate of C. D., deceased, and also in his own right (or personal capacity).
 - (g₁) A. B. (add description and residence), reversioner to the estate of C. D. deceased.
 - (h₁) A. B. (add description and residence), heir of C. D. deceased.

3. **Body:** The body of the plaint should be divided into paragraphs consecutively numbered. Dates, sums and numbers should be expressed in figures.³

- (a) *The words, "The plaintiff states":*—The body of the plaint begins with the words, "The plaintiff states"—or, "The plaintiff states as follows":—. A relic of olden times is to be found in the pleadings of the Courts subordinate to the Lahore High Court in which the words "Respected Sir" or the word "Sir" are, or is, stated on top of the words "The

1. O. XXX, r. 1, C. P. Code.

2. O. XXX, r. 10, C. P. Code.

3. O. VI, r. 2, C. P. Code,

plaintiff states": But the practice is gradually falling into disuse.

(b) *Matters of Inducement*: In the body of the plaint should be set forth facts constituting the cause of action and when it arose. But before setting out the said facts, it is permissible and customary to make some prefatory averments 'stating who the parties are, what business they carry on, how they are related or connected, and other surrounding circumstances leading up to the dispute.' These are called *matters of inducement*; they are useful because they explain what follows, though they are not essential to the cause of action, and, therefore, perhaps should strictly not be pleaded. In any case they should be stated as concisely as possible.¹

(c) *The facts constituting the cause of action*²: Next, the facts constituting the cause of action must be stated. Where the plaintiff sues in a representative character, the plaint shall show not only that he has an actual existing interest in the subject-matter, but that he has taken the steps, if any, necessary to enable him to institute a suit concerning it.³ An administrator derives his title from the grant of the letters of administration and cannot, therefore, institute a suit as administrator, before he obtains the grant. In a suit by an administrator the plaint should state that the plaintiff has obtained the letters of administration.⁴

The plaint must show that the defendant is, or claims to be, interested in the subject-matter and that he is liable to be called upon to answer the plaintiff's demand.⁵

Where the plaintiff seeks relief in respect of several distinct causes of action founded upon separate and distinct grounds, they shall be stated as far as may be separately and distinctly.⁶

1. Bullen & Leake, 8th Edn., pp. 38, 39; Odgers on Pleading, 11th Edn., p. 191.

2. O. VII, r. 1 (e), C. P. Code.

3. O. VII, r. 4, C. P. Code.

4. *Administrator-General of Bengal v. Lalit Mohan Roy*, (1907-08) 12 C.W.N. 738, 739.

5. O. VII, r. 5, C. P. Code.

6. O. VII, r. 8, C. P. Code. Cf. O. VI, r. 2, C. P. Code; *Davy v. Garrett*, (1878) 7 Ch. D. 473, 489; *Official Assignee v. Bidyasundari*, (1919-20) 24 C. W. N. 145, 148.

A plaintiff may rely upon several different rights alternatively, although they may be inconsistent. Thus, a plaintiff may plead that he is the owner of a piece of land and that if he is not the owner he is entitled to an easement over it.¹ But if there is no reasonable excuse for the inconsistent reliefs the Court may put the plaintiff to his election to choose between the two reliefs.² If the facts on which each of the alternative relief is founded are not distinctly stated but are mixed up so as to embarrass the fair trial of the suit, the Court may strike out matters which may embarrass the trial. Further, inconsistent pleas based upon inconsistent facts may be taken only if the evidence required to prove one fact is not destructive of the other.³

“Where the plaintiff seeks the recovery of money, the plaint shall state the precise amount claimed :

But where the plaintiff sues for mesne profits, or for an amount which will be found due to him on taking unsettled accounts between him and the defendant, the plaint shall state approximately the amount sued for⁴.

Where the subject-matter of the suit is immovable property, the plaint shall contain a description of the property sufficient to identify it, and, in case such property can be identified by boundaries or numbers in a record of settlement of survey, the plaint shall specify such boundaries or numbers”.⁵

- (d) *Date of cause of action* : Whether it is necessary to state in the body of the plaint, as is usually done, that the plaintiff's cause of action arose on such and such a date, was considered by his Lordship Mr. Justice Lort-Williams in a Calcutta case⁶, and, according to his Lordship, Rule 1 (e) and (f) of O. VII, C. P. Code, requires not that a statement should be made that the

1. *Tamanbhat v. Krishtacharya*, A. I. R. 1933 Bom. 122.

2. *Dwarka v. Ram Jatan*, (1931) I. L. R. 53 All. 16.

3. *Motilal v. Judhistir*, (1915-16) 20 C. W. N. 310.

4. O. VII, r. 2, C. P. Code.

5. O. VII, r. 3, C. P. Code.

6. *Ramprasad Ohimantal v. Hazarimal Lalchand*, (1931) I. L. R. 58 Cal. 418.

plaintiff has a good cause of action or that it arose on such and such a date or that it arose wholly or partly within the jurisdiction but that particulars should be given of the facts constituting the cause of action and when it arose and the facts showing that it arose partly or wholly within the jurisdiction. The plaintiff should give such particulars as will enable the defendant and the Court to ascertain from the plaint, whether in fact or in law the cause of action did arise as alleged or not. The plaintiff's mere statement that it did, is useless for this purpose. Whether these necessary facts appear in their appropriate places in the plaint or in a separate paragraph is a matter of choice.

As a direct result of the above judgment, the paragraph containing a statement that the cause of action arose on such and such a date came to be omitted from the plaints filed on the original side of the Calcutta High Court. Sometime after the above judgment was delivered, his Lordship Buckland J., of the Calcutta High Court, had occasion to deal with a case of encroachment¹ in which there was not only no separate paragraph stating when the cause of action arose, but it was impossible upon the perusal of the facts alleged to constitute the cause of action to ascertain when it was alleged to have arisen. Referring to the previous judgment of his Lordship Lort-Williams J., his Lordship Buckland J., observed as follows, "The cause of action is not a single fact. It has been described as the bundle of facts which have to be established to enable a plaintiff to succeed, but it may arise on various days, or it may arise on a specific day. It may be that the paragraph to which the exception has been taken, stating that the cause of action arose on such and such a day, is superfluous and unnecessary, when from the statement of the facts constituting the cause of action there can be no ambiguity whatever about the day to which the plaintiff commits himself as being that upon which the cause of action arose. For instance, in an action for damages for breach of contract by reason of failure to take delivery upon the agreed

1. *Kalyani Dassi v. Ganesh Chandra Sreemany*, (1932) I.L.R. 59 Cal. 448.

date, there can be no doubt about the matter which would not admit of argument. But there are many cases, for instance, title suits, in which it is by no means so simple a matter by a statement of the facts to allege specifically and without ambiguity when the cause of action aroseI find myself unable to agree with my learned brother's general proposition that a paragraph in the plaint stating that the plaintiff's cause of action arose on such and such a date is either wholly insufficient or useless or unnecessary. That will be the case if the date upon which the cause of action arose is otherwise alleged specifically. But, if that has not been done, in stating the facts which constitute the cause of action, which method I agree is to be preferred, then, in my judgment, the plaintiff should be required to allege dates specifically, though whether he does so in a separate paragraph or not, is a matter of no account, but whatever form is adopted, the defendant should be able to ascertain from the pleading upon which day the cause of action is alleged to have arisen."

It is submitted that O. VII, Rule (1) (e) requires that particulars of facts constituting the cause of action and when it arose should be given. Where such facts are not pleaded, the plaintiff should be directed to amend his plaint by pleading such facts. It is useless for the plaintiff to mention a date which he thinks is the date when his cause of action arose if he pleads the facts constituting the cause of action and when it arose. Where such facts are sufficiently pleaded, the plaintiff need not state that his cause of action arose on such and such a date. To state that the cause of action arose on such and such a date without pleading the facts constituting the cause of action and when it arose is not a sufficient compliance with the rules. When the plaint does not specify the date when the cause of action arose, it is the duty of the judge to find out from facts stated in the plaint as to when the cause of action arose.¹ Even where the plaint states that the cause of action arose on such and such a date, the plaintiff cannot be tied down to the said date, and the Court is entitled to

1. Cf. *Jalim Singh v. Ohoonee Lal*, (1910-11) 15 C. W. N. 882.

determine the date on which the cause of action arose from the facts alleged and proved¹.

(e) *Grounds of exemption from limitation law*² : Where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaintiff shall show the ground upon which exemption from such law is claimed.³ The plaintiff cannot take advantage of any ground of exemption from the law of limitation which has not been set up in the plaint⁴. If the grounds of exemption from limitation law are not taken in the plaint and if there is no application to amend the plaint, the suit ought to be dismissed as barred by limitation⁵.

(f) *The facts showing that the Court has jurisdiction*⁶ : The plaintiff must plead facts showing that the Court has jurisdiction—pecuniary, territorial, and over the subject-matter.⁷ If the jurisdiction depends upon the place where the cause of action arose either wholly or in part, the plaintiff must plead facts showing that the cause of action arose partly or wholly within the jurisdiction. If the plaintiff relies upon the defendant's residence or place of business as giving jurisdiction, the fact that the defendant's place of residence or place of business is within the jurisdiction should be stated in the body of the plaint. It is not sufficient to state it only in the cause-title, as is usually done, unless the cause-title itself is verified. Since the word 'Calcutta' includes an area wider than the original jurisdiction of the Calcutta High Court, it is not sufficient to state in a plaint that the residence or place of business of the defendant is in Calcutta

1. *Fateh Ali Shah v. Muhammad Bakhsh*, A. I. R. 1928 Lah. 516 ; cf. *Abdul Shakur Khan v. Rajendra*, A. I. R. 1935 All. 759.

2. These grounds are set forth in Secs. 12 to 20 of the Ind. Lim. Act, 1908.

3. *Mt. Umri v. Kalu*, A. I. R. 1933 Lah. 491 ; *Madappaya v. Mahabala*, A. I. R. 1937 Mad. 826 ; *Ramaswami Chetty v. Palaniappa Chetty*, A. I. R. 1933 Mad. 675 ; *Girdhari Lal v. (Firm) Bishnu Chand*, (1932) I. L. R. 54 All. 506.

4. *Jogeshwar Roy v. Raj Narain*, (1904) I. L. R. 31 Cal. 195.

5. O. VII, r. 11 (d), C. P. Code ; *Palani Chetty v. Sevugan Chetty*, A. I. R. 1933 Mad. 395 ; *Mahadeva Sastrigal v. Marulai Reddiar*, A. I. R. 1933 Mad. 874.

6. O. VII, r. 1 (f), C. P. Code.

7. See "Jurisdiction", Chap. XI.

or in Calcutta within the jurisdiction; the street and the number must be given.¹

- (g) *Statement of the value of the subject-matter of the suit for the purposes of jurisdiction and Court fees*: This is necessary to be stated in the plaints of the Subordinate Civil Courts which are Courts of different grades and to which the Court Fees and the Suits Valuation Acts are applicable. There are no original side rules of the High Courts for inclusion of such a statement in the body of the plaint except O. II, r. 2, of the O. S. Rules of the Madras High Court, which provides that the plaint shall contain a statement of valuation as directed under Item No. 1, App. II of the High Court Fees Rules.

In cases where the valuations—one for the purposes of Court fees and one for the purposes of jurisdiction are not the same, they have to be stated specifically. Where the plaintiff's claim arises out of the same cause of action, he can state the aggregate value of his reliefs but if he claims reliefs in respect of two or more distinct causes of action, he should state the valuation of each cause of action separately, the Court fee being payable in respect of each². Where the plaintiff claims relief in the alternative, he should state his valuation in respect of the two reliefs and pay the Court fee on the value of the larger relief³.

- (h) *Relief*: Next the plaintiff must state specifically the relief which he claims either simply or in the alternative⁴.

A plaintiff entitled to more than one relief in respect of the same cause of action may sue for all or any of the reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted⁵. *It is not necessary to ask for general*

1. *Ramprosad Chimanlal v. Hazarimull Lalchand*, (1931) I. L. R. 58 Cal. 418, *fg. Fink v. Buldeo Dass*, (1899) I. L. R. 26 Cal. 715.
2. Sec. 17, Court Fees Act.
3. *Motigauri v. Pranjivandas*, (1882) I. L. R. 6 Bom. 302; *cf. Kashinath v. Govinda*, (1891) I. L. R. 15 Bom. 82; *Girdhari Lal v. Ram Lal*, (1898) I. L. R. 21 All. 200; *Mt. Saiyadunnessa Khatun v. Gaibandha Loan Co.*, (1937) 65 C. L. J. 199.
4. O. VII, r. 7, C. P. Code.
5. O. II, r. 2 (3), C. P. Code. For exception to the rule, see O. XXXIV, r. 14, C. P. Code; *Indarpal v. Mewa Lal*, (1914) I. L. R. 36 All. 284. The

or other relief which may always be given as the Court may think just to the same extent as if it had been asked for¹.

Where the plaintiff claims more than what he is entitled to, the Court will not dismiss the suit but give the plaintiff only such relief as he is entitled to².

Where the plaintiff claims less than what he is entitled to, the Court will not grant him any relief he has not specifically claimed unless the plaint is amended before the judgment³. But the Court should not refuse to grant a relief not specifically claimed in the plaint, if such relief is obviously required by the nature of the case and is not inconsistent with the relief specifically claimed and raised by the pleadings⁴.

Where the plaintiff omits to indicate the basis of the relief he claims, the suit cannot fail for such omission if all the facts have been stated and specially where no prejudice has been caused to the defendant⁵.

exception does not apply to mortgage of movables : *Official Assignee v. Chimniram*, (1933) I. L. R. 57 Bom. 346.

1. O. VII, r. 7, C. P. Code.
2. *Pitambur v. Ram Joy*, (1867) 7 Suth. W. R. 93 ; *Lakshman v. Hari*, (1880) I. L. R. 4. Bom. 584.
3. *Sooriah Row v. Cotaghery*, (1838) 2 M. I. A. 113 ; *Percival v. Collector of Chittagong*, (1930) I. L. R. 30 Cal. 516, 519.
4. *Gulabgir v. Nathmal*, A. I. R. 1932 Nag. 23 ; *Imam Din v. Nizam Din*, A. I. R. 1933 Lah. 287 (where Court declined to declare a right of easement, because it was inconsistent with a right of ownership which the plaintiff claimed).
5. *Moti Mahton v. Deblal Mahton*, A. I. R. 1935 Pat. 593,

CHAPTER XIV.

PRESENTATION OF PLAINT.

Presentation of plaintiff, to whom to be made—

Under the C. P. Code, a plaintiff shall be presented to the Court or such officer as it appoints in this behalf.¹

Under the Rules of the Federal Court, a plaintiff shall be presented to the Registrar².

Under the O. S. rules of the Madras and Rangoon High Courts, a plaintiff shall be presented to the Registrar, but in case of urgency, to a Judge³.

Under the O. S. rules of Bombay High Court, a plaintiff shall be lodged, except in the case of special urgency, with the Assistant Master or Associate in attendance of the Judge in chambers for examination⁴.

The O. S. rules of the Calcutta High Court do not expressly provide to whom a plaintiff shall be presented, but according to the practice of the said High Court, every plaintiff has ordinarily to be presented to the Master and, in case of urgency, to a Judge⁵.

Presentation of plaintiff, by whom and how to be made—O. III, r. 1, C. P. Code, provides that any appearance, application or act in

1. Sec. 26 and O. IV, r. 1, C. P. Code. *Receiver of Nidadavole and Medur Estate v. Suraparaxu*, (1915) I. L. R. 38 Mad. 295, F. B. (Plaints under the Madras Estates Land Act, 1 of 1908, cannot be said to be validly presented to the Head Clerk of the Collector, unless the Collector has appointed him to receive them.)
2. O. XVIII, rr. 1 and 2, F. C. Rules.
3. O. II, rr. 11 and 12, and O. IV, r. 1, Mad. High Court O. S. Rules; Part II, Chap. I, r. 19, Rang. High Court O. S. Rules. *Sattyya Padayachi v. Soundarathachi*, (1924) I. L. R. 47 Mad. 312 (On the last day of limitation and after the Judge had risen for the day, a plaintiff was presented to him at his club, which he accepted. *Held*, that the Judge had jurisdiction to constitute himself as the officer to receive plaintiffs, that he could receive them at any time and place and that the suit was properly instituted.)
4. Bom. High Court, O. S. Rules, Chap. VI, rr. 97—100.
5. Cf. Chap. VII, r. 3, Cal. High Court O. S. Rules, which begins with the words "The Judge or officer to whom a plaintiff is presented." Cf. Chap. VI, r. 13, read with r. 11 (d) of the same Chap., Cal. High Court O. S. Rules, for business to be transacted by the Master.

or to any Court by a party in such Court, may, except where otherwise expressly provided, be done by the party in person or by his recognised agent or pleader. Therefore, in the matter of presentation of a complaint, it must be done by the party in person or by a recognised agent or pleader of a party.¹

The absence of presentation on the part of some of the plaintiffs out of several does not affect the jurisdiction of the Court and the suit must be deemed to have been duly instituted on their behalf if it was filed with their knowledge or authority. Where a suit had been filed in the name of the plaintiff by his mother acting as guardian and next friend describing him as minor, while in fact he was of age, but the suit was authorised by him and was presented by him in person, it was held that the defect in form being due to a *bona fide* mistake could be cured by amendment.²

Date of presentation of complaint: The date on which the complaint is presented to the Court or to the officer appointed in that behalf is the date on which the suit is instituted, although the complaint is not admitted until a subsequent date owing to insufficiency of Court-fee.³

Where leave under clause 12 of the Letters Patent is necessary, a complaint is not admitted until the leave of the Judge has been obtained. But the obtaining of the leave of the Judge and the

1. *Sarju Prasad v. Badri Prasad*, A. I. R. 1939 Nag. 242, 244 (case where the complaint was presented by the plaintiff's pleader) ; *Seecarmal v. Kunjilal*, A. I. R. 1939 Rang. 1 (where a memorandum of appeal drawn up and signed by authorised pleader was presented by another pleader delegated to do so). Cf. *Chandra Kanta v. Rajani*, (1934-35) 39 C. W. N. 534 (case of presentation of a complaint by a pleader who filed a printed form of Vakalatnama, accepted by him but not signed by the client. Held, it was irregular presentation ; such irregularity can be cured in only one way, that is to say, by an application to the Court to allow the plaintiff to remedy it. The Court may grant the application or order the complaint off the file.) A complaint presented by a servant of the plaintiff is not valid : *Uttamram Vithaldas v. Thakurdas Parshottamdas*, (1922) I. L. R. 46 Bom. 150.
2. *Wali Mahomed Khan v. Istak Ali Khan*, (1931) I. L. R. 54 All. 57.
3. *Per Panckridge J.*, in *Heerendranath Dutta v. Dheerendranath Niyogi*, (1935) I. L. R. 62 Cal. 1115. Cf. *Muhammad Shafi v. Delhi House of Multan*, A. I. R. 1928 Lah. 274 (case where complaint was presented without Court-fee stamps as no Court-fee stamps were available on the day of presentation of the complaint).

admission of the plaint do not affect in any way the presentation of the plaint for the purposes of the Limitation Act.¹

A suit is commenced when plaint is filed although it is not duly signed or verified until subsequently.²

Where a suit was instituted by a person of unsound mind through his next friend, and no affidavit of fitness was presented with the plaint, it was held in a Calcutta case³ that "it is not more than a defect of procedure which the Court itself has power to cure, and when cured, the suit must be deemed to have been instituted at the time when the plaint was presented."

A suit against a minor is instituted when the plaint is presented and not when the guardian *ad litem* is appointed.⁴

For the purpose of limitation a suit must be considered to have commenced from the date on which the plaint was originally presented, and not from the date of its amendment;⁵ but where after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party.⁶

Where a plaint, presented within the period of limitation, is returned by the Court for want of pecuniary jurisdiction, and the plaint is reduced in its scope in order to get over the difficulty of want of jurisdiction and re-presented to the same Court on a date on which a new suit would be barred by limitation, it may be treated as a continuation of the previous suit; the Court returning the plaint has the power to receive the plaint with a reduced scope on re-presentation.⁷

Computation of time for presentation of plaint: Where the period of limitation prescribed for any suit, appeal or application expires on a day when the Court is closed, the suit, appeal or appli-

1. *Ramgopal Chunital v. Ramsarup*, A. I. R. 1934 Bom. 91.
2. *Shib Deo Misra v. Ram Prasad*, (1924) I. L. R. 46 All. 637 (case of subsequent verification); *Ramgopal v. Dhirendra*, (1927) I. L. R. 54 Cal. 380 (Irregularity of verification can be cured by amendment).
3. *Rabindra Nath Mitter v. Purna Chandra Sinha*, (1937-38) 42 C. W. N. 422.
4. *Khem Karan v. Har Dayal*, (1882) I. L. R. 4 All. 37.
5. *Patel Mufatilal Narandas v. Bai Parson*, (1895) I. L. R. 19 Bom. 320; *Saminatha v. Muthayya*, (1892) I. L. R. 15 Mad. 417.
6. Sec. 22 Ind. Lim. Act.
7. *Chendrayya v. Seethanna*, A. I. R. 1939 Mad. 397.

cation may be instituted, preferred or made on the day that the Court re-opens.¹

The above rule applies to a suit instituted in the proper Court on the day on which that Court re-opens.²

A plaintiff who relies on the statutory exemption under Sec. 4 of the Limitation Act need not expressly claim in the plaint, as required by O. VII, r. 6, C. P. Code, an exemption from the Limitation law, inasmuch as it is the duty of the Court to take judicial notice of the Gazetted holidays, and the plaintiff is entitled to presume that the Court would take such notice thereof.³

According to the Madras High Court, when a Court is adjourned for the vacation but the notification states that the Court will open on certain days for the réception of plaints, petition and other papers, the Court cannot be treated as "closed" on those days when it was open for the purpose.⁴

According to the practice prevailing on the Original Side of the

1. Sec. 4, Ind. Lim. Act. All that Sec. 4 provides is that the suit might be brought on the day when the Court re-opened if the Court happened to be closed when the period prescribed expired. The words of Sec. 4 do not extend limitation : *Shanti Parkash v. Harnam Das*, I. L. R. 1938 Lah. 193.
2. *Maqbul Ahmad v. Onkar Pratap*, (1935) I.L.R. 57 All 242 (P. C.); *Ummathu v. Pathumma*, (1921) I.L.R. 44 Mad. 817 (where a suit was instituted on the re-opening day as a Small Cause suit in the Court of a Subordinate Judge on its Small Cause side and on the plaint being returned after some days for want of jurisdiction it was filed on the next day in the same Court as an original suit, *Held*, that the time during which the suit was pending on the Small Cause side of the Court, and which the plaintiff was allowed to deduct under Sec. 14 of the Lim. Act, could not be tacked on to the period during which the Court was closed, under Sec. 4 of the Act, so as to save the bar of limitation) ; *Dharman Ram v. Ganga Ram*, (1929) I. L. R. 11 Lah. 12 ; *Dhanna Mistry v. Bengal Nagpur Ry. Co. Ltd.*, (1934) I. L. R. 13 Pat. 632.
3. *Gyansingh v. Buddha*, (1932) I. L. R. 14 Lah. 240.
4. *The British India Steam Navigation Co. v. Sharafally*, (1923) I. L. R. 46 Mad. 938, 942, *fg. Nachiyappa v. Ayyasami*, (1882) I. L. R. 5 Mad. 189 (F. B.) ; *Receiver of the Nidadavole & Medur Estates v. Suraparaxa* (1915) I. L. R. 38 Mad. 295 (F.B.), and *Parvatheesam v. Bapanna*, (1890) I. L. R. 13 Mad. 447, 451 (where it was implied that a Court cannot be regarded as closed on dates when arrangement was made and notified for the reception of plaints.)

Bombay High Court, the Court is not "closed" within the meaning of Sec. 4 for presentation of complaints during the summer vacation.¹

For exclusion and extension of time for presentation of complaint, see "Causes of Action", Chapter X, pp. 299 to 307.

CHAPTER XV

REJECTION OF COMPLAINT.

O. VII, r. 11 of the C. P. Code provides for rejection of complaint in certain cases. The Code also provides that clauses (b) and (c) of the said Order do not apply to the chartered High Courts.² Nevertheless O. VII, r. 11 as a whole has been adopted by the O. S. Rules of the Rangoon High Court.³ O. II, r. 2 of the Original Side Rules of the Madras High Court provides that the complaint shall contain a statement of valuation as directed under the High Court Fee Rules and that where it appears that the suit is under-valued or that the stamp affixed to the complaint is insufficient, the Registrar shall require the plaintiff to make good the deficiency within a period fixed by him, and if default is made, the Registrar shall post the complaint before the Court for order as to dismissal.

Rejection of complaint under O. VII, r. 1, of the Code : The complaint shall be rejected in the following cases :—

(a) *Where it does not disclose a cause of action :* If no cause of action has been pleaded against the defendant, the Court ought to reject the complaint before issuing summonses.⁴ The question whether a complaint ought to be rejected cannot depend on anything which the defendant may say in his written statement. The defect ought to be apparent on the face of the complaint.⁵ The evidence of defendant is not necessary for the purpose of deciding whether the complaint discloses any cause of action ; such question should be deci-

1. *Dharamsi Morarji Chemical Co. v. Occhaval Hargovandas*, (1927) I. L. R. 51 Bom. 848.
2. O. XLIX, r. 3 (1), C. P. Code.
3. Part II, Chap. I, r. 21B, Rang. High Court, O. S. Rules.
4. *Sadhu Kathalia v. Dhirendra Nath Roy*, (1928) I. L. R. 55 Cal. 590.
5. *Ladhomal Premchand v. Budho*, A. I. R. 1933 Sind. 1.

ded on the allegations of the fact in the plaint and, if necessary, after examining the plaintiff.¹ The Court, of course, is not limited to the allegations pleaded as cause of action, but is at liberty to consider other allegations in the plaint for the purpose of determining whether the plaint discloses a cause of action.² In no case, however, the Court is entitled to go outside the pleading.³

(b) *When the relief claimed is undervalued and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so :* Clauses (c) and (d) of sub-section (iv) of Sec. 7, Court Fees Act, must be read with O. VII, r. 11, C. P. Code and these provisions of the Code control the provision of the Court Fees Act.

The absence of rules under Sec. 9 of the Suits Valuation Act is no bar to the exercise of the powers conferred by O. VII, r. 11 of the C. P. Code, and the question as to what is the proper valuation depends upon the circumstances of each suit and the judicial discretion of the Court.⁴ In a Full Bench case⁵ of the Calutta High Court, one of the questions referred to the Full Bench was whether in suits to obtain a declaratory decree or order where consequential relief is prayed for and in suits to obtain an injunction, where the Court finds the relief claimed as under-valued, it is entitled under O. VII, r. 11 (b), C. P. Code to require the plaintiff to correct the valuation stated by him, in accordance with the provisions of Sec. 7, Court Fees Act. The answer given to this question was in the affirmative ; but it was held that "so long as there are no rules framed under Sec. 9, Suits Valuation Act, the Court would have no standard before it on which it may regard the plaintiff's valuation as an under-valuation and its power of correction would have to be exercised on that footing."

O. VII, r. 11, C. P. Code makes it compulsory for the Courts, before rejecting the plaint to give some time to the

1. *Hari Dutt v. Shib Kumar*, A. I. R. 1935 Pat. 449.
2. *U Po Kha v. Ma Gyi*, A. I. R. 1935 Rang. 497.
3. *Mayadas Bhagat v. Commercial Union Assurance Co. Ltd.*, I. L. R. (1937) 1. Cal. 541.
4. *Lakhomal Deepchand v. Deepchand Tolaram*, A. I. R. 1937 Sind 241.
5. *Narayangunj Co-operative Society v. Mafizuddin*, (1934) I. L. R. 61 Cal. 796 (F. B.).

plaintiff to make up the deficiency, however short that time may be, and the Court cannot straightway reject the plaint without such time.¹

(c) *Where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp paper within a time to be fixed by the Court, fails to do so :* The above rule is not confined to a case where the plaintiff has properly valued the relief claimed but has failed to pay the proper court fees. It applies as well to a case where the Court finds that the plaint has been undervalued and ascertains the real value and the deficient Court fees has not been paid by the plaintiff.²

(d) *Where the suit appears from the statement in the plaint, to be barred by any law :* Where a suit is brought against the Secretary of State without giving the notice required by Sec. 80 of the C. P. Code, the plaint should be rejected³.

If a suit appears from the statement of the plaint to be barred by any law, the proper course is to reject the plaint under O. VII, r. 11, clause (d) of the C. P. Code and not to dismiss the suit entirely.⁴

Where a suit appears from statements in the plaint to be barred by the law of limitation, the Court may, in a proper case, allow the plaint to be amended at the hearing⁵.

Note : O. VII, r. 11, C. P. Code is not exhaustive. The Court has inherent jurisdiction to reject plaints in appropriate cases, not covered by the said rule. Thus, where a plaint is filed by the next friend of a minor, the Court, in a proper case, can reject the same on the ground that it is not in the interest of the minor that the suit should be proceeded with.⁶

1. *Bajinath Prasad v. Umeshwar Singh*, (1937) I. L. R. 16 Pat. 600.
2. *Selima Sheehan v. Hafex Mohammad*, (1931-32) 36 C. W. N. 567; cf. *Jagat Ram v. Misar Kharaiti Ram*, A. I. R. 1937 Lah. 392; *Walaiti Ram v. Gopiram*, A. I. R. 1935 Lah. 75.
3. *Bachchu v. Secy. of State*, (1903) I. L. R. 25 All. 187; *Venkata Rangiah v. Secy. of State*, (1931) I. L. R. 54 Mad. 416.
4. *Pran Krishna v. Kripa Nath*, (1919) 29 C. L. J. 17; *Vithoba Yadeo v. Suryabhan*, A. I. R. 1924 Nag. 80.
5. *Gunnaji Bhawaji v. Mankanji*, (1910) I. L. R. 34 Bom. 250 (where the plaint was on the face of it time-barred, and leave to amend the plaint by setting out an acknowledgment in writing signed by the defendant within the period of limitation was allowed).
6. *Thakur Harihar Baksh v. Thakur Jagannath*, A. I. R. 1924 Oudh 413, 414,

Remedies of the plaintiff after rejection of his plaint : The plaintiff may appeal against the order rejecting the plaint, in as much as under Sec. 2 (2) of the Code, rejection of plaint is to be deemed to be a decree¹. But where the Court orders rejection of the plaint and the plaintiff fails to vacate the order within the time prescribed by law, by an appeal against that order, the Court has no jurisdiction to set aside the order under S. 151, C. P. Code, and thereby deprive the defendant of a valuable right which he has already acquired by virtue of the law of limitation².

Where a plaint was rejected for non-compliance with order for payment of Court-fee, the Patna High Court held that a review of that order is permissible and the Court has discretion to restore the suit³. The Calcutta High Court has doubted that an order rejecting a plaint can be reviewed under O. XLVII, r. 1, C. P. Code⁴. After rejection of his plaint the plaintiff is not precluded from presenting a fresh plaint on the same cause of action⁵. On such presentation the Court can allow the old Court-fee paid on the rejected plaint to be computed towards Court-fee on the fresh plaint⁶.

CHAPTER XVI

DEFENCE OR WRITTEN STATEMENT OF THE DEFENDANT.

Nature of Defence : The defendant in answer to the plaint may take one or more of the following courses :

1. He may deny or refuse to admit the facts alleged by the plaintiff. This is called 'traversing' ;
2. he may confess or admit the facts stated by the plaintiff, and avoid their effect by pleading new facts. This is called 'confessing and avoiding' ;
3. he may admit the facts stated by the plaintiff and raise a question of law as to their legal effect ; or

1. *Kashi Kurmi v. Bansraj Kurmi*, A. I. R. 1938 All. 150.
2. *Saratchandra v. Mrityunjay*, (1935) I. L. R. 62 Cal. 61.
3. *Jadunandan Singh v. Shankar Sahu*, A. I. R. 1936 Pat. 310.
4. *Saratchandra v. Mrityunjay*, *supra*.
5. O. VII, r. 13, C. P. Code.
6. *Bachan Singh v. Dasrath Singh*, A. I. R. 1935 All. 985.

4. he may plead a counter-claim, where he is permitted to do so by the Rules of the Court.

1. **Traverse** : As to traverses or denials there are three fundamental rules :

- (a) *Denial must be specific* : "It shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth, except damages."¹
- (b) *Denial must not be evasive* : "Where a defendant denies an allegation of fact in the plaint, he must not do so evasively, but answer the point of substance. Thus, if it is alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but must deny that he received that sum or any part thereof, or else set out how much he received. And if an allegation is made with diverse circumstances, it shall not be sufficient to deny it along with those circumstances."²

A traverse may become evasive—

- (i) *If in the pleading there is no specific denial or a definite refusal to admit.* The defendant must make it clear how much of the plaintiff's pleading he intends to dispute.

Illustrations :

(i) The plaintiffs alleged an agreement to take a lease and to carry on a partnership. They alleged that, in pursuance of the agreement, they took a lease, and that the draft articles were prepared to define the terms of the partnership and that on.....the same were approved by the parties subject to revision by the defendant's solicitor, that the defendant procured the plaintiffs to sign the draft articles and that the plaintiffs and the defendant subsequently carried on the business. In his Defence, the defendant alleged, "The defendant denies that the terms of the arrangement between himself and the plaintiffs were definitely agreed upon as alleged". Held by Jessel, M. R., "That is evasive, 'As alleged' means the whole allegation in the statement of claim, not the allegations of the particular paragraph. I cannot tell from his pleading what part of the allegation of the plaintiffs the defendant intends to deny..... He is bound to deny that any agreement or any terms of agreement were ever come to, if that is what he means ; if he does not mean that, he should say that there were no terms of arrangement come to, except the following terms ; other-

1. O. VIII, r. 3, C. P. Code (O. XIX, r. 17, R.S.C.). It is intended that damage shall be put in issue in all cases, unless admitted,
2. O. VIII, r. 4, C. P. Code (O. XIX, r. 19, R. S. C.).

wise there is no specific denial at all." : *Thorp v. Holdsworth*, (1876) 3 Ch. D. 637, 641.

(ii) The statement of claim in an action for specific performance stated that the predecessor-in-title of the plaintiff, by his agent lawfully authorised, signed an agreement with H., the predecessor-in-title of the defendant. The statement of defence denied this in words following the words of the statement of claim and then proceeded to state that H., the predecessor-in-title of the defendant, was of unsound mind and did not lawfully authorise any one as his agent to sign an agreement, and in a subsequent paragraph denied that any agreement was signed by H., or any person by him lawfully authorised :—*Held* : Under the statement of defence, the defendant could only enter into evidence to show the unsoundness of mind of H., and could not enter into evidence to show that the agent was not duly authorised : *Byrd v. Nunn*, (1877) 7 Ch. D. 284.

(ii) *If the traverse is too literal.* "A traverse may become evasive if it follow too closely the precise language of the allegations traversed. By traversing too literally you may fall into the vice of pleading "*negative pregnant*". A negative pregnant is such a form of negative expression as may imply or carry within it an affirmative proposition. It is therefore evasive and ambiguous and must not be used¹.

Illustration :

In an action against a lessee to set aside a lease granted under a power, the statement of claim alleged that the defendant knew that the plaintiff T. was a trustee only with a power of leasing, that the defendant offered the said T. a bribe of £ 500, if he would grant him the said lease and that T. in fact granted the said lease in consideration of the said bribe. And the defendant in fact paid to the plaintiff T. £ 200, part of £ 500. The defendant pleaded, "The defendant denies that he offered the said plaintiff a bribe of £ 500, if he would grant him the said lease and that the said plaintiff in fact granted the said defendant the said lease in consideration of such bribe. The defendant denies that he in fact paid to the said plaintiff the sum of £ 200, part of the said sum of £500. *Fry L. J., held*, "The denial here is a denial of the whole string of circumstances, and would be justified by the proof that any of those circumstances so thrown together was not true.....The point of substance in the allegation in the statement of claim is that a bribe was given by A. to T., and that point of substance is nowhere met." The defendant should have pleaded that he never offered a bribe of £ 500. or any other sum or that he paid to the plaintiff T. £ 200 or any other sum : *Tildesley v. Harper*, (1878) 7 Ch. D. 403.

(iii) *If the traverse is too large* : "If your opponent's allegation be in the *conjunctive*, you must plead to it in the *disjunctive* ; otherwise your traverse may be too large ; for it is seldom, if ever, necessary for your opponent to prove at

the trial the whole of his allegation precisely as he has pleaded it. In other words, when traversing, remember always to turn "and" into "or", and "all" into "any".¹

Illustrations :

(1) Claim : "The defendants borrowed Rs. 500/- from the plaintiff." The proper traverse is, "The defendants deny that they or any of them borrowed Rs. 500/- or any other sum from the plaintiff."

(2) Claim : "The defendant forcibly entered the plaintiff's house" If the defendant wants to deny the entry as well as the fact that the plaintiff is the owner of the house, he should plead thus, "The defendant denies that the plaintiff is the owner of the house or that he entered the said house as alleged or at all."

(c) *Allegations of fact not denied shall be deemed to be admitted :*

"Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability : Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission²."

The rule is only intended to apply to a case where a pleading has been put in by the defendant. It is not intended to apply to a case where the defendant has not put in a written statement. Thus, in a case where the plaintiffs claimed damages for breach of contract and the defendant did not file a written statement, and the Court decreed the plaintiffs' suit *ex parte* without hearing any evidence, the Court of Appeal pointed out the desirability and necessity in cases where the defendant does not appear that the plaintiff should be called upon to prove all the material facts which are necessary for the proof of his case³. Again, defendants who do not file a written statement are not debarred from giving evidence which traverses the allegations made in the plaint⁴.

O. VIII, r. 5, is not happily worded. The placing of a comma after the word 'implication' and before the word 'or' is unhappy.

1. Odgers on Pleading, 12th Edn., p. 141.

2. O. VIII, r. 5, C. P. Code.

3. *Ross & Co. v. Scriven*, (1916) I. L. R. 43 Cal. 1001, 1010, 1013 ; fol. in *Narindar Singh v. C. M. King*, A. I. R. 1928 Lah. 769.

4. *Gobind Gorhi v. Baldeo Ram*, A. I. R. 1930 Pat. 293 ; but see *Shriram Surajmal v. Shriram Jhunjhunwalla*, (1936) I. L. R. 60 Bom. 788 ; *Sonabati Kumari v. Kiriyanand*, (1935) I. L. R. 14 Pat. 70.

But the rule means "every allegation of fact in the plaint if not denied specifically, or if not denied by necessary implication, or if not stated to be not admitted, shall be taken to be admitted"¹.

Where a certain allegation in the plaint is "*not admitted*", the effect of that is a denial by the defendant of that allegation². The words "*stated to be not admitted*" must mean "*specifically stated to be not admitted*", if r. 5 is read with r. 3 of the Code³. The defendant must be quite as specific when he says "I do not admit" as when he says "I deny"⁴. A statement, "The defendants do not admit the correctness of certain allegations in the statement of claim and require proof thereof" was held to be an insufficient denial, and the defendants were ordered to state in what respects they disputed these allegations⁵.

A *denial of knowledge* of a fact is not a denial of the fact. Thus, where a defendant, instead of denying specifically the mortgage in favour of the mortgagee merely denies knowledge of the mortgage, such a procedure is neither a specific denial of the mortgage, nor it is a statement that the mortgage is not admitted, and consequently under O. VIII, r. 5, it must be held against such defendant that he has by implication admitted the mortgage in favour of the mortgagee⁶.

O. VIII, r. 5, makes an exception in the case of persons under disability. But while the rule of admission by non-denial does not apply to a person under disability, it has been held that the exception has nothing to do with the conduct of the suit⁷.

The proviso to O. VIII, r. 5, gives the Court a discretion to require proof of allegations of facts not denied. Under the old Code,

1. *Balaghat Husain v. Abid Bakhsh*, A. I. R. 1927 All. 225 (2); *Mansa Ram v. Mt. Ancho*, (1933) I. L. R. 55 All. 700.
2. *Mansa Ram v. Mt. Ancho*, *supra*; *Rajagopalachariar v. Bhasyachariar*, A. I. R. 1924 Mad. 838, *fd. in Venkataswami v. Ramamurthy*, A. I. R. 1934 Mad. 579.
3. *Subramania v. Hitchcock*, A. I. R. 1925 Mad. 950, 957; *Harris v. Gamble*, (1878) 7 Ch. D. 877.
4. *Thorp v. Holdsworth*, (1876) 3 Ch. D. 637, 640.
5. *Rutter v. Tregent*, (1883) 12 Ch. D. 758, *fd. in Choithram v. Khemchand*, A. I. R. 1929 Sind 7, *distd. in Venkataswamy v. Ramamurthy*, *supra*.
6. *P. L. N. K. L. Chettyar Firm v. Ko Lu Doka*, A. I. R. 1934 Rang. 278; *Lakshmi Chand v. Ram Lal*, A. I. R. 1931 All. 423.
7. *Nagappa v. Siddalingappa*, (1918) 35 M. L. J. 372; *Bharosa Singh v. Jhauri Sao*, A. I. R. 1936 Pat. 428.

such proof was required at the hearing under special circumstances¹. Under the present Code, the discretion should be exercised by the Court when it suspects an admission made collusively, or with a view to avoid a rule of public policy², or where the defendants fail to deny the allegations due to ambiguous and unsatisfactory assertions in the plaint³, or where the defendant is taken by surprise or misunderstands the plaint⁴. Even facts admitted by a defendant's pleader may be required to be proved⁵. The discretion should, however, usually be exercised by the Court of first instance.

Matters which need not be traversed :—

(a) Matters of law need not be traversed, because "Matters of law or any other matters which are not fit subjects of traverse, are not taken to be admitted by the defendant's pleading over" (i. e., by his omitting all reference to them in his pleading).⁶

(b) "Neither party should traverse matter not alleged ; he should be content to answer the case that is actually laid against him, not that which he thinks his opponent meant or ought to have raised"⁷.

(c) Neither should either party plead to his opponent's particulars⁸. As regards pleading to particulars, it often happens that a plaintiff includes in his particulars allegations of facts, which under the rules of pleading, he ought to have included in the body of the plaint. In such cases it is wise for the defendant to plead to the particulars, lest the plaintiff should complain of surprise at the trial⁹.

(d) Neither party should plead to any matter in his opponent's pleading introduced by a *videlicet*¹⁰.

1. *Madho Pershad v. Gajadhar*, (1883-84) L. R. 11 I. A. 186 ; *Deo Nandan v. Meghu*, (1907) I. L. R. 34 Cal. 57, 64.
2. *Nagappa v. Siddalingappa*, (1918) 35 M. L. J. 372 ; *Venkata Reddi v. Muthu Pambulu*, A. I. R. 1920 Mad. 588.
3. *Kundan Lal v. Makundi*, (1923) I. L. R. 45 All. 571.
4. *Govindasami v. R. Sami*, A. I. R. 1923 Mad. 114 (2).
5. *Vir Singh v. Bhola Singh*, A. I. R. 1924 Lah. 744.
6. *Odgers on Pleading*, 11th Edn., p. 143.
7. ...do...
8. ...do...
9. *Odgers on Pleading*, 11th Edn., p. 214.
10. *Odgers on Pleading*, 11th Edn., p. 143.

(e) The defendant need not plead to the prayer or claim for relief in the plaint.¹

(f) It is not necessary for a defendant in a suit for damages to deny specifically the damages ; it is sufficient if he pleads generally to the damages².

2. Confession and avoidance : The defendant may admit the facts alleged by the plaintiff and avoid their effect by asserting fresh facts "showing some justification or excuse of the matter charged against him or some discharge or release from it"³. Thus, in a suit for libel, the defendant may admit the publication and at the same time plead that the words complained of are true or that they were published on a privileged occasion. All matter in confession and avoidance must be pleaded specifically. For instances of special defences, read Chapter XVII.

3. Objections in point of law : The defendant may admit the facts stated by the plaintiff and may at the same time raise an objection in point of law. The fault in the plaint to which objection in point of law is taken should be something more than a mere defect in form. Thus, the defendant may plead that the plaint does not disclose any cause of action, or that the plaintiff's cause of action if any, is barred on the very face of the plaint, or that the plaint does not show that the Court has jurisdiction to try the suit, or that the plaint does not set forth a sufficient ground of action.

Upon objections in point of law taken by the defendant, issues of law arise. If the Court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of issues of fact until after the issues of law have been determined⁴. The only thing left open to the Court is to form and express an opinion whether the case can be disposed of on issues of law. In deciding the question as to whether the Court should grant or refuse a prayer to try a preliminary issue on a point of law, some harmony is to be observed between the general principle that it is undesirable to try cases piecemeal and the specific and wholesome provisions of O. XIV, r. 2, C. P. Code, which is

1. Odgers on Pleading, 11th Edn., p. 143.

2. O. VIII, r. 3, C. P. Code ; *Ross & Co. v. Scriven*, (1916) 1. L. R. 43 Cal. 1001, 1010 ; See Odgers on Pleading, 11th Edn., pp. 214, 215,

3. Odgers on Pleading, 11th Edn., p. 157.

4. O. XIV, r. 2, C. P. Code,

for the purpose of preventing the injustice of a party being able to force his opponent to go at great length into evidence when the simple decision on a point of law might render the investigation of a fact unnecessary. Where the Court summarily rejects a prayer to try a preliminary issue on a point of law and in its summary jurisdiction has not expressed any opinion as to whether the question of law would be sufficient to dispose of the case, the High Court shall interfere in revision.¹ It is the duty of the Court to determine whether circumstances exist in each particular case for the exercise of the power conferred by O. XIV, r. 2 of the Code.²

O. XIV, r. 2, C. P. Code refers to the stage of settlement of issues. Where an application is made, after the date of first hearing, for trial of some of the issues, should the Court under O. XIV, r. 2 or O. XV, r. 3, C. P. Code determine issues of law postponing the trial of issues of fact? According to the Madras High Court, the Court has jurisdiction to post a case for trial on preliminary issues of law even though the issues of law and fact had been settled long before³. According to the Calcutta High Court, the Court must deal with the case irrespective of the provisions of O. XIV, r. 2, or O. XV, r. 3 of the Code⁴.

At the hearing of a case on a preliminary issue, the party by whom it is raised, has the right to begin⁵.

4. Counter-claim : See "Set-off and Counter-claim," Chap. XVIII.

Alternative and inconsistent defences : O. VI, r. 2 of the C. P. Code does not prohibit the raising of inconsistent pleas. A person may rely on one set of facts if he succeeds in proving them, and another set of facts if he succeeds on that set of facts⁶. It has been held that a Defence is not embarrassing merely because it contains

1. *Per* Courtney-Terrell C. J., in *Janki Das v. Kalu Ram*, A. I. R. 1936 Pat. 250, *fg. Shanta Nand v. Basudeva*, A. I. R. 1934 All. 986; and *Harihar Prasad v. Gopal Saran*, (1935) I. L. R. 14 Pat. 488.
2. *Udmi Ram-Ram Sarup v. Ghasi Ram*, A. I. R. 1933 All. 753; *Ghulam Mohy-ud-Din v. Mt. Ruqiya*, A. I. R. 1939 Lah. 158.
3. *Ramkrishna Pillai v. Krishnaswami*, A. I. R. 1922 Mad. 321.
4. *Debendra Narain v. Jogendra Narain*, A. I. R. 1933 Cal. 559.
5. *Fatmabai v. Aishabai*, (1888) I. L. R. 12 Bom. 454.
6. *Bansi Dhar v. Ajudhia Prasad*, A. I. R. 1925 Oudh 120, *fol. Bagot v. Easton*, (1877) 7 Ch. D. 1; *In re. Morgan, Owen v. Morgan*, (1837) 35 Ch. D. 492, 499.

inconsistent averments.¹ "I take 'embarrassing' to mean that the allegations are so irrelevant that to allow them to stand would involve useless expenses, and would also prejudice the trial of the action by involving the parties in a dispute that is wholly apart from the issues."²

A defendant may plead that he is the owner of a piece of land, and alternatively, that if he is not the owner, he is entitled to an easement over it.³ The defendant's right to raise as many distinct and separate, and therefore inconsistent, defences, is subject to the provision contained in O. VI, r. 16 of the Code, which provides "that Court may at any stage of the proceedings order to be struck out or amended any matter in any pleading which may be unnecessary or scandalous or which may tend to prejudice, embarrass or delay the fair trial of the suit."

Formal parts of Defence : A written statement should have the same heading and title as a plaint; but if there are several plaintiffs or several defendants, it is sufficient to state the name of one plaintiff and one defendant adding the words "and another" or "and others".

Below the cause title should be stated, "Written statement on behalf of the defendant or defendants or defendants so and so," as the case may be.

Immediately below that should be stated "The defendmant states—" or "The defendants state—".

If any defendant is a minor, the words, "Written statement on behalf of the minor defendant" should be used, and these should be followed by the words, "The minor defendant through his guardian-ad-litem states—"

The body of the Defence should be divided into separate paragraphs consecutively numbered.

Where the defendant relies on several distinct grounds of defence or set-off, founded upon separate and distinct facts, they shall be stated, as far as may be, separately and distinctly.⁴

Any ground of defence which has arisen after the institution of

1. *Child v. Stenning*, (1875) 5 Ch. D. 695.

2. *Per Pickford, L. J.*, in *Mayor etc. of London v. Horner*, (1914) 111 L. T. 512, 514.

3. *Tamanbhat v. Krishtacharya*, A. I. R. 1933 Bom. 122.

4. O. VIII, r. 7, C. P. Code (O. XX, r. 7, R. S. C.)

the suit or presentation of the written statement, claiming a set-off may be raised by the defendant in his written statement.¹

For verification and signature of written statement, see "Verification of Pleading," Chap. XXIII.

CHAPTER XVII

SPECIAL DEFENCES.

Nature and object of special defence : The C. P. Code provides—

*"The defendant must raise by his pleading all matters which show the suit not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the plaint, as, for instance, fraud, limitation, release, payment, performance, or facts showing illegality".*²

The 'matters' mentioned in the above rules are matters of facts as provided in O. VI r. 2 of the C. P. Code which says that "every pleading shall contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved."³

Order VIII r. 2 does not abrogate or limit O. VI. r. 2, but points out that certain facts must be pleaded⁴ if certain points are to be raised. Thus, if a contract sued on is *ex facie* illegal or void, there are no facts to plead and the defendants need not plead that it is illegal, because that is law, not fact; but if it is not so *ex facie* and they desire to raise the plea on facts *ultra*, they must plead those facts.⁵

1. O. VIII, r. 8, C. P. Code.

2. O. VIII. r. 2, C. P. Code, which is the same as O. XIX, r. 15, R. S. C.

3. Equivalent to O. XIX, r. 4, R. S. C.

4. As to how facts are to be pleaded, see O. VI, r. 8, C. P. Code which is equivalent to O. XIX, r. 20, R. S. C.

5. *Per* Farwell L. J., in *North-Western Salt Co. v. Electrolytic Alkali Co.* (1913) 3 K. B. 422; on appeal, (1914) A. C. 461.

Effect of omission to take special defence : Referring to O. XIX, r. 15, R. S. C. (equivalent to O. VIII, r. 3. C. P. Code), Buckley L. J. has thus stated the effect of omission to take special defences :—

“O. XIX, r. 15, provides that the defendant must by his pleading do various things, but it names no consequence if he does not do those things. It is not confined to a case where a statute is the thing to be pleaded ; it applies to all cases of grounds of defence or reply which if not raised would be likely to take the opposite party by surprise or raise issues of fact not arising out of the pleadings. Where the defendant ought to plead things of that sort the rule does not say that if he does not the Court shall adjudicate upon the matter as if a ground valid in law did not exist which does exist. If in the course of the proceedings it was proved that the deed sued upon was a forgery and the defendant does not plead it or did not know it was a forgery, the Court would not give judgment upon the deed on the footing that it was a valid deed. The effect of the rule is, I think, for reasons of practice and justice and convenience to require the party to tell his opponent what he is coming to the Court to prove. If he does not do that, the Court will deal with it in one of two ways. It may say that it is not open to him that he has not raised it and will not be allowed to rely on it ; or it may give him leave to amend by raising it, and protect the other party if necessary by letting the case stand over. The rule is not one that excludes from the consideration of the Court the relevant subject-matter for decision simply on the ground that it is not pleaded. It leaves the party in mercy and the Court will deal with him as is just,”¹

Particular Instances of Special Defences :—

The instances of special defences enumerated in O. VIII, r. 2 of the C. P. Code are not exhaustive. Other instances of special defences are set out below :—

1. **Account settled or stated :** A settled account is the same thing as an account stated. It is a statement of accounts between the parties which is agreed to and accepted² by both as correct. An

1. *In re Robinson's Settlement, Gant v. Hobbs*, (1912) 1 Ch. 717, 727, 728.

2. The acceptance need not be express. It may be implied by contemporaneous or subsequent conduct amounting to acquiescence : *Clark v. Glennie*, (1820) 3 Stark. 10 N. P. ; cf. *Hira Lal v. Raj Kumar*, (1929) 50 C. L. J. 183, (P. C.).

account stated may be a 'mere account stated' or a 'real account stated.'¹ A 'mere account stated' is that form of account stated which constituted a mere acknowledgment of a debt in respect of transactions entirely unilateral. A 'real account stated' is one which contains entries on both sides, and on which the parties who have stated the account between them have agreed that the items on one side should be set against the items upon the other side and the balance only should be paid; the items on the smaller side are set off and deemed to be paid by the items on the larger side, and there is a promise for good consideration to pay the balance arising from the fact that the items have been set off and paid in the way described.² In other words, there is mutual consideration to support the promises on either side and to constitute the new cause of action.³

For a 'real account stated', it is immaterial, except for the purpose of limitation, whether it is signed or not by the debtor. If it is signed by the debtor, Art. 64 of the Limitation Act applies, in the other case, either Art. 115 or 120.⁴

In the case of a 'real account stated,' it is not necessary that the balance should be struck within the period of limitation applicable to any of the items in the account.⁵

A 'mere account stated' by acknowledgment does not give rise to a new cause of action. The acknowledgment if made within time may be relied upon as saving limitation.⁶

A 'real account stated' is a good defence to a suit for account and must be specially pleaded. But a plea of account stated may under special circumstances be investigated and re-opened by the Court. Thus, where the plea of account stated is taken by the defendant, the plaintiff may, in his reply, allege that the settlement ought to

1. *Kleinberger v. Norris*, (1937) 183 L. T. J. 107, C. A.

2. *Elvira Rodrigues Siqueira v. Gondicalo Noronha*, (1933-34) 38 C. W. N. 813.

3. *Bishun Chand v. Girdhari Lal*, (1933-34) L. R. 61 I. A. 273; *Irving v. Veitch*, (1837) 3 M. & W. 90. Cf. *Satis Chandra v. Rampada*, A. I. R. 1938 Cal. 861.

4. *Jalim Singh v. Choonee Lal*, (1910-11) 15 C. W. N. 882, 887.

5. *Suraj Prasad v. Boucke*, (1920) 5 P.L.J. 371; cf. *Bishun Chand v. Girdhari Lal*, *supra* (where the question whether there can be a real account stated if all the items in the account were time-barred was left open).

6. *Suraj Prasad v. Boucke*, *supra*; *Ramprasad v. Anandi*, A. I. R. 1938 Nag. 180.

be set aside on the ground, say, of fraud or mistake, which would justify setting aside any other agreement.

The defendant who takes the plea of a '*real account stated*' must plead the facts constituting the account stated thus :

(a) that the parties verbally (or in writing, as the case may be) agreed that the claims of the plaintiff should be satisfied and discharged by setting off the claims of the defendant and the balance should be paid;

(b) that after setting off the said claims of the defendant against the said claims of the plaintiff there was found due from the defendant to the plaintiff Rs.....;

(c) that in this way an account was stated between the parties signed (or as the case may be) by the defendant.¹

If the above agreement to treat the items on one side as discharging the items on the other side *protanto* and to pay the balance to be found due is not pleaded, it will not be a case of account stated. Thus, in a recent Calcutta case, where there was a balance struck in the account showing cross items and the defendant wrote below it, "I admit and accept as correct," it was held that this was not a case of "account stated," as there was neither agreement nor adjustment but merely a statement of account with a mere acknowledgment by the defendant, nor did the endorsement amount to a promise to pay.²

2. Accord and Satisfaction : These are technical terms of the English Common Law. The defence of 'accord and satisfaction' is confined to the case of 'accord and satisfaction' *after breach*. The defence consists of two parts : (1) 'accord' and (2) 'satisfaction'.

A mere accord (a new agreement entered into after breach of the original agreement) without satisfaction does not put an end to an existing liability unless it appears to be intended that the new agreement itself is to extinguish the liability³. Where a new agreement is accepted as in accord and satisfaction of a cause of action, the plea of such accord alone is a good defence to an action

1. For forms, see Bullen & Leake on Precedents of Pleading, 8th Edn., pp. 586, 587 and Odgers on Pleading, 11th Edn., pp. 462, 463.

2. *Satis Chandra v. Rampada*, A. I. R. 1938 Cal. 861.

3. Scrutton and Greer L. JJ., in *Talbot v. Associated Newspapers Ltd.*, (1933) 2 K. B. 616, 643, 654; *Elton Cop Dyeing Co. v. Broadbent*, (1919) 89 L. J. K. B. 186,

on the original liability, and non-enforceability of the new agreement, although a very material fact in arriving at a conclusion upon the question whether the new agreement without performance was taken in accord and satisfaction of the old, is immaterial when this has been established in point of fact¹. Otherwise, the plea must allege both accord and satisfaction.

The question as to whether or not the new promise only, as distinct from its performance, constitutes an accord and satisfaction discharging the accrued cause of action depends on the construction of the fresh agreement.²

Where *before breach*, a new agreement is entered into varying or discharging the original contract, the substituted contract, according to the English common law, forms a good defence to an action on those terms of the previous contract which have been altered by it, and may be so pleaded without any performance or satisfaction which is required to constitute a good defence after breach³.

In India, there has been some controversy over the question whether the common law rule of accord and satisfaction applies to India and the said controversy rests upon the scope of Section 62 of the Ind. Contract Act.

In India, the word 'accord' has not been used by the Indian legislature in the Ind. Contract Act or any other law relating to contract. The word 'satisfaction' has however, been used in Section 53 of the Ind. Contract Act⁴.

According to the Calcutta High Court, Section 62 of the Ind. Contract Act is a legislative expression of the common law and that it does not apply to a case where the agreement to substitute a new contract is made after the breach of the original contract. Therefore, according to the said High Court, where a new agreement is entered into after the breach of the original contract, the common law doctrine of accord and satisfaction would apply, and the defendant, who has failed to perform the satisfaction which he promised to give, would remain liable on the original contract⁵.

1. *Morris v. Baron & Co.*, (1918) A. C. 1, 13.

2. *Elton Cop Dyeing Co. v. Broadbent*, (1919) 89 L. J. K. B. 186.

3. *Taylor v. Hilary*, (1835) 149 E. R. 1279; see *Bullen & Leake*, 8th Edn., p. 778 (and note).

4. *Collector of Etah v. Kishori Lall*, A. I. R. 1930 All. 721 (F. B.).

5. *Monohur Koyal v. Thakur Das*, (1838) I. L. R. 15 Cal. 319.

There was a difference of opinion between Seshagiri Iyer J. and Kumarswami Shastri J., as to whether Section 62 is confined to a new agreement entered into before breach of the original contract, the former taking the same view as the Calcutta High Court, the latter expressing the opinion that the section contemplates the making of a new agreement whether before or after the breach of the original agreement¹.

The view taken by Kumarswami Shastri J. has since been followed by the Madras High Court,² and seems to have been approved by the Allahabad High Court.³ According to the Madras High Court, therefore, the technical rule of accord and satisfaction has no application to India.

There is, however, one fundamental difference between the Indian and the English law relating to satisfaction. In England, there must be valuable consideration for satisfaction. Thus, in the case of an ascertained debt, the acceptance of a smaller sum is no satisfaction, e. g., payment of £50 is no answer to a debt of £100.⁴ In India, where a promisee remits part of the debt and gives a discharge for the whole debt on receiving a reduced amount, the discharge is valid, even though the remission was in pursuance of an oral agreement which is inadmissible under Sec. 92 (4) of the Indian Evidence Act, 1872.⁵

3. Acquiescence : Acquiescence implies either 'that a person abstains from interfering while a violation of his legal rights is in progress' or 'that he refrains from seeking redress when a violation of his rights, of which he did not know at the time, is brought to his notice'. In the first sense, which is the proper legal sense, acquiescence operates by way of estoppel by words or conduct.⁶ In the latter sense, acquiescence is an element in laches.⁷ The defendant must plead that the plaintiff having a right, and with knowledge of his legal right, stood by and saw the defendant dealing with

1. *Ramiah v. Somasi*, (1915) 29 M. L. J. 125.

2. *N. M. Firm v. Theperumal Chetty*, (1922) I. L. R. 45 Mad 180.

3. *Ramnath v. Mannulal*, (1923) I. L. R. 45 All. 472.

4. *Couldery v. Bartrum*, (1881) 19 Ch. D. 394; *Foakes v. Beer*, (1884) 9 A. C. 605.

5. Sec. 63, Ind. Cont. Act, 1873; *Davis v. Gundasami*, (1896) I. L. R. 19 Mad. 398; *Collector of Etah v. Kishori Lal*, A. I. R. 1930 All. 721 (F.B.); *Mohim Chandra v. Ramdayal*, (1925-26) 30 C. W. N. 371; *Balasundara v. Ranganatha*, (1930) I. L. R. 53 Mad. 127.

6. *Kuwarji v. Bhurelal*, A.I.R. 1939 Nag. 163.

7. See Halsbury, 2nd Edn., Vol. 13, p. 208, Art. 200.

the property in a manner inconsistent with the right of the plaintiff (that is to say, expending money or doing some act on the faith of his mistaken belief while the act was in progress).¹ This is the defence of acquiescence in the first sense. The defence of laches is a defence of lapse of time and delay involving (a) acquiescence on the plaintiff's part and (b) change of position that has occurred on the defendant's part and 'causing a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy'.²

In either sense, acquiescence is an equitable defence and must be specially pleaded.³ Where the plea of acquiescence is taken in the defence, the plaintiff in his reply may allege that the acquiescence was procured by a false representation on the part of the defendant, e. g., that the intended building would not obstruct the light.⁴

4. Adverse Possession : Ordinarily, adverse possession must be specifically pleaded and should also form the subject-matter of an issue. But Courts in India have allowed a little laxity in the rule by holding that where a plea of adverse possession has not specifically been raised in the pleading, a party may be allowed to succeed on a title by adverse possession pleaded for the first time in the Court of Appeal if such a case arises on the facts stated in the pleadings and the opposite party is not taken by surprise⁵.

Adverse possession is a mixed question of fact and law. It is not sufficient to plead merely that the plaintiff or the defendant, as the case may be, acquired title by adverse possession. That will be pleading merely a conclusion of law. The facts constituting adverse possession must be pleaded. See 'Adverse possession' under 'Particulars', Chap. XX.

1. See *Leeds (Duke) v. Amherst (Earl)*, (1846) 2 Ph. 117, 124; *Abdul Kader v. Upendra Lal*, (1935-36) 40 C. W. N. 1370; *Jai Narain v. Jafar Beg*, (1926) I. L. R. 48 All. 353.
2. Per Lord Selbourne, in *Lindsay Petroleum Co. v. Hurd*, (1870) L. R. 5 P. C. 221. See Halsbury, 2nd Edn., Vol. 13, p. 208; cf. *Davis v. Marshall*, (1861) 10 C.B.N.S. 697; and *Roberts & Lovell v. James*, (1903) 89 L.T. 287; *William Brunton v. Brunton* A. I. R. 1925 Mad. 360.
3. *Abdul Kader v. Upendra Lal*, *supra*.
4. *Davis v. Marshall*, *supra*.
5. *Batisa Kuer v. Raja Ram Pandey*, A. I. R. 1926 Pat. 192 (case where the defendant was allowed to plead adverse possession for first time in Court of Appeal). Cf. *Ram Chandra Sil v. Ramanmani Dasi*, (1915-16) 20 C. W. N. 773 (where the same principle was applied in the case of the plaintiff).

5. Alteration: Parties to a contract may alter its terms by mutual consent and the altered terms are a good defence to a suit on the original contract.¹

As regards alteration of a deed or instrument by one party without the knowledge of the other, 'whether by interlineation, addition, erasing or by drawing of a pen through a line or through any material word', the rule in *Pigot's* case² was—that where the obligee himself alters the deed by any of the above ways, although it is in words not material, yet the deed is void; and if a stranger, without the privity of the obligee, alter the deed by any of the above ways in any point not material, it shall not avoid the deed. The later view is that in either case, only where a deed is altered in a material part of it so as to enhance the liability of the obligor, it shall be void³. The question in each case is whether the alteration made any material change as regards the rights and liabilities of the parties or their legal position.⁴ A subsequent affixing of a stamp on an account in a bahi is not a material alteration when the integrity or identity of a contract is not changed by the alteration and that is not done with a fraudulent design.⁵ The rule as regards alteration of a deed is applicable to negotiable instruments⁶.

As to the right of a person who has altered a deed or a negotiable instrument to sue on the original consideration, the rule is—where there is no cause of action apart from the inadmissible

1. Cf. Sec. 62, Ind. Cont. Act. See 'Accord and Satisfaction', pp. 381-383.

2. *Pigot's* case, (1614) 77 E. R. 1177.

3. Cf. *Master v. Miller*, (1791) 4 T. R. 320; *Aldous v. Cornwell*, (1868) L. R. 3 Q. B. 573; *Mt. Gomti v. Meghraj Singh*, A. I. R. 1933 All. 443, 448; *Gour Chand v. Prasanna Kumār*, (1906) I. L. R. 83 Cal. 812, 816; *Parbati Charan v. Amarendra Nath*, (1926) I. L. R. 53 Cal. 418; *Lala Tulsi Ram v. Ram Saran*, (1924-25) 29 C. W. N. 965 (P. C.) (case of an immaterial alteration).

4. *Surendra Nath Bose v. Krishna Chandra Kundu* (1938-39) 43 C.W.N. 191; *Janardan Parida v. Prandhan Das*, A.I.R. 1940 Pat. 245 (where a conditional promise to pay contained in a document was made unconditional promise to pay by cutting portion of document).

5. *Fateh Mahomed v. Surja*, A.I.R. 1939 Lah. 486.

6. Sec. 87, Neg. Inst. Act; *Satya Narayan v. Sital Missir*, A. I. R 1934 Rang. 345; *Santhu Mohideen v. Jamal*, A. I. R. 1928 Mad. 1092; *Bishop of Crediton v. Bishop of Exeter*, (1905) 2 Ch. 455 (where the addition of the words "on demand" to a promissory note was held immaterial).

document, the whole claim fails with the inadmissible document. Where there has been a material alteration in the document, the further questions for the consideration of the Court are—whether the alteration is fraudulent or innocent and whether the plaint is or can also be based on the original loan itself and evidence exists *aliunde*. Where the alteration is fraudulent, the Courts will not allow the plaint to be amended and the plaintiff to fall back on the original cause of action. But where the alteration, though material, is innocent and the plaint is based on the original cause of action as well as on the document altered, the claim, if properly proved, can be allowed on the original cause of action, or, if the original plaint is not on the original cause of action, it is open to the plaintiff to apply and the Court to consider whether the plaintiff should be allowed to amend it¹. .

To a suit based on an altered² contract, deed or negotiable instrument, irrespective of whether the alteration was made with the consent of the creditor and the debtor or by the creditor himself without the consent of the debtor, so long as the alteration was made without the consent of the surety, the plea of the surety that the alteration has discharged³ him from his obligation is a good defence. So also an alteration in the terms of the contract by an Act of the legislature is a good defence by the surety as regards his discharge.⁴

The plea of material alteration is one of confession and avoidance and should be specially pleaded.⁵

6. **Attestation, Want of** :—The plea of want of attestation is a good defence to a suit based on a document required by law to be attested. So also a plea that the document was not attested in accordance with law. The last plea involves an express denial that the document was not duly executed and the plaintiff must prove the

1. *Ravjibhai v. Ranchhod*, A. I. R. 1930 Bom. 66 ; *Parbati Charan v. Amarendra Nath*, (1923) I. L. R. 53 Cal. 418 ; *Tapiram v. Jugalkishore*, A. I. R. 1926 Nag. 209.

2. As to whether alteration should be material, see *Holme v. Brunskill*, (1878) 3 Q. B. D. 495. Alteration need not actually prejudice the surety ; *Kashavlal v. Pratap*, (1932) I. L. R. 56 Bom. 101. But see, *Mathra Das v. Shamboo Nath*, A. I. R. 1929 Lah. 203. It is immaterial that the alteration has subsequently been withdrawn : *Nuserwanji & Co. v. Mahamayi*, A. I. R. 1938 Mad. 585.

3. Sec. 133, Ind. Cont. Act, 1872.

4. Sec. 133, Ind. Cont. Act, 1872.

5. *Davidson v. Cooper*, (1843) 11 M. & W. 778.

document by the examination of at least one of the attesting witnesses unless all the attesting witnesses are dead or are not available.¹ The plea of want of due execution of a document which is required by law to be attested involves the plea of want of due attestation.²

7. **Authority—want of :** If the principal is sued by a person claiming to be his agent, he (the principal) may plead that the plaintiff never had any authority from him either express or implied, or that even if he had authority, the acts alleged were in excess of his authority or that the authority had been terminated by revocation or had ceased by renunciation or otherwise before the authority was exercised.³

If the principal is sued by a third person for, say, goods supplied to the agent acting within the scope of his ostensible authority, for and on behalf of the principal, the latter should not only plead want of authority or termination of authority by revocation or otherwise but also that the plaintiff at all material times had notice of the same.⁴

The plea of want of authority may under certain circumstances be taken in case of sale of goods by persons not the owner, of sale of goods by one of joint owners and of sale of goods by a person in possession under a voidable contract.⁵

The plea that certain acts sought to be enforced are *ultra vires* a company or a corporation is equivalent to the plea of want of authority.

The facts showing want of authority must be specifically pleaded.⁶

8. **Benami :** In a suit for a declaration that the plaintiff is the real owner of the property in suit, he having purchased it from a third party or at a Court sale, the defendant may plead that the plaintiff is merely his benamdar.⁷

1. *Hari Nath v. Nepal Ohandra*, (1936-37) 41 C. W. N. 306 ; *Mt. Hira Bibi v. Ram Hari Lal*, (1924-25) L. R. 52 I. A. 362.

2. *Mt. Hira Bibi v. Ram Hari Lal*, *supra*.

3. Secs. 201, 203, 204 and 207, Ind. Cont. Act.

4. Sec. 208, Ind. Cont. Act ; *Premabhai Hemabhai v. Brown*, (1873) 10 B. H. C. R. 319.

5. Secs. 27 to 29, Ind. Sale of Goods Act, 1930.

6. Cf. *Byrd v. Nunn*, (1877) 7 Ch. D. 284 (where it was held that the defendant in his defence did not plead want of authority sufficiently).

7. Cf. Sec. 68, C. P. Code ; *Sankatha Prasad v. Mt. Rukmani*, A. I. R. 1939 All. 81 (case of a private purchaser) ; *Keshri Mull v. Sukhan Ram*,

The defendant taking the defence of benami must allege and prove the following :¹

- (a) the purchase money was paid by him ;
- (b) the property is in his possession and enjoyment ;
- (c) the title deeds are in his custody ;
- (d) the relationship of the parties, if that has any bearing on the probability of the benami.

Benami is an inference of law from given facts. Therefore, the facts from which the said inference should be drawn, ought to be pleaded. The difference between a benami transaction and a sham transaction is this that in the former legal title is intended to be transferred, in the latter no interest, legal or beneficial is transferred.²

9. **Capacity :** The defence as regards capacity may arise out of (a) contractual capacity, that is capacity to enter into contractual relations or (b) the capacity in which the plaintiff sues or the defendant is sued.

(a) *Contractual capacity :* In suits based on contracts, the plea of disqualification from contracting on the ground (i) that the defendant at the date of the contract was a minor according to the law to which he is subject,³ or (ii) that at the time of entering into the contract he was of unsound mind,⁴ or (iii) that at the time aforesaid he was disqualified from contracting by any law to which he was subject,⁵ ought to be specifically taken in the defence, where such disqualification shall have the effect of rendering the contract void.⁶

In England, a defendant who seeks to avoid a contract on the ground of his insanity, must plead not merely his in-

(1933) I. L. R. 12 Pat. 616 (case of a certified purchaser of a court sale).

1. Cf. *Promode Kumar v. Kali Mohan*, (1922-23) 27 C. W. N. 305.
2. *Rangappa v. Rangasami*, A. I. R. 1925 Mad. 1005.
3. Sec. 11, Ind. Cont. Act, 1872 ; cf. *Kashiba v. Shripat*, (1895) I. L. R. 19 Bom. 697.
4. Secs. 11 and 12, Ind. Cont. Act, 1872.
5. Sec. 11, Ind. Cont. Act, 1872 ; cf. *Lachmi Narain v. Fateh Bahadur*, (1902) I. L. R. 25 All. 195, 202.
6. Note : A person incapable of entering into a contract may be sued for necessities supplied (Sec. 68, Ind. Cont. Act) or under certain circumstances for refund of benefit received ; see *Hanumantha Rao v. Sitharamayya*, I. L. R. (1939) Mad. 203 ; *Mt. Hamidan Bibi v. Nanhe Mal*, A. I. R 1933 All. 371, 372.

capacity but also that the plaintiff knew of the defendant's state.¹

In India, it is not necessary to plead that the plaintiff had knowledge of the defendant's insanity or unsoundness of mind.²

(b) *Capacity in which the plaintiff sues or the defendant is sued* : In a proper case, the defendant may take the defence that the plaintiff is not entitled to sue, say, in his personal capacity in regard to the estate of the testator of which the plaintiff is the executor or administrator, or that the defendant is not liable to be sued in his personal capacity, he having entered into the contract sued on in his capacity as executor or administrator. If two or more persons institute a suit under O. 1, r. 8, C. P. Code, the defendant may deny the representative character of the plaintiffs. If an agent is sued in respect of contracts entered into by him in his capacity as agent, he may, under certain circumstances, take the defence that he is not liable to be sued. If a person executes a promissory note in his individual name, in a suit brought on the note against him as the Karta of a joint Hindu family, he may take the defence that he is not liable to be sued in his capacity as Karta, as so on.

10. **Coercion** : The facts constituting coercion must be pleaded specifically.³ See 'Coercion' under 'Particulars', Chap. XX.

11. **Condition of Mind** : "Wherever it is material to allege malice, fraudulent intention, knowledge or other condition of the mind of any person, it will be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred."⁴

12. **Conditions Precedent** : A condition precedent is an event but for the happening of which, the right to sue will not arise. Conditions precedent may be imposed either by the provisions of some statute or 'by the parties, either expressly or by necessary implication arising out of the construction of the document or

1. *Imperial Loan Co. v. Stone*, (1892) 1 Q. B. 599 C. A. ; *Broughton v. Snook*, (1938) 1 All. E. R. 411, 417.

2. Cf. Secs. 11 and 12, Ind. Cont. Act, 1872.

3. O. VI, r. 4, C. P. Code ; *Purushottam Daji v. Pandurang*, (1915) I. L. R. 39 Bom. 149, 161.

4. O. VI, r. 10, C. P. Code.

agreement, or they may be implied by law according to the nature of the transaction.¹

*A condition precedent is 'not of the essence of the cause of action but it has been made essential. It is an additional formality superimposed on what otherwise would have been held valid.'*² In other words, where the cause of action is otherwise complete and something more has to be done before the plaintiff can enforce his right by suit, that something more is the condition precedent. Where any condition precedent is of the essence of the cause of action, it must be pleaded by the plaintiff.³ But where it is not of the essence of the cause of action but is only an 'additional formality superimposed', that is, where it is 'condition precedent' properly so called, it need not be pleaded by the plaintiff.⁴ unless he is required to do so by the express provision of any statute.⁵

(a) *Conditions precedent imposed by statute : Illustrations :*

The consent of the Advocate-General or of the local government, as the case may be, is a condition precedent to the institution of a suit by two or more persons in respect of public nuisances⁶ or public charities.⁷ Notice is a condition precedent to the institution of a suit against the Government or public officers in their official capacity.⁸ Notice to the railway administration of a claim for compensation for loss, deterioration or destruction of animals or goods is necessary under section 77 of the Indian Railways Act before a suit for compensation is maintainable against the railway company.⁹ To the institution of a suit for ejectment by the lessor against the lessee where a lease of immovable property has determined by forfeiture for a breach of an

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1. Wharton's Law Lexicon, 14th Edn., p. 228.
 2. Odgers on Pleading, 11th Edn., p. 96 ; Annual Practice, (1938) p. 361.
 3. *Naraindas v. Kunjilal*, A. I. R. 1924 Nag. 162 (2) (Notice was held to be an essential part of the cause of action in the case of resale by the vendor on the vendee's default.).
 4. O. VI, r. 6, C. P. Code.
 5. Cf. Sec. 80, C. P. Code, requires notice to be alleged in the plaint.
 6. Sec. 91, C. P. Code.
 7. Sec. 92, C. P. Code.
 8. Sec. 80, C. P. Code.
 9. *M. & S. M. Ry. Co. Ltd. v. Haridoss*, (1918) I. L. R. 41 Mad. 871 ; *E. I. Ry. v. Ajodhya Prasad*, A. I. R. 1919 Pat. 150 ; *E. I. Ry. Co. v. Fazal Elahi*, (1925) I. L. R. 47 All. 136 ; *Thakur Das v. E. I. Ry. Co.*, A. I. R. 1926 All. 686.

express covenant, a notice in writing as required by section 114A of the Transfer of Property Act, 1882, and a reasonable time for remedying the breach, in a case where the breach is capable of remedy, are conditions precedent¹. Under section 51 of the Indian Contract Act, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise. Thus, in a suit for damages for breach of promise, as in any other action of breach of contract, the readiness and willingness of the plaintiff to perform his part of the contract, is a condition precedent and need not be pleaded by the plaintiff.²

(b) *Conditions precedent imposed by agreement between parties :*

Illustrations : A condition in a fire policy that until a certificate of the insured's loss is produced, the loss of money should not be payable is a condition precedent to the maintainability of a suit to recover the loss.³ A condition in a policy to secure the insured against the fraud of the employee that the employer should, when required by the company, use all diligence in prosecuting the employee to conviction for any fraud, constitutes a condition precedent, and its non-performance is a good defence to the action.⁴ If A. agrees to pay a certain sum of money to B. upon delivery of certain bills by B. to C., the delivery of the bills is a condition precedent to B.'s right to sue for recovery of the money.⁵

The plea that there is a condition precedent to the plaintiff's right to sue may be taken by the defendant even where there is a partial or defective performance of a condition precedent, unless the condition and performance are made

1. 114A, Transfer of Property Act, 1882. *Gates v. Jacobs*, (1920) 1 Ch. 567. The defendant may rely on a defence that reasonable time has not elapsed though he has not pleaded that fact : *Hopley v. Thrvin Parish Council*, (1910) 74 J. P. 209.
2. (*Firm Kanwar v. (Firm) Ganpat*, (1926) I. L. R. 7 Lah. 442 ; *Jefferson v. Paskell*, (1916) 1 K. B. 57.
3. *Oldman v. Bewicke*, (1786) 126 E. R. 713 ; *Worsley v. Wood*, (1796) 6 T. R. 710. Cf. *Roper v. Lendon*, (1859) 120 E. R. 1120.
4. *London Guarantee Co. v. Fearnley*, (1880) 5 A. C. 911. Cf. *Welch v. Royal Exchange Assurance*, (1939) 1 K. B. 294.
5. *Bradley v. Chamberlyn*, (1893) 1 Q. B. 439.

divisible and apportionable, as in the case of a contract for the delivery of goods or any part thereof or of a covenant to build or repair several distinct houses.¹ But after the plaintiff has performed the contract in a substantial part and the defendant has accepted the benefit of part performance the latter may thereby be precluded from relying upon the performance of the residue, as a condition precedent to his liability. He must perform the contract on his part and claim damages in respect of the defective performance.²

A peculiarity of conditions precedent is that an illegal condition or a condition which has been made impossible by the person who imposed it will avoid the obligation.³ Therefore, where the defendant relies upon the non-performance of a condition precedent as a defence, the plaintiff in his reply may set up the case that it is an illegal or impossible condition. But if the condition precedent is neither illegal nor impossible and the plaintiff knows that it has not been performed, "the strictly proper course is for him to state the fact in his plaint and then to allege the facts on which he relies as excusing its non-performance, for the burden of proof lies on him." It is pointed out by Bullen & Leake that in England "in practice the usual course is for the plaintiff in this case, also to say nothing about the matter leaving the defendant to take the objection if he wishes in his Defence. The plaintiff will then plead his excuse in the Reply, although such a Reply is technically a departure from the allegation implied in the Statement of Claim that all conditions have been fulfilled."⁴ In India, having regard to the limits placed upon the plaintiff's right of reply under O. VIII, r. 9, C. P. Code, the strictly proper course and not the English practice ought to be followed.

An averment of the due performance or occurrence of a condition precedent shall be implied in every pleading and,

1. *Wilson v. London Adriatic Steam Nav. Co.*, (1865) 35 L. J. C. P. 9; *Wilkinson v. Clements*, (1872) 42 L. J. Ch. 38.
2. *Leake on Contract*, p. 501; *Mills v. Blackall*, (1847) 11 Q. B. 358; *Carter v. Scargill*, (1875) L. R. 10 Q. B. 564.
3. *Wharton's Law Lexicon*, 14th Edn., p. 229. Cf. Sec. 13(3) of the Ind. Sale of Goods Act.
4. *Bullen & Leake*, 8th Edn., p. 163n.

unless otherwise provided by any statute, it need not be alleged. It is for the defendant who intends to contest the performance or occurrence of a condition precedent to state specifically what that condition was and to plead its non-performance.¹ If the pleadings are silent, that is, if neither party refers to the condition, they must be read as implying an allegation of performance.² Even where the performance of a condition precedent is implied, the burden of proof is on the plaintiff.³

If any condition in a contract is relied on by the defendant as a condition precedent, he must state its terms and between whom it was made and whether verbally or in writing.⁴ An exception to the rule that the plaintiff need not plead the performance of a condition precedent is provided in section 80 of the Civil Procedure Code, which requires that the plaint shall contain that notice under that section had been given.

An allegation which is of the essence, which forms part of the cause of action is not a condition precedent within the meaning of Order VI, rule 6 of the C. P. Code and must be pleaded by the plaintiff.⁵

The difference between a material fact constituting or forming part of the cause of action and a condition precedent is liable to be overlooked and is often overlooked in the judgments of the Indian Courts.⁶ A notice of dishonour of a bill of exchange or cheque by the drawee or acceptor must be given to the drawer by the holder thereof before the drawer

1. O. VI, r. 6, C. P. Code which is equivalent to O. XIX, r. 14, R. S. C. ; *Gates v. Jacobs*, (1920) 1 Ch. 567 ; *fd. in Murli Manohar v. Raja Nand Singh*, A. I. R. 1924 Pat. 205 ; *In re Harris Calculating Machine Co., Sumner v. The Company*, (1914) 1 Ch. 920. 925 ; *Jolly v. Brown*, (1914) 2 K. B. 109, 120 ; *Firm Kunwar v. Firm Ganpat*, (1926) I. L. R. 7 Lah. 442.
2. *Murli Manohar v. Raja Nand Singh*, *supra*.
3. *Maharaja Bikram Kishore v. Tafaxal Hussein*, (1933) I. L. R. 60 Cal. 733.
4. Annual Practice (1938), p. 361.
5. Annual Practice (1938), p. 361.
6. Cf. *Jagannadha v. Lakshmana*, A. I. R. 1925 Mad. 132 ; *Naraindas v. Kunjilal*, A. I. R. 1924 Nag. 162 (2) (case of notice of resale). *Shanmuga v. Ramalingam*, A. I. R. 1928 Mad. 952 (where a demand is said to be of the substance of the cause of action and also a condition precedent).

can be made liable unless such notice was waived or excused.¹ The consequence of not giving due notice of dishonour is to discharge all parties who are entitled to require such notice. Dishonour and notice of dishonour are therefore material facts and the plaint must state those facts, or facts relied on as excusing the giving of such notice. They are part of the cause of action of the holder.²

In a suit for specific performance the plaintiff's readiness and willingness to perform the contract on his part is of the essence of his cause of action and hence he has to allege, and if the fact is traversed, he is required to prove, a continuous readiness and willingness from the date of the contract to the time of the hearing, to perform the contract on his part.³ In a suit for ejectment due notice to quit where the tenancy was determinable by notice is part of the plaintiff's cause of action and must be pleaded. In the above cases if the condition which is of the essence of the cause of action is not pleaded in the plaint, the defendant need not plead the existence and non-performance of the condition by the plaintiff, and the plaintiff ought not to be permitted to prove the condition, because he has not pleaded it, without an amendment of his plaint.

13. Consideration : Subject to the Exceptions specified in Sec. 25, and Sec. 28 (Exception 2), of the Indian Contract Act, 1872, consideration⁴ is a necessary element in a binding contract.⁵

Keeping the above rule and its exceptions in view, we may con-

1. Sec. 30, Neg. Inst. Act. Cf. Secs. 35 and 95 of the Act. For when notice of dishonour is dispensed with, see Sec. 98 of the Act.
2. *Per* Westropp C. J., in *Mulchand Joharimal v. Suganchand*, (1876) I. L. R. 1 Bom. 23, 43, fd. in *Ram Rajji Jambhekar v. Pralhaddas*, (1896) I. L. R. 20 Bom. 133. Cf. *Fruhauf v. Grosvenor & Co.*, (1892) 61 I. J. Q. B. 717.
3. *Ardeshir Nama v. Flora Sassoon*, (1927-28) L. R. 55 I. A. 360, 373, fd. in *Narinjan v. Muhammad Yunus*, A. I. R. 1932 Lah. 265, and *Madan Choudhry v. Kamalidhari*, A. I. R. 1930 Pat. 121; *Teju Kaya & Co. v. Gangji Nensey & Co.*, (1933) I. L. R. 57 Bom. 292.
4. Sec. 2, Ind. Cont. Act, 1872. In England, a simple contract requires valuable consideration to support it but if the promise is by deed even the express absence of any consideration will not affect its validity in law or in equity.
5. Cf. Sec. 10, Ind. Cont. Act, 1872.

sider the special defences as regards consideration under the following heads :

- (a) *Presence of consideration* : In a suit to set aside a deed on the ground that there was no consideration for the deed, the defendant may plead that there was good, sufficient or valuable consideration for the same, even if that consideration is not identical with that stated in the deed itself.¹
- (b) *Total absence or total failure of consideration* : Total absence or total failure of consideration is a good defence and must be pleaded specifically.² "A variety of circumstances might defeat the consideration, and ought therefore to be stated in order the plaintiff might know what he has to meet."³ A common instance of an agreement without consideration is where a voluntary or gratuitous promise not falling within the Exceptions mentioned above is given or accepted.⁴

In the case of negotiable instruments, consideration is presumed, and plaintiff need not plead consideration. If the defendant relies upon absence or failure of consideration as a defence he must plead that defence specifically;⁵ and the

1. *Kailash Chandra v. Harish*, (1900-01) 5 C. W. N. 158.
2. *Southall v. Rigg*, *Forman v. Wright*, (1851) 11 C. B. 481 (where the defence was that the promissory note sued on was obtained from defendant upon a representation by plaintiff that a sum of money was owing from defendant to plaintiff by virtue of an indenture, whereas no such sum was owing.)
3. *Per* Lord Abinger C. B., in *Stoughton v. Earl of Kilmorey*, (1835) 150 E. R. 31.
4. *Abdul Aziz v. Masum Ali*, (1914) I. L. R. 36 All. 268, 271 ; cf. *Adaitya v. Premi Chand*, (1929) 49 C. L. J. 278.
5. *Suppan Samban v. Sadaya Moopan*; A. I. R. 1927 Mad. 1146 (case of total absence of consideration. *Facts* : Defendants executed a pro-note as a security to cover the advance which the plaintiff was willing to pay on behalf of the defendants in connection with an expected litigation, but as a matter of fact the plaintiff did not spend any money for such litigation); *Solly v. Hinde*, (1834) 149 E. R. 865 (case of a total failure of consideration. *Facts* : B., being very ill, made his will and stated that he had left A. £100/- for his trouble in acting as his executor. Three days after that, A. said to B. that as he was to have £100/- for acting as his executor, it would save the legacy duty if B. would then sign a pro-note for the amount, which B. accordingly did. B. recovered from his illness and A. died in the life-time of B. In an action on the pro-note brought by the executors of A. against the executors of B., it was held that there was a total failure of consideration and the amount could not be recovered on the note.) ; cf. Sec. 43, Neg. Inst. Act, 1881.

plaintiff need not in his Reply, if any, state what the consideration was.¹

But absence of consideration in the case of negotiable instruments can be gone into between immediate parties to the transaction, and "also between remote parties where it has passed without consideration through the intermediate parties; but the want of consideration throughout must be stated in the defence, and must be proved if denied."²

Thus, if A. gave a promissory note to B. for Rs. 100/- and received payment from B. by a cheque which on presentation was dishonoured, in a suit by B. on the note, A. is entitled to take the defence of total absence or failure of consideration. If the defendant accepted a Bill for the plaintiff's accommodation, in a suit on the Bill, the defendant ought to take the defence that the Bill sued on was accepted by the defendant for the accommodation of the plaintiff, and there never was any consideration for the acceptance or payment thereof by the defendant.³ In a suit by an indorsee of a Bill against the drawer, the latter may take the defence that he drew the Bill for no consideration and that the drawee also indorsed the Bill for no consideration.

If consideration paid at the time of drawing, accepting or indorsing is to fail, subsequent failure is as good a defence as the original want of consideration.⁴ But failure of consideration is no defence against a holder for value or any person deriving title under him.⁵

- (c) *Partial absence or partial failure of consideration*: Partial absence or failure of consideration is not a defence to the whole amount of consideration. It is a defence affecting the instrument *protanto*,⁶ but the *quantum* to be deducted on

1. Bullen & Leake, 8th Edn., p. 617 (n).

2. Bullen & Leake, 8th Edn., p. 617 (n); Sec. 43, Neg. Inst. Act, 1881.

3. Bullen & Leake, 8th Edn., p. 617. See Exception I to Sec. 43, Neg. Inst. Act, 1881.

4. *Elliott v. Crutchley*, (1906) A. C. 7.

5. Secs. 43 and 59, Neg. Inst. Act, 1881.

6. *Munshi Bajrangi v. Udit Narain*, (1905-06) 10 C. W. N. 932 (suit on a mortgage where it was proved that the amount actually advanced was less than what was stated in the bond. Decree made for amount actually advanced); cf. Sec. 44, Neg. Inst. Act, 1881.

that account must be liquidated and must be in the nature of a certain debt.

- (d) *Difference in the character of consideration* : It is open to the parties to plead and prove that the actual consideration for a deed was different from what was mentioned in the deed, and even oral evidence is admissible to prove the difference in the character of consideration.¹ Thus, where A. executed a sale deed in favour of B., stating Rs. 800/- as the consideration and then sued B. for recovery of the amount, alleging that it was unpaid, B. may plead and prove that the real consideration was service rendered by him to A.² Where A. executed a sale deed in favour of B. and B. executed a sale deed in favour of A. and Rs. 1000/- is mentioned as the consideration in each of the sale deeds, in a suit by A. against B. for recovery of Rs. 1000/- as the unpaid consideration of the deed executed by him in favour of B., B. may plead and prove that the real consideration was the property given in exchange.³
- (e) *Inadequacy of consideration* : Where the consideration is lawful and of some value,⁴ the Court will not go into the question of its adequacy,⁵ but inadequacy of consideration may be taken into account by the Court in determining the question whether the consent of the promissor was freely given.⁶ Therefore, a party seeking to set aside or resist a transaction on the ground of inadequacy of consideration, must show such inadequacy as will involve the conclusion that he either did not understand what he was about, or was the victim of some imposition,⁷ such as fraud, coercion or undue influence.

1. *Annada Charan v. Hargobinda*, (1922-23) 27 C. W. N. 496, 500; *Lala Himmat Sahai v. Llewellyn*, (1895) I. L. R. 11 Cal. 486.
2. *Nathu Khan v. Sewak Koeri*, (1910-11) 15 C. W. N. 408.
3. *Muhammad Yusuf v. Muhammad Musa*, (1907) 4. A. L. J. 441.
4. *Simons v. Lang*, (1849) 13 L. T. O. S. 74; *Bolton v. Madden*, (1873) L. R. 9 Q. B. 55.
5. *Adib el Hinawi v. Yacoub*, A. I. R. 1936 P. C. 139.
6. Explan. 2 to Sec. 25, Ind. Cont. Act, 1872.
7. *Administrator-General v. Juggeswar*, (1878) I. L. R. 3 Cal. 192 (P. C.); cf. *Kedari v. Atmarambhat*, (1865) 3 B. H. C. R. (A. C. J.) 11, 18, 19; *Bhimbhat v. Yeshwantrao*, (1901) I. L. R. 25 Bom. 126, 128; *Banda Ali v. Banspat Singh*, (1882) I. L. R. 4 All. 352 (extreme inadequacy—presumption of oppression).

(f) *Illegal or unlawful consideration*: Every agreement of which the object or consideration is unlawful¹ is void.

Where any part of single consideration for one or more objects, or any one or any part of any one of several considerations for a single object is unlawful, the agreement is void.² But if the promise be divisible and apportionable to the several parts of the consideration, the promise in so far as it is not attributable to the illegal consideration may be valid. In other words, where you can sever the legal from the illegal part of a covenant, 'you may reject the bad part and retain the good'.³

Where an agreement is illegal or immoral, but the suit is based on another agreement which is naturally connected with or has for its support the original agreement, the intimate connection between the two agreements is a good defence.⁴

Illegality is no defence where it was unknown to the plaintiff and was not apparent on the face of the transaction.⁵

In the case of an *executory illegal agreement*, the person who has paid money or delivered goods under the agreement, may, before the illegal purpose is carried out, repudiate the transaction and recover back the money or goods as upon a

1. Under Sec. 23, Ind. Cont. Act, 1872, the consideration or object of an agreement is lawful, unless—it is forbidden by law; or is of such a nature, that if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies injury to the person or property of another; or the Court regards it as immoral or opposed to public policy. Cf. *Sayamma v. Punamchand*, (1933) I. L. R. 57 Bom. 678 (consideration was the compounding of a non-compoundable criminal charge); *Nabidad Khan v. Abdul Rahman*, (1931) I. L. R. 53 All. 130 (consideration was withdrawal of a criminal prosecution against a third party).
2. Sec. 24, Ind. Cont. Act, 1872; *Waite v. Jones*, (1835) 131 E. R. 1270.
3. *Mohammad Khalitür Rahman v. Muzammilullah Khan*, A. I. R. 1933 All. 468, fg. *Shackell v. Rosier*, (1836) 2 Bing. N. C. 634, and *Pickering v. Ilfracombe Ry.*, (1868) L. R. 3 C. P. 250; *W. M. Grant v. Eklal Jha*, A. I. R. 1922 Pat. 171, 177; *Saundatti Yellama Municipality v. Shripadbhat*, (1933) I. L. R. 57 Bom. 278; *Baker v. Hedgecock*, (1888) 39 Ch. D. 520.
4. *Kali Kumari v. Mono Mohini*, (1935) I. L. R. 63 Cal. 445.
5. *Fletcher v. Harcot*, (1622) 123 E. R. 1097; consd. in *Betts v. Gibbins*, (1834) 2 Ad. & El. 57.

total failure of consideration, but if he waits till the illegal purpose is carried out, he cannot maintain an action.¹ In the last case, the defendant must plead facts showing that it was an executory illegal agreement, that the illegal purpose has been carried out and that there was no repudiation by the plaintiff of the transaction at all, or at any rate, before the illegal purpose was carried out.

In the case of an executed illegal contract, money paid under it whether as the consideration or in performance of the promise cannot be recovered back ; for the parties are then equally delinquent (*in pari delicto*) and the rule applies that "*in pari delicto melior est conditio possidentis.*"² The same rule would apply where the illegal purpose has been executed in a material part, though it remains unexecuted in another material part,³ or where it has been executed as far as possible and further execution has become impossible.⁴

If a contract sued on is *ex facie* illegal, the defendant need not plead that it is illegal, but if it is not *ex facie* illegal and the defendant desires to raise the plea on facts *ultra*, he must plead those facts,⁵ in order to save the plaintiff from surprise.⁶ But if it is brought to the notice of the Court that the consideration for a contract is in whole or in part unlawful, the Court is bound to give effect to the fact thus brought to its notice even though the defendant has

1. *Per Mellish, L. J., in Taylor v. Bowers*, (1876) 1 Q. B. D. 291, *consd. in Kearley v. Thomson*, (1890) 24 Q. B. D. 742 ; *Srinivasa Ayyar v. Sesha Ayyar*, (1918) I. L. R. 41 Mad. 197. Cf. *Jadu Nath Poddar v. Rup Lal*, (1906) I. L. R. 33 Cal. 967 (case of a fraudulent transfer, fraud not having been carried into effect) and *Petherpermal v. Muniandy*, (1908) I. L. R. 35 Cal. 551 (P. C.) ; *Qadir Bukhsh v. Hakam*, (1932) I. L. R. 13 Lah. 713 (F. B.).
2. *Taylor v. Chester*, (1869) L. R. 4 Q. B. 303, 313, *fd. in Vilayat Husain v. Misran*, (1923) I. L. R. 45 All. 396, 398. Cf. *Qadir Bukhsh v. Hakam*, *supra*.
3. *Kearley v. Thomson*, *supra*, *fd. in Srinivasa Ayyar v. Sesha Ayyar*, *supra*.
4. *Re Great Berlin Steam Boat Co.* (1884) 26 Ch. D. 616.
5. *North Western Salt Co. v. Electrolytic Alkali Co.* (1913) 3 K. B. 422 ; *Lipton v. Powell*, (1921) 2 K. B. 51 ; *Nur Ilahi v. Mawaz Khan*, A. I. R. 1925 Lah. 345 ; *Maung Sein Htin v. Chee Pan Ngau*, (1925) I. L. R. 3 Rang. 275.
6. *Lipton v. Powell*, *supra*.

not pleaded the illegality and does not wish to raise the objection.¹ The Court does not sit to enforce, illegal contracts. There is no question of estoppel ; it is for the protection of the public that the Court refuses to enforce such a contract.²

14. Contributory Negligence :—In a suit for damages for negligence, contributory negligence is a good defence. Where contributory negligence is a defence the mere averment that the plaintiff has been guilty of contributory negligence is not sufficient. All facts showing or tending to show that the accident was caused partly by the negligence of the plaintiff and partly by the negligence of the defendant must be pleaded. Where such plea is taken it is the duty of the Court to endeavour to ascertain whether the negligent act or omission of the plaintiff or that of the defendant was the cause of the accident.³ Again, damage is the gist of the action. Therefore a party setting up a case of negligence must allege and prove both the breach of duty and damage.⁴ The defendant may, in a given case, plead that the negligence of the plaintiff was the sole cause of the accident and plead contributory negligence in the alternative.⁵

15. Damages :—The defendant need not plead specifically to damages claimed by the plaintiff. A general denial is sufficient.⁶ This rule applies to both general and special damages. But where special damages are claimed by the plaintiff, the defendant may object that the special damage stated is too remote or is not sufficient in point of law.⁷

Matters in mitigation of damages ought to be pleaded. They are not material facts in the sense that they are essential to the defence.

1. *Narayanamurti v. Ramalingam*, A. I. R. 1933 Mad. 187 ; *Alice Mary Hill v. William Clarke*, (1905) I. L. R. 27 All. 266 ; *Kregor v. Hollins*, (1913) 109 L. T. 225, C. A.
2. *Per Scrutton L. J.*, in *Re Mahmoud & Isphani* (1921) 2 K. B. 716.
3. *In re "Rabensfels,"* (1929) I. L. R. 56 Cal. 763 ; *Krishna Murari v. Dixit Chaturbhuj*, A. I. R. 1933 All. 214 ; *Mathuranayagam Pillai v. Municipal Council, Madura*, A. I. R. 1937 Mad. 152 ; *Yosaf Sagar Abdulla v. S. S. "Ellora,"* A. I. R. 1939 Sind. 349.
4. *The Karamea* (1922) 1 A. C. 68 ; *S. S. Heranger (owners) v. S. S. Diamond (owners)*, (1939) 1 A. C. 94, 104.
5. *Kansi Ram v. Mrs. Owen Roberts*, A. I. R. 1939 Lah. 565, *fg. Tidy v. Battman*, (1934) 1 K. B. 319 (contributory negligence is a question of fact).
6. O. VIII, r. 3, C. P. Code ; *Ross & Co. v. Scriven*, (1916) I. L. R. 43 Cal. 1001, 1010.
7. See Annual Practice, 1938, p. 382.

dant's defence which he must prove or fail but they are material in the sense that they must be proved and discussed at the trial as affecting the amount of damages which the plaintiff ought to get. It was held in the case of *Millington v. Loring*¹ that the plaintiff ought to plead matters in aggravation of damages. In the later case of *Wood v. Earl of Durham*² it was held that matters in mitigation of damages ought not be pleaded, because they are not material on the main issue and also because under O. XXI, r. 4, R. S. C., no defence is necessary as to damages claimed or their amount. In spite of the above decision, as a matter of practice, in England, no objection can be taken if such matters are pleaded.³

In India, there is no rule in the Civil Procedure Code corresponding to O. XXI, r. 4, R. S. C. and accordingly, such matters ought to be pleaded.⁴

16. **Estoppel** : In some cases the law will not allow a party to attempt to prove at the trial any matter,

- (a) which has been already decided against him, or
- (b) which is contrary to an essential averment made by him in a deed, or
- (c) which is contrary to what he himself represented to be the fact.

In each of the above cases he is said to be "estopped" from pleading or proving such matters.

The English law recognises three kinds of estoppel, namely,

- (a) by Record,
- (b) by Deed, and
- (c) *in pais*.

The Indian law has not in terms adopted this classification, but the rules of estoppel in force in India substantially come under the above heads and may usefully be considered under those heads.

(a) **Estoppel by Record** : Matters of record giving rise to estoppel are in modern times limited to matters of records of

1. *Millington v. Loring*, (1880) 6 Q. B. D. 190. Cf. *Scott v. Sampson*, (1882) 8 Q. B. D. 491 (where evidence of matters in mitigation of damages was not allowed because not pleaded).
2. *Wood v. Earl of Durham*, (1838) 21 Q. B. D. 501.
3. See Odgers on Pleading, 11th Edn., pp. 97-99.
4. See Mulla's Commentaries on the C. P. Code, under O. VI, r. 2.

Courts of law.¹ Such records are twofold: (i) Record of proceedings of a Court of law, and (ii) Record considered as a judgment.²

In the first case, 'no one whether party, privy or stranger, is permitted to deny the fact that the proceedings narrated in the record took place, or the time when they purport to have taken place, or that the parties there named as litigants participated in the cause or that judgment was given as therein stated; unless in a direct proceeding instituted for the purpose of correcting or annulling the record.'

In the second case, the admissibility and effect of judgment depends upon whether the judgment is *in rem* or *in personam*, and upon the question whether the judgment is that of a domestic or foreign Court.³

Judgments are the most extensive species of record.

In India, estoppel by record is dealt with by the Civil Procedure Code, sections 11—14, and by sections 40—44, Indian Evidence Act.

Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under sections 40, 41, or 42 of the Indian Evidence Act and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion.⁴

A judgment *inter partes* creates an estoppel if it results in *res judicata*.⁵

1. Letters patent, pleadings, warrants of attorney, which were among the matters of record enumerated by Lord Coke, are now obsolete; Hals. 2nd Edn., Vol. 13, p. 403, Art. 456.
2. *Ahsan Hussain v. Maina*, I.L.R. (1938) Nag. 431.
3. *Marati v. Jagannathdas*, A. I. R. 1939 Nag. 72; *Nataraja Pillai v. Subbaraya Chettiar*, I.L.R. (1939) Mad. 507 (judgment of a foreign Court when judgment in rem).
4. Sec. 44, Ind. Evidence Act; cf. *Chenvirappa v. Puttappa*, (1867) I. L. R. 11 Bom. 708, 713; *Varadarajulu Naidu v. Srinivasulu*, (1897) I. L. R. 20 Mad. 333.
5. Sec. 40, Ind. Evidence Act, read with Sec. 11, C. P. Code. Estoppel must be distinguished from *res-judicata*: *Res-judicata* ousts the jurisdiction of a Court, while estoppel only shuts the mouth of a party: *Cassamally v. Sir Currimbhoy Ebrahim*, (1912) I. L. R. 36 Bom. 214.

A lis pendens without judgment creates no estoppel¹.

An '*estoppel against estoppel*', as where there are conflicting judgments *in rem*, shall have the effect of setting the whole matter at large². But an existing estoppel arising from a judgment *inter partes* is unaffected by a subsequent judgment, *inter partes* or *in rem*, where parties to the later judgment are different or are not both representing the same interest in the earlier proceedings³.

(b) **Estoppel by Deed** : The old common law doctrine of estoppel by deed, namely, that a man shall not be permitted to dispute his own solemn deed, in other words, he shall always be estopped by his own deed or not permitted to aver or prove anything in contradiction to what he has so solemnly and deliberately avowed⁴, cannot be strictly applied to India⁵, where the form of expression or the literal sense is not so much to be regarded as the real intention of the parties which the transaction discloses⁶.

According to the above common law doctrine, a document executed under seal is conclusive, not merely as to the interests conveyed but also as regards matters of recital⁷. In the last case, estoppel arises where the action is brought to enforce rights arising out of the deed and not collateral to it⁸. A party is not prevented from disputing the correct-

1. *Hitchin v. Campbell*, (1772) 95 E. R. 1069.
2. *R. v. Hutchings*, (1881) 6 Q. B. D. 300 C. A., per Lord Selborne L. C. at p. 303.
3. *Poulton v. Adjustable Cover etc. Co.*, (1908) 2 Ch. 430.
4. 2 Blackst. Comm. 295 ; *Bowman v. Taylor*, (1834) 2 Ad. & El. 278, 291.
5. *Ram Gopal v. Blaquiere*, (1867) 1 B. L. R. (O. C.) 37 ; *Param Singh v. Lalji Mal*, (1876-78) I. L. R. 1 All. 403 ; *Kedarnath v. Donzelle*, (1873) 20 Suth. W. R. 352 ; *Gokaldas Gopaldas v. Puranmal Premeukhdas*, (1884) I. L. R. 10 Cal. 1035 ; *Rajah Sahib Perhlad v. Baboo Budhoo Sing*, (1869) 12 Moo. I. A. 275.
6. *Thakur Vasonji v. Mt. Chanda Bibi*, (1914-15) 19 C.W. N. 873 (P. C.) ; *Hunoomanpersaud Panday v. Mt. Babooee*, (1856) 6 Moo. I. A. 393, 411.
7. Cf. *Bowman v. Taylor*, *supra* ; *Lainson v. Tremere*, (1834) 1 A. & E. 792.
8. *Wiles v. Woodward*, (1850) 5 Exch. 557, 563 ; *Lainson v. Tremere*, *supra*, at 801, 802 ; *Young v. Raincock*, (1849) 7 C. B. 338 ; *Stroughill v. Buck*, (1850) 14 Q. B. 781 ; *Carpenter v. Buller*, (1841) 8 M. & W. 212.

ness of that which is not an essential averment but is a mere description, such for instance, as the date of the deed, the quantity of land, its nature, arable or meadow and the like¹. In other words, there is no estoppel if action is not founded on the deed.

In India, a deed is not conclusive as regards the interests conveyed. Thus, in India, a deed of conditional sale in favour of the defendant may be shewn to have been executed in order to protect the claims of third persons. A conveyance may be shown to be a mere benami transaction.

As regards estoppel by recitals in a deed, the principle accepted in a large number of cases in India is that statements in documents are, as admissions², always evidence against the parties ; but estoppel by recitals can only arise if any material statement in a deed can be brought within the rule as to estoppel by conduct contained in Section 115 of the Indian Evidence Act³. In a Calcutta case, Mookerjee J., stated the doctrine in another form : To give a recital effect of an estoppel it must be shown that the object of the parties was to make the matter recited a fixed fact as the basis of their action⁴.

(c) **Estoppel in pais** : According to the modern doctrine, the term is said to arise from (a) agreement or contract ; (b) act or conduct or representation⁵.

(i) *Estoppel by agreement* : Estoppel may be found to exist where there is an agreement either express or to be implied from the conduct of the parties or the nature of, the transaction itself which justice requires should be enforced.

1. See Taylor on Evidence.

2. Such admissions may have the effect of shifting the onus ; *Chandra Kunwar v. Chaudhri Narpal*, (1907) I. L. R. 29 All. 184 (P. C.).

3. Cf. *Param Singh v. Lalji Mal*, (1876-78) I. L. R. 1 All. 403 ; *Sadhu Churn v. Basudev*, (1905-06) 9 C. W. N. ccviii ; *Johnstone v. Gopal Singh*, (1931) I. L. R. 12 Lah. 546.

4. *Bipin Behary v. Tincowri*, (1911) 13 C. L. J. 271.

5. "Estoppel in pais" under the ancient doctrine of the common law, sprang from (i) livery of seisin ; (ii) entry ; (iii) acceptance of rent ; (iv) partition ; and (v) acceptance of an estate.

The entire law of estoppel by agreement has been explained in the case of *Rup Chand Ghose v. Sarbessur Chandra*¹ from which the following extracts have been taken :

“Sections 116 and 117 of the Indian Evidence Act mention certain well-known forms of estoppel by agreement, viz., that of the tenant, the licensee, bailee, and acceptor of a bill of exchange. But these sections are not exhaustive of the doctrine of estoppel by agreement. The case of *Dalton v. Fitzgerald*² is an instance of such an estoppel which is not provided for by the Act.”

“Estoppel by agreement may arise where the parties did not come to an express agreement but dealt with one another on the basis of a conventional state of facts, and the estoppel is nothing but the carrying out what the parties as honest men must have intended at the time of making the bargain. The tenant, and licensee and bailee obtaining possession are taken to accept it upon the terms that they will not dispute the title of him who gave it to them and without his permission they would not have got it. The act of acceptance of a bill amounts to an undertaking to pay to the order of the drawer. Another instance of such an estoppel may arise out of the doctrine of election e.g., where the party cannot both approbate and reprobate.³ The principle of such an estoppel is—that where property is taken under an instrument and the taking possession is in accordance with a right which would not have been granted except upon the understanding that the possessor should not dispute the title of him under whom the title was derived.”

“Although a tenant cannot question his landlord's title, a grantee in fee may do so, because it is not a case of

1. *Rup Chand Ghose v. Sarbessur Chandra*, (1905-06) 10 C. W. N. 747.

2. *Dalton v. Fitzgerald*, (1897) 1 Ch. D. 440, on appeal (1897) 2 Ch. D. 86. (In that case the defendant obtained possession of certain land from a grantor who had no title to it. By means of that possession he was able to acquire a good title by possession against the true owner. Held, he was estopped as against the grantor and his remainder man from disputing the validity of the deed of grant.)

3. *Mt. Bibi Kundo v. Onkar Nath*, A.I.R. 1939 Lah. 63.

permissive occupation. The possession is the sole right of the grantee who is under no obligation express or implied that he will some time or in some event surrender his possession."

On the above principles, a mortgagor is estopped from denying the title of the mortgagee to the mortgage money,¹ and the mortgagee is estopped from denying the title of the mortgagor to the mortgage property.²

- (ii) *Estoppel by conduct or representation*: The rule of estoppel by conduct or representation is contained in Section 115 of the Indian Evidence Act which reads as follows :

"When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing"³

It is not essential that the intention of the person making the representation should have been fraudulent⁴ or that he should have been acting with a full knowledge of the circumstances and not under a mistake or misapprehension.⁵

The words 'declaration, act or omission' are equivalent to representation, express or implied, generally used by English writers. Thus, estoppel may be brought about by acquies-

1. *Hillaya Subbaya v. Narayanappa*, (1912) I. L. R. 36 Bom. 185; *Bengal Coal Co. Ltd. v. Sitaram Chatterji*, (1935) 61 C. L. J. 560.
2. *Sombhai Adesing v. Jagjivan*, A. I. R. 1928 Bom. 380; *Jai Nandan v. Umrao Koeri*, A. I. R. 1929 All. 305; *Mahadeo Chaube v. Ram Raj*, A. I. R. 1930 All. 108.
3. See *Sarat Chunder Dey v. Gopal*, (1891-92) L.R. 19 I.A. 203 (It is not essential that the intention of the person making the representation should have been fraudulent, or that he should have been acting with a full knowledge of circumstances and not under a mistake or misapprehension).
4. *Abdullah Shah v. Mahomed Yaqub*, A.I.R. 1938 Lah. 558; *Sarat Chandra Dey v. Gopal*, *supra*.
5. *Ananda v. Parbati*, (1906) 4 C. L. J. 198; cf. *Shyam Lal v. Rameswari*, (1916) 23 C. L. J. 82; *Syed Ali v. Manik*, (1922-23) 27 C. W. N. 969; *Forbes v. Ralli*, (1924-25) L. R. 52 I. A. 178; cf. *Abdul Kader Choudhury v. Upendra*, (1935-36) 40 C. W. N. 1370.

cence¹ or by neglect,² or by silence where there is a duty to speak,³ or where it is fraudulent.⁴ A representation which can ground an estoppel must be representation of an existing fact and not of a future intention which may or may not be enforceable in contract.⁵

Statutory estoppel: Estoppel may be created by Statute. The principles underlying such estoppels are generally those underlying estoppels by agreement or estoppels *in pais*. But where a statute declares that a certain matter is conclusive under certain circumstances between certain parties, it is not necessary to consider whether the estoppel can be brought within any of the general principles of estoppel. A few instances of Statutory estoppels are set out below :

- (1) *Contract Act* : Section 235 deals with estoppel of a person who untruly represents himself to be the authorised agent of another. Section 166 deals with the estoppel of bailee from denying the bailor's title. Section 237 deals with the estoppel of the principal inducing belief in the agent's authority.
- (2) *Negotiable Instruments Act* : Section 120 provides that no maker of a promissory note and no drawer of a bill of exchange or cheque, and no acceptor of a bill of exchange for the honour of the drawer, shall, in a suit thereon by a holder in due course, be permitted to deny the validity of the instrument as originally made or drawn. Section 121 provides that no maker of a promissory note, and no acceptor of a bill of exchange payable to order shall, in a suit thereon by a holder in due course, be permitted to deny the payee's capacity, at the date of the note or bill, to indorse the same.

1. *Carr v. L. & N. W. Ry. Co.*, (1875) L. R. 10 C. P. 307 ; *Swan v. N. B. Australasian Co.*, (1863) 2 H. & C. 175 ; *Morrison v. Verschoyle*, (1901-02) 6 C. W. N. 429 ; *Kuicarji v. Bhurelal*, A. I. R. 1939 Nag. 163.
2. *Kanchan v. Kamala*, (1915) 21 C. L. J. 441 ; *Umaram v. Puruk*, A. I. R. 1925 Cal. 993 ; *Chadwick v. Manning*, (1896) A. C. 231, 238.
3. *Abdul Kader Choudhury v. Upendra*, (1935-36) 40 C.W.N. 1370 ; *Mul Ra, v. Janeshwar Lal*, 41 P. L. R. 573 ; *Niharbala Debi v. Shashadhur Roy Chaudhuri*, (1931) I.L.R. 58 Cal. 358.
4. *Bindubashini Debi v. Kashi Nath*, (1931) I. L. R. 58 Cal. 1371 ; *Kotayya Naidu v. Mahalakshamma*, (1933) I. L. R. 56 Mad. 646.
5. *Dawson Bank Ltd. v. Nippon Menkwa Kabushiki Kaish*, (1935-36) I. R., 62 I. A. 100,

Section 122 provides that no indorser of a negotiable instrument shall, in a suit thereon by a subsequent holder, be permitted to deny the signature or capacity to contract of any prior party to the instrument.

- (3) *Indian Partnership Act* : The provision in Section 28 regarding liability of a person who represents himself or knowingly permits himself to be represented to be a partner in a firm, depends upon the principle of estoppel.
- (4) *Sale of Goods Act* : Section 27, *proviso*, says that, under certain circumstances, the owner of goods will be estopped from setting up his title against the buyer.
- (5) *Specific Relief Act* : Section 18 deals with the purchaser's rights against a vendor with an imperfect title and it embodies the same principle as is to be found in Section 43 of the Transfer of Property Act, 1882, which is to the effect that as between the transferor and the transferee, the transferor cannot plead subsequent title to the land transferred if he had induced the transferee to pay money for the transfer. This principle is an extension of the rule of estoppel,¹ and is sometimes referred to as feeding the grant by estoppel.²
- (6) *Transfer of Property Act* : Section 41 which provides that where the ostensible owner of an immovable property transfers the same for consideration, the transfer shall not be voidable, if it is shown that the transferee after taking reasonable care to ascertain that the transferor had power to make the transfer has acted in good faith. This rule is based upon the doctrine of estoppel.³

Section 43, which has been already referred to, is an illustration of the principle that a subsequently acquired interest feeds the estoppel.⁴

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1. *Mokhoda v. Umesh Chandra*, (1908) 7 C. L. J. 381, 383.
 2. *Tilakdhari v. Khedan Lal*, (1920-21) 25 C. W. N. 49.
 3. *Ramecoomar v. McQueen*, (1885) 18 Suth. W. R. 163 (P. C.); *Khwaja Md. Khan v. Md. Ibrahim*, (1904) 1 L. R. 26 All. 490; *Baidyanath v. Alef Jan Bibi*, (1931-32) 36 C. L. J. 93; *Krishna Kishore v. Sarat Kumari*, (1936-37) 41 C. W. N. 797.
 4. *Krishna Chandra v. Rasik Lal*, (1916-17) 21 C. W. N. 218; *Rustam Ali v. Abdul Jabbar*, A. I. R. 1923 Cal. 535; *Villa v. Petlay*, A. I. R. 1934 Rang. 51.

Estoppel against statute : There can be no estoppel against an act of the legislature,¹ and no estoppel on a statement of law.² A statutory defence not set up in a prior suit can be set up in a subsequent suit.³

Estoppel, pleading of—The facts giving rise to estoppel are material facts and must now be specially pleaded⁴, unless—

- (a) the estoppel appears on the face of the adverse pleading, where it is ground for an objection in point of law, or
- (b) there is no opportunity of pleading it.⁵

Therefore, where the estoppel does not appear on the face of the adverse pleading, or where there is an opportunity of pleading it, the defendant in his defence, and the plaintiff in his reply, must plead the estoppel relied on specially.

A vague and general allegation in the written statement that the plaintiff is estopped from claiming, say, an account from the defendant, is not sufficient⁶. It has, however, been held in an English case that it is not necessary to plead estoppel in any technical or special form so long as the matter relied upon as raising the estoppel is stated in such a manner as to show that the party pleading relies upon it as a defence or answer.⁷ In India, where

1. *Fojmal v. Mst. Singari*, 1939 M. L. R. 60 (c) ; *Jagabandhu Saha v. Radha Krishna Pal*, (1909) I.L.R. 36 Cal. 920.
2. *Kartar Singh v. Dayal Das*, A. I. R. 1939 P.C. 201.
3. *Nafar v. Bhusi*, (1922) 65 I. C. 581.
4. O. VI, r. 2, C. P. Code.
5. See Odgers on Pleading, 11th Edn., p. 222 ; Bullen & Leake on Precedents of Pleadings, 8th Edn., p. 663 ; *Matthew v. Osborne*, (1853) 13 C. B. 919 ; *Trevilian v. Lawrence*, (1704) 2 Sm. L. C., 12th Edn., p. 765 ; *Co-operative Town Bank v. Shanmugam*, (1930) I. L. R. 8 Rang. 223, (C. obtained a decree against M. and 2 others and in execution attached a decree obtained by M. against a third person. No objection was taken by M. to the said attachment although it was upon notice to him, and C. after realising the amount of the decree released the co-judgment-debtors of M. Thereafter B., a Bank, sued C. (making M. a party defendant) for a declaration that the decree which was the subject-matter of the attachment had been assigned to it by M. It was not stated in the plaint that M. was the chairman of B. C. was not aware of the said fact and did not plead that notice to M. was notice to B., and that B. not having taken any objection to that attachment, is estopped from challenging it. *Held*, defence of estoppel can be taken if it is warranted by the facts proved or admitted even if those facts are not specially pleaded).
6. *Shashk Abdul Rahim v. Mt. Barira*, (1921) 6 P. L. J. 273, 277.
7. *Houstoun v. Sligo (Marquis)*, (1885) 29 Ch. D. 448.

technical rules of pleading are seldom observed, the above rule should apply with greater force.

The following is an illustration of a defence of estoppel by conduct :

"The defendant says that the plaintiff is estopped from saying that the goods which he claims in this action are the property of the plaintiff, because the said goods were with the knowledge of the plaintiff advertised and put up for sale by public auction by one....., and the plaintiff and the defendant attended the said auction sale on March 14th, 1923, and the defendant then bid for and purchased the said goods in the presence of the plaintiff, who never made any claim to the ownership of the said goods but by his silence permitted and induced the defendant then and there to purchase the same"¹.

17. Fair Comment: The plea that the words complained of are 'fair comment on a matter of public interest' is good defence to an action founded on defamation. It is "precisely where criticism would be otherwise actionable as a libel that the defence of fair comment comes in."²

The facts upon which the comment purports to be made must exist, for otherwise the foundation of the plea fails; and such facts must be truly stated³. Again, comment to be justifiable fair comment, must appear as comment, and must not be so mixed up with the facts that the reader cannot distinguish between what is report and what is fair comment⁴.

In England, before the year 1890, the plea of fair comment used to be drawn up in a form different from what is now in vogue. The following is an example of the said old form of plea :—

"The said words are fair and bona fide comment on matters of public interest, viz., the said judicial proceedings and the promotion and registration of the E. N. F. O. Company, and

1. Adopted from Bullen & Leake, 8th Edn., pp. 663, 664.

2. *Per Lord Loughburn C. in Dakhyi v. Labouchere*, (1908) 2 K. B. 325, n. 327.

3. *Subhas Chandra Bose v. Knight & Sons*, (1928) I. L. R. 55 Cal. 1121 ; *Subramania v. Hitchcock*, A. I. R. 1925 Mad. 950 ; "*Truth*" and "*Sportsman*" Ltd v. *George Stanley Thompson*, A. I. R. 1933 P. C. 36.

4. *Hunt v. Star Newspaper Co., Ltd.*, (1908) 2 K. B. 309, 319.

were published by the defendants *bonafide* and without any malice towards the plaintiff."¹

In the year 1890, the Court of Appeal in *Penrhyn v. The Licensed Victuallers' Mirror*² approved of the following form of plea :

"In so far as the words complained of consist of allegations of fact they are true in substance and in fact, and in so far as they consist of expressions of opinion they are fair comments made in good faith and without malice upon the said facts which are matters of public interest."

The above plea which is generally called 'the rolled-up plea' is now the accepted standard of the plea of fair comment. There was some doubt as to whether this plea was really a plea of fair comment coupled with a plea of justification. But, in the case of *Sutherland v. Stopes*,³ the House of Lords held that the plea was one of fair comment only. If a plea in the above form is taken, no particulars of the matters on which the defendant relies to support his plea of fair comment will be ordered, because the matters were the statements of facts contained in the libel and the defendant cannot be required to pick out the statements on which he relies as statements of fact as distinguished from statements of opinion.⁴

Where, however, there is no averment that the comments are upon "the said facts",⁵ or where neither the language of the libel nor the plea of fair comment makes it clear what are the facts on which the comment is based, particulars of facts will be ordered.⁶

It has been pointed out that where the facts upon which comment purports to be made exist and are truly stated and where facts and comment are not so mixed up as to be indistinguishable, the defendant is entitled to take the plea of fair comment, in modern practice, in the form of a rolled-up plea. But where the above conditions exist, the absence of any specific plea of 'fair comment' will nevertheless entitle the defendant to raise the issue of 'fair comment'

1. See Fraser on 'Libel and Slander', 7th Edn., p. 314 (para. 6 of Form No. 29).
2. *Penrhyn v. The Licensed Victuallers' Mirror*, (1890) 7 T. L. R. 1.
3. *Sutherland v. Stopes*, (1925) A. C. 47.
4. *Aga Khan v. Times Publishing Co.*, (1924) 1 K. B. 675.
5. *Aga Khan v. Times Publishing Co.*, *supra.*, appd. in *Subhas Chandra Bose v. Knight & Sons*, (1927) 1 L. R. 54 Cal. 73.
6. *Digby v. Financial News Ltd.*, (1907) 1 K. B. 502 ; *Peter Walker & Sons Ltd. v. Hodgson*, (1909) 1 K. B. 239.

under the general plea of 'not guilty', in as much as the general plea of absence of guilt includes a plea of fair comment.¹

18. Fraud : Fraud as a ground of action or as a ground of defence must be specially pleaded.² General allegations, however strong, are not sufficient to amount to even an averment of fraud of which any Court will take notice.³ The plea should contain statement of specific particulars as to the facts constituting the fraud alleged,⁴ except in a case where the defendant is unable to give particulars of fraud before discovery.⁵

Coercion, undue influence, fraud, and misrepresentation are all separate and separable categories in law but they may overlap or may be combined. The plea, however, must clearly show what ground or grounds are really taken up.⁶

To call a deed both 'fraudulent' and 'bogus' is not a clear piece of pleading. Though fraud may be present in both cases, a deed may be fraudulent without being bogus and hence the two pleas should be kept distinct.⁷ See 'Fraud' under 'Particulars', Chap. XX.

19. Fraudulent Intention : Wherever it is material to allege fraudulent intention, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred.⁸

20. Illegality : Facts showing illegality are material facts and must be specially pleaded.⁹ But if a contract sued on is *ex facie* illegal, there are no facts to plead and the defendant need not plead that it is illegal, because that is law not fact.¹⁰ The omission on

1. "*Truth*" and "*Sportsman*" Ltd. v. *George Stanley Thompson*, A. I. R. 1933 P. C. 36.
2. O. VIII, r. 2, C. P. Code.
3. *Gunga Narain Gupta v. Tiluckram Chowdhry*, (1888) I. L. R. 15 I. A. 119 ; *Bal Gangadhar Tilak v. Shrinivas*, (1915) I. L. R. 39 Bom. 441 (P. C.).
4. *Gopatar v. Abdul Aziz*, (1931) I. L. R. 9 Rang. 135 ; *Sankunni Menon v. Nallappah Ramunni Menon*, (1915) 29 I. C. 482 (Mad.).
5. *Leitch v. Abbott*, (1886) 31 Ch. D. 374.
6. *Bal Gangadhar Tilak v. Shrinivas*, *supra*, at 467.
7. *Godbole v. Mt. Nani Bai*, A. I. R. 1938 Nag. 546.
8. O. VI. r. 10, C. P. Code.
9. O. VIII, r. 2, and O. VI, r. 2, C. P. Code ; *Nur Ilahi v. Mawaz Khan*, A. I. R. 1925 Lah. 345.
10. *North Western Salt Co. v. Electrolytic Alkali Co.* (1913) 3 K. B. 422 ; *Kregor v. Hollins*, (1913) 109 L. T. 225 C.A.

the part of the defendant to plead facts *ultra* showing illegality does not amount to waiver and does not mean that the Court shall adjudicate upon a matter as if a ground valid in law did not exist which does exist.¹ The Court can and shall take notice of an illegality which emerges in the course of a case although not pleaded.²

21. **Inevitable Accident** : If the defence that the damage complained of arose from inevitable accident is relied on, it is proper and advisable that it should be specially pleaded.³ In one case, where the defendant did not plead inevitable accident specifically in the defence and sought to raise at the trial of the action a defence that the alleged injuries and damage were due to an inevitable accident, he was not allowed to raise such defence.⁴ But in a later case, it was held that where in an action claiming damages for negligence, defendant in his defence denies negligence, he may give evidence that the accident upon which the action is based was an inevitable accident and it is not necessary in such a case that the defence of inevitable accident should be specially pleaded.⁵

22. **Jurisdiction-want of** : Facts showing that the Court has no jurisdiction to try or entertain the suit are material facts and ought to be specially pleaded,⁶ unless want of jurisdiction appears on the face of the plaint.

23. **Jus Tertii** : In some cases and under certain circumstances the plea of *jus tertii* (that is, the right or title of a third person) may be set up by the defendant.

*An agent can set up jus tertii on behalf of and by the authority of the person whose title he sets up.*⁷ Thus, where the defendant had received certain goods as the agent for the plaintiff, and he sold those goods and was in possession of the proceeds of the sale, and the claim upon him was for that amount, *prima facie* he had no defence to such a claim; but he set up the fact that the goods which he had sold did not really belong to the plaintiff but belonged to a man named Robbins who had made a claim on him for them; and he was

1. *Re Robinson's Settlement, Gant v. Hobbs*, (1912) 1 Ch. 717, 727, 728.

2. *Asaram v. Ludheshwar*, A. I. R. 1938 Nag. 335 (F. B.) at p. 341.

3. See Bullen & Leake, 8th Edn., p. 914 (n).

4. *Winchelsea v. Beckly*, (1886) 2 T. L. R. 300.

5. *Rumbold v. London County Council*, (1909) 25 T. L. R. 541.

6. O. VIII, r. 2, C. P. Code.

7. *Rogers, Sons & Co. v. Lambert*, (1891) 1 Q. B. 318; *Russian Commercial & Industrial Bank v. Comptoir etc. Mulhouse*, (1925) A. C. 112.

relying upon the right of Robbins, by the authority of Robbins, as a defence to the claim for the money, namely, the proceeds of sale of the goods : *Held*, that the defendant might set up the *jus tertii* of Robbins as an answer to the action.¹

The above principle, however, cannot be applied to the claiming of a sum due on an account so as to enable the agent, who would otherwise be bound to account to his principal in respect of moneys paid to him, to resist the claims of his principal by alleging that some claim has been made to the moneys by some other person.²

A tenant is estopped from denying the title of the landlord during the continuance of the tenancy.³ But he may set up a *jus tertii* in favour of a third person, where he has been evicted by title paramount and by a party entitled to immediate possession,⁴ or where he has given up his tenancy.⁵

Whatever would estop or bar the person whose title is set up must also bar the person pleading *jus tertii* whether the estoppel is by record, deed, or *in pais*. Thus, where A. filed a suit for ejectment and the tenant set up the title of a third person, a judgment recovered by A. against the third person was held to estop the tenant from setting up the plea of *jus tertii*.⁶

In case of trespass to goods, possession being *prima facie* evidence of right to possession, where the plaintiff in possession has been dispossessed, he can successfully maintain an action against the wrong-doer unless the latter shows a better title in himself or authority under a better title.⁷ But where a plaintiff relies upon a mere

1. *Biddle v. Bond*, (1865) 6 B. & S. 225.
2. *Blaustein v. Maltz Mitchell & Co.*, (1937) 2 K. B. 142, *Per* Slessor J., at 151.
3. Sec. 116, Evidence Act.
4. *Valia Muhammad v. Sarakutti Keyi*, A. I. R. 1934 Mad. 197; *Ramaswami v. Alaga Pillai*, A. I. R. 1925 Mad. 143 (The plaintiff having been ousted by title paramount has himself no title to sue). Cf. *Rev. Luckman Chaplain v. Pearey Lal*, A. I. R. 1939 All. 670, (where the tenant was held not estopped from pleading that since the commencement of the tenancy, the title of the landlord had passed to the Government so that he had no right to realise any rent.)
5. *Ramxani v. Bansidhar*, A. I. R. 1935 Oudh 385. Cf. *Bilas Kunwar v. Desraj Ranjit Singh*, (1914-15) L. R. 42 I. A. 202.
6. *Krishnan Nair v. Kambi*, A. I. R. 1937 Mad. 544. Cf. *Ajodhiya Prasad v. Mt. Sanjhari Kuar*, A. I. R. 1932 Oudh 342.
7. *Elliott v. Kemp*, (1840) 7 M. & W. 306; Bullen & Leake, 8th Edn., p. 859.

right to property without actual possession, the defendant may rebut his title by showing a *jus tertii*.¹

In case of conversion of goods, the same rule would apply.²

In case of trespass to land, the same rule would also apply except in the case of a suit brought under Section 9 of the Specific Relief Act, read with Art. 3 of the Indian Limitation Act. Sec. 9 provides that if any person is dispossessed without his consent of immovable property otherwise than in due course of law, he or any person claiming through him, may, by suit instituted (within six months from the date of dispossession thereof) notwithstanding any other title that may be set up in such suit. For onus of proof of title in suits brought more than six months after the date of dispossession, see section 110 of the Indian Evidence Act and the cases cited under that section.

Where, however, the facts are consistent with possession being in either A. or B., the law will attribute possession to whichever of them has the legal title to goods.³

In a plea of *jus tertii* the defendant must state in whom the right of suit resides. A mere allegation that there may be a third party with better title is nothing.⁴ He must prove that the person whose right he sets up in defence has a subsisting right.⁵

24. Justification : Justification is a defence showing sufficient reason why the defendant did what he is called upon to answer. It is an excuse for an act *prima facie* wrongful. The defence of justification may be taken in contract or in tort. In either case, it must be specially pleaded.

In contract, the defendant may justify an alleged breach of contract. He may justify his failure to perform it on any ground which existed at the time of his refusal to perform, *e. g.*, late delivery, short delivery, defective delivery, fraud of the seller, and this, whether he knew of that ground or not at the time, or whether he gave that as his reason for his refusal or not.⁶

1. Bullen & Leake, 8th Edn., p. 516 (note).

2. Bullen & Leake, 8th Edn., p. 356 (note).

3. *Ramsay v. Margrett*, (1894) 2 Q. B. 18.

4. *Ganshamdoss v. Gulab Bi Bai*, (1927) I. L. R. 50 Mad. 927 (F. B.). Cf. *Chaturbhuj Singh v. Sarada Charan*, (1933) I. L. R. 11 Pat. 701; *Gour Chandra Das v. Subashini*, A. I. R. 1926 Cal. 240.

5. *Mt. Guda Kuri v. Adnath Pande*, I. L. R. (1938) All. 779.

6. See Pollock & Mulla's Ind. Sale of Goods Act, p 325; *Taylor v. Oakes*, (1922) 127 L. T. 267 (defective delivery); *Levy v. Green*, (1859) 1 E. & E.

In tort, justification, as a special defence, may arise under a variety of circumstances. It may refer to a particular wrong or a particular class of wrong. Thus, in an action for libel, a defence of justification is a defence showing the libel to be true and this defence is dealt with under the next heading. But there are other justifications which are common to all kinds of wrongs. These grounds of justification are classified under the following heads :—

Justifications of torts :

- (i) *Acts of State* : An act of State is essentially an exercise of Sovereign power and hence cannot be challenged, controlled or interfered with by the Municipal Courts.¹

No Court will inquire into the legality of acts done by a foreign Government against its own subject in respect of property situate in its own territory.²

As regards the British Sovereign in relation to British subjects, there is no such thing as an act of State, at any rate in times of peace.³ Similarly in the case of an alien subject residing within the realm in time of peace, there can be no act of State until the Crown withdraws its protection. Thus, in an action of tort brought by a friendly alien resident in the United Kingdom against an officer of the Crown in respect of the wrongful seizure and detention of the alien's property, the defence *viz.*, that the seizure and detention had been adopted and ratified by the Crown as an act of State was held not a good defence to the action.⁴

Where any act is done under colour of legal title, as distinguished from an act of State, the jurisdiction of the Court is not ousted.⁵

969 (case where the plaintiffs sent not only the articles ordered but other articles also, which the defendant refused to accept) applied in *Jackson v. Rotax Motor & Cycle Co.*, (1910) 2 K. B. 937; *Alexander v. Webber*, (1922) 1 K. B. 642 (fraud of seller).

1. *Salaman v. Secy. of State for India*, (1906) 1 K. B. 613.
2. *Chaturbhuj v. Chunilal*, (1933) I. L. R. 57 Bom. 474, 487 (P. C.), *fg. Paley Olga Princess v. Weisz*, (1929) 1 K. B. 718.
3. *Municipal Corpn., Bombay v. Secy. of State*, (1934) I. L. R. 58 Bom. 660.
4. *Johnstone v. Pedlar*, (1921) 2 A. C. 262.
5. *Oma Parshad v. Secy. of State*, I. L. R. (1937) Lah. 380, *fg. Secretary of State v. Kamachee*, (1859) 7 M. I. A. 476, and *Khursaidi Begum v. Secy. of State*, (1926) I. L. R. 5 Pat. 539.

An act of State as a defence ought to be specially pleaded, *i. e.*, the nature of the act and the conditions under which the act was done ought to be set forth in the written statement.

(ii) *Judicial acts* : In a suit in any Civil Court against a Judicial officer, or any other person acting judicially, the plea that the act complained of was done or ordered to be done by him in the discharge of his judicial duty whether or not within the limits of his jurisdiction, provided he at the time in good faith believed himself to have jurisdiction to do or order the act complained of, is a good defence. Similarly, in a suit in any civil Court against any officer of any Court or other person who is bound to execute the lawful warrants or orders of any Judge or other person acting judicially, the plea that the warrant or order was within the jurisdiction of the person issuing the same is a justification in trespass and therefore a good defence.¹ In the last case, it is not necessary for the defendant to set out the judgment or order on which the warrant or any act done in obedience to any order is founded, for he is bound to execute process of the Court or to carry out the order without enquiring into the validity or even the existence of the judgment or order.² He need only show a writ of execution ; otherwise of a common person, unless in aid of the officer by his command.³

(iii) *Quasi-judicial acts* : Besides judicial persons and bodies, there are other persons⁴ and bodies⁵ who have authority or discretion to decide upon matters affecting other persons. All persons exercising such quasi-judicial powers are entitled to protection if they are not guilty of any fraud, collusion or malicious motive. So in a suit by any person

1. Sec. 1 of the Jud. Prot. Act, XVIII of 1850 ; *Venkat v. Armstrong*, (1865) 3 B. H. C. R. (A. C. J.) 47 ; *Vinayak v. Bai Itcha*, (1865) 3 B. H. C. R. (A. C. J.) 36 ; *Clarke v. Brajendra*, (1912) I. L. R. 39 Cal. 953 ; *Sinclair v. Broughton*, (1881-82) L. R. 9 I. A. 152.

2. Cf. *Andrews v. Maris*, (1841) 1 Q. B. 3, consd. in *Dews v. Riley*, (1851) 11 C. B. 434 ; *Aspey v. Jones*, (1884) 54 L. J. Q. B. 98.

3. *Britton v. Cole*, (1698) 90 E.R. 596 ; cf. *Andrews v. Maris*, *supra*.

4. Such as, head of an administration, public officials exercising administrative powers, arbitrators.

5. Such as, local councils, boards, committee of clubs.

aggrieved by their decisions or by words used in the course of the proceedings, the plea of absence of fraud, collusion or malicious motive is a good defence¹.

Executive acts must be distinguished from judicial acts².

In order to determine whether a tribunal, in the exercise of quasi-judicial powers, is entitled to protection, the Court has to investigate whether they have observed the rules of natural justice and also the particular statutory and other rules, if any, prescribed for their guidance. 'Natural justice' implies that the members of the tribunal must not be judges in their own cause, or have any interest or bias in the matter and the parties must be afforded opportunity of being heard, and that the decision whatever it is must be arrived at in good faith with a view to the common interest of the society or institution concerned³.

This rule extends not merely to persons exercising judicial discretion upon the arising of a dispute and upon evidence, but also persons appointed to decide matters upon their own knowledge or professional skill for the purpose of preventing disputes between the parties to a contract⁴. Thus, where by a contract an architect was employed to supervise the erection of certain houses by a contractor and the building contract provided that the certificate of the architect shall be conclusive evidence as regards com-

1. Hals, 2nd Edn., Vol. 26, pp. 284-285, Art. 604.
2. *Mask & Co. v. Secy. of State*, I. L. R. (1938) Mad. 1040 (Every order of a Customs Officer, under the Sea Customs Act, in whatever connection passed, cannot be regarded as in the nature of an adjudication by a tribunal; it is only in cases of offences referred to in the Sea Customs Act, in respect of which the Customs Officers are given a kind of magisterial jurisdiction, that the orders of such officers can be spoken of as adjudications or decisions so as to preclude the Civil Courts from questioning them).
3. *Mahomed Kalimuddin v. Stewart*, (1920) I. L. R. 47 Cal. 623 (case of expulsion of a member of the Stock Exchange); *Ambalal Sarabhai v. Phirox*, A. I. R. 1939 Bom. 35 (case of expulsion of a member from a club); *Gompertz v. Goldingham*, (1886) I. L. R. 9 Mad. 319 (expulsion of member from club by committee); *Ramji Motichand v. Naranji Parshotam*, A. I. R. 1935 Bom. 268 (excommunication from caste); *Devchand v. Ghanashyam*, A. I. R. 1935 Bom. 361 (excommunication by a properly assembled panchayat); *Abdul Razak v. Adam Haji* A. I. R. 1935 Bom. 367; *Nem Das v. Kunj Behari*, A.I.R. 1928 Oudh 424.
4. Hals. 2nd Edn., Vol. 26, p. 285, Art. 605.

pletion of works and the amount payable to the contractor, in a suit by the building owner against the architect, *Held*, the architect was in the position of an arbitrator and could not be sued for negligence, and that he would only be liable to an action on the ground of fraud or collusion¹. Nor can he be held liable for mere error of judgment in the discharge of his duty of adjudicating².

In some cases persons³ or bodies⁴ are invested with *quasi-judicial* authority for purposes of investigation or decision as to matters relating to the internal discipline⁵ or administration⁶ or private dispute⁷, and involving civil consequences to individuals. Such authority may be conferred and its exercise regulated by statutes⁸ including rules framed thereunder, or by the Articles of Association or Rules⁹, voluntarily submitted to by the persons concerned or by agreement¹⁰ or by conventional usage¹¹.

In suits against such persons or bodies for any act *prima facie* wrongful, the plea that the act complained of was done in the *bona fide* exercise of the power conferred by Statute

1. *Chambers v. Goldthorpe*, *Russel v. Nye*, (1901) 1 K. B. 624, *fd.* in *Boynnton v. Richardson*, (1924) 69 Sol. Jo. 107. Cf. *Stevenson v. Watson*, (1879) 4 C. P. D. 148; *Wisbech R. D. C. v. Ward*, (1928) 138 L. T. 308. Cf. *Ludbrook v. Barret*, (1877) 46 L. J. Q. B. 798 (where the architect fraudulently withheld the certificate in collusion with the employer).
2. *Kimberley v. Dick*, (1871) L. R. 13 Eq. 1.
3. E. g., Arbitrators to whom parties have submitted a reference; President of a Club; Head of an administration; Spiritual Head; Headman of community or caste.
4. E. g., University; Medical Council; Bar Council; Local bodies.
5. E. g., punishment or expulsion of officer or member by club, community or company; admission or conferment of degrees by University.
6. E. g., appointment, punishment or dismissal of subordinates or servants.
7. E. g., relating to contracts.
8. The University Act, as to admission of graduates and regulation of educational institutions; The Medical Council Act, as to investigation and report of medical institutions and practitioners; The Bar Council's Act, as to investigation and report of the conduct of Advocates.
9. The rules of a Club, Society or Association; The Articles of Association and bye-laws of a Limited Company.
10. Reference to arbitration.
11. As to matters relating to caste or community.

or any Article of Association or Rule or usage, as the case may be, is a good defence.

The defence will prevail even though they may have committed an error of discretion or judgment, provided they had acted fairly, honestly, considerately, and with due regard to the requirements of natural justice, i.e., if they had acted in good faith and after giving fair and sufficient notice and an opportunity to show cause against the truth of what was alleged against the person dealt with.¹

But the defence will not avail, if the matter was beyond the scope of their authority, or if the rules of procedure presented by the statute, bye-laws or convention, have not been followed, or if it was against the principles of natural justice.²

(IV) *Executive acts*: In suits relating to acts done by public officers in the discharge of their statutory duties, the statute may be set up in defence, and it should be specially pleaded. In most cases, the statutes themselves expressly provide for such immunity.³

To sustain such defence, the officers must have strictly complied with the provisions of the particular statute relied on, although they may have not acted maliciously or without probable cause.⁴

1. *Mahomed Kalimuddin v. Stewart*, (1920) I. L. R. 47 Cal. 623 (expulsion of member from Stock Exchange by the Committee of the S. E. Association); *Derchand v. Ghanshyam*, A. I. R. 1935 Bom. 361 (excommunication from caste by resolution of castemen at meeting); *Sukratendra Tirtha Swami v. Prabhu*, A. I. R. 1930 Mad. 100 (out-casted by spiritual head).
2. *Abdul Razak v. Adam Haji*, A. I. R. 1935 Bom. 367 (expulsion from caste by resolution of caste meeting); *Ramji Motichand v. Narani*, A. I. R. 1935 Bom. 268 (*ibid*); *Gompertz v. Goldingham*, (1886) I. L. R. 9 Mad. 319 (expulsion from membership of a club by the committee); *Administrator-General of Bombay v. David Haim Davaker*, (1887) I. L. R. 11 Bom. 185 (dismissal of officers of the community by resolution passed at community meeting).
3. c. g., S. 56, Electricity Act, IX of 1910; S. 81, Factories Act, XXV of 1934; S. 74, Forest Act, XVI of 1927; S. 24, Ancient Monuments Preservation Act, VII of 1904; S. 41, Railways Act, IX of 1890; S. 181-C, Sea Customs Act, VIII of 1878; S. 68-A, Ports Act, XV of 1908; S. 97 Lunacy Act, IV of 1912; S. 272, Cantonments Act, II of 1924; S. 43, Police Act, V of 1861.
4. *Clarke v. Brojendra Kishore*, (1909) I. L. R. 36 Cal. 433, 550 (Damages were

If the officer has acted *bona fide* and within his powers, he will not be liable for any honest errors of judgment, unless the plaintiff sets up and shows that it was done dishonestly and was prompted by a desire to injure the plaintiff.¹ This protection from liability may be availed of not only by the officer concerned but also by the persons who assist him in the performance of his lawful duty.²

As to executive acts of public officers, no legal wrong can be done by the regular exercise of their statutory duties.³ Thus, in a suit for damages for malicious search against a police officer, it was held that the defendant was not liable (1) as he was acting in the discharge of a duty recognized by law when he conducted the search, and (2) it was not proved by the plaintiff that the defendant acted dishonestly and was prompted by a desire to injure the plaintiff.⁴ The immunity would equally apply to persons assisting the officer in the conduct of the search.⁵ In some cases, the statute provides that if damage results compensation shall be made for it.⁶

An officer is not protected from the ordinary consequences of unwarranted acts, such as the using of needless violence to secure a prisoner. To avail himself of the protection he must show that he acted in a manner by itself reasonable,

awarded in this case against a District Magistrate for conducting the search of plaintiff's premises for concealed arms, believed by him to be possessed by the plaintiff, '*without first recording the grounds of the belief*', as required by Sec. 25 of the Arms Act, XI of 1878, under which the search was made).

1. *Narasimha v. Inam*, (1903) I. L. R. 27 Bom. 590.
2. *Assan Alliar v. Musilamani*, (1919) I. L. R. 42 Mad. 446 (case of a person assisting a police officer in a house-search).
3. In most cases the Statutes themselves expressly provide for such immunity. Cf. Sec. 56, Electricity Act, IX of 1910; Sec. 81, Factories Act, XXV of 1934; Sec. 74, Forest Act, XVI of 1927; Sec. 24, Ancient Monuments Preservation Act, VII of 1904; Sec. 41, Railways Act, IX of 1880; Sec. 181-C, Sea Customs Act, VIII of 1878; Sec. 68-A, Ports Act, XV of 1908; Sec. 97, Lunacy Act, IV of 1912; Sec. 272, Cantonments Act, II of 1924; Sec. 43, Police Act, V of 1861; Sec. 18, Ind. Air Craft Act, XXII of 1934.
4. *Narasimha v. Inam*, (1903) I. L. R. 27 Bom. 590.
5. *Assan Alliar v. Masilamani*, *supra*.
6. Cf. Sec. 20A, Ancient Monuments Preservation Act, VII of 1904.

and in execution of an apparently regular warrant or order, which on the face of it, he was bound to obey.¹

Executive officers invested with statutory powers of a drastic nature must strictly comply with the provisions of the statute as regards the exercise of their powers.²

As to a mistake of fact, such as, arresting the body or taking the goods of a wrong person, an executive officer is liable,³ unless on the principle of estoppel he is misled by the party's own act.⁴

- (v) *Parental and quasi-parental authority* : Parents, or guardians, or persons to whom parental authority is delegated, such as, school masters, are entitled to use summary force or restraint which the necessities of society require to be exercised and such persons are protected in exercise thereof if they act in good faith and in a reasonable and moderate manner.

Thus, a parent may inflict moderate chastisement for the welfare of the child. But if he exceeds the bounds of moderation and inflicts cruel and merciless punishment he will be liable. The same principle applies to a school master who represents the parent for purpose of correction.⁵ If, however, in any particular case no punishment will be justified, the school master will be liable even for moderate punishment. Thus, where the English Elementary Education Acts did not authorize the setting of lessons to be prepared at home by children attending a board school, and the school master detained a child after school hours for not doing home lessons, it was held that the detention was unlawful and rendered the school master guilty of assault.⁶

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1. *Mayor of London v. Cox*, (1867) L. R. 2 H. L. 239, 269.
 2. *Clarke v. Brojendra Kishore*, (1909) I. L. R. 36 Cal. 433.
 3. Cf. *Horsfield v. Brown*, (1932) 1 K. B. 355.
 4. *Glasspoole v. Young*, (1829) 9 B. & C. 696 ; *Dunston v. Paterson*, (1857) 2 C. B. N. S. 495.
 5. *Per Venkatasubba Rao, J.*, in *Sankunni v. Swaminatha*, (1922) I. L. R. 45 Mad. 548, 557, 558 ; *Mansell v. Griffin*, (1908) 1 K. B. 947 (the authority is not confined to the head master but it extends to the other masters of the school) ; *Ex parte Wright, King v. Newport*, (1929) 2 K. B. 416 (canning a boy for smoking at school). Cf. *Cleary v. Booth*, (1893) 1 Q. B. 465 (the authority of school-master is not confined to the four walls of the school. He may punish for offences committed outside the school).
 6. *Hunter v. Johnson*, (1884) 13 Q. B. D. 225.

In the case of *lunatics*, persons who have their lawful custody, and persons acting under their direction, are justified in using such reasonable and moderate restraint as is necessary to prevent the lunatic from doing mischief to himself or others. Where there are statutory rules in this matter, failure to conform to them would involve liability.¹

(vi) *Authority of necessity* : Apart from authority conferred by Statute, there is another class of authority the exercise of which is justifiable by the necessities of the case. Thus, the captain of a ship has absolute control over the passengers in all that is necessary regarding the safe and proper conduct of the vessel, but the exercise of such power in each instance is defined and limited by the necessity of the case. If a passenger misconducts himself, say, at table, the captain may remove or may even imprison him for a short period, if imprisonment is necessary for the enforcement of his lawful commands.² The master of a merchantship has authority over the mariners to enforce obedience to his lawful commands for the navigation of the vessel and preservation of good order ; and in case of disobedience or disorderly conduct may inflict corporal punishment moderate and proportionate to the offence.³

(vii) *Acts authorised by statute* : Where a statute authorises the use or the doing of a particular thing, (such as the construction of a railway and the use of locomotives) and the thing is used or done for the authorised purpose, any damage resulting therefrom is *damnum absque injuria* and in the absence of negligence or unreasonable conduct no action lies therefor⁴. The statutory authority and the consequent statutory indemnity extends not only to the

1. *R. v. Jackson*, (1891) 1 Q. B. 671.

2. *King v. Franklin*, (1858) 1 F. & F. 360 N. P.

3. *Lamb v. Burnett*, (1831) 148 E. R. 1430. *The Agincourt*, (1824) 166 E. R. 96.

4. *Vaughan v. Tuff Vale Ry. Co.*, (1860) 5 H. & N. 679, fd in *Secretary of State v. Kali Brahmo*, (1928-29) 33 C. W. N. 50. For cases of liability for negligence, see *Smith v. London & S. W. Ry.* (1870) L. R. 6 C. P. 14 (negligence of Ry. Co. in leaving combustible matter along the banks of the Ry. which caught fire from sparks from the engine and burnt a house in the vicinity) ; *Gaekwar v. Gandhi Kachrabhai*, (1902-03) L. R. 30 I. A. 60 (negligent construction of a railway whereby plaintiff's land were flooded with water).

act itself but by necessary implication to all inevitable results of that act¹.

Where the legislature expressly provides for compensation to the person damaged by the authorised acts, the only remedy is to apply for it in the manner provided by the statute². Even so, the distinction is now clearly established between damage from works authorised by statute, where the party is to have compensation and the authority is a bar to the action, and damage by reason of the works being negligently done, as to which the owner's remedy by way of action remains.³

Where no compensation is provided in the statute and the terms of the statute are not imperative but permissive, the fair inference is that the legislature intended that the discretion as to the use of general powers should be exercised in strict conformity with private rights.⁴

Statutory authority is a good defence in respect of an act which would otherwise be a trespass and wrongful, and it should be specifically pleaded giving reference to the statute relied on⁵.

Such a defence can be sustained only where the act complained of has been done without negligence⁶, and the exercise of the statutory powers was bona fide⁷ and in accordance with the formalities prescribed by the statute⁸.

1. *Nirmal Chandra v. Mun. Commissioners, Pabna*, I.L.R. (1937) 1 Cal. 407.
2. Cf. *Muhammad Mohidin v. Mun. Commrs. for City of Madras*, (1902) I. L. R. 25 Mad. 118, 135.
3. *Brine v. Great W. Ry. Co.*, (1862) 2 B. & S. 402; *Clothier v. Webster*, (1862) 12 C. B. N. S. 790.
4. *Metropolitan Asylum Dst. v. Hill*, (1881) 6 A. C. 193, 203 fd. in *Prices' Patent Candle Co. v. L. O. Co.*, (1908) 2 Ch. 526; *Suratee Bara Bazaar Co., Ltd. v. Mun. Corp., Rangoon*, (1928) I. L. R. Rang. 722 (where the terms of the statute are imperative); cf. *Nirmal Chandra v. Mun. Commrs, Pabna*, *supra*.
5. *National Telephone Co. v. Baker*, (1893) 2 Ch 186.
6. *Gackwar v. Gandhi Kachrabhai*, (1903) I. R. 30 I. A. 60 (Defendant Railway Co. which had made certain constructions negligently and thereby caused the plaintiff's lands to be flooded was held liable in damages in spite of the statutory authority for such construction); *Maya Ram v. Municipal Committee, Lahore*, A. I. R. 1929 Lah. 730.
7. *Lalbhai v. Mun. Commr., Bombay*, (1909) I. L. R. 36 Bom. 334.
8. *Clarke v. Brojendra Kishore*, (1909) I. L. R. 36 Cal. 433; *Ranchordas v. Mun. Commr., Bombay*, (1901) I. L. R. 25 Bom. 387.

(viii) *Inevitable accident*: Inevitable accident does not mean accident absolutely inevitable but it means "not avoidable by such precautions as a reasonable man doing such an act then and there could be expected to take"¹. It is a defence that there was no want of reasonable care on the actor's part. Thus, where the defendant who was one of a shooting party fired at a pheasant and a pellet glanced from a bough and wounded the plaintiff's eye, it was held that the defendant was not liable².

(ix) *Exercise of common rights*: It is a well recognised rule of law that the exercise of ordinary rights in an ordinary manner is no wrong even if it causes damage³. Thus, competition is no ground of action, whatever damage may be caused. The damage so caused falls within the description of *damnum sine injuria*. The sinking of a deep pit on a man's own land may have the effect of drying up the neighbour's spring or well but the inconvenience to the neighbour falls within the description of *damnum absque injuria* which cannot become the ground of an action⁴. It would make no difference even if the act complained of was prompted by a motive which is improper or even malicious⁵.

(x) *Leave and Licence*: *Volenti non fit injuria*: 'Leave and license' is a defence to an action in trespass setting up the consent of the plaintiff to the trespass complained of⁶.

'Consent' or 'leave and license' is a defence in actions for wrongs independent of contract according to the maxim of law *volenti non fit injuria* (where the sufferer is willing, no injury is done), unless the act amounts to the infliction of a serious physical injury or where the rights of the public as well as the individual sustaining harm have intervened⁷.

1. Pollock on Torts, 14th Edn., p. 107.

2. *Per Denham J.*, in *Stanley v. Powell*, (1891) 1 Q. B. 86.

3. *A.—G. v. Tomline*, (1880) 14 Ch. D. 58.

4. *Acton v. Blundell*, (1843) 12 M. & W. 324; cf. *Chasenore v. Richards*, (1859) 7 H. L. C. 349.

5. *Bradford Corpn. v. Pickles*, (1895) A. C. 587, 598; *Allen v. Flood*, (1898) A. C. 1.

6. Wharton's Law Lexicon, 14th Edn., p. 579.

7. —do— —do—

Thus, the maxim protects the surgeon who amputates a limb, and the boxer, so long as he plays fairly according to the rules of the game. It does not protect one engaged in prize fights without gloves.

The maxim has also been invoked in cases where the person injured was alleged to have contracted to absolve the defendant from a known risk or from obligation such as not to be negligent in the course of a contract. But in these cases, knowledge of the risk is not conclusive, and it is not evidence from which consent may be inferred¹.

The performance of a public duty in the face of imminent risk does not come within the maxim to disentitle the plaintiff from his remedy². It is otherwise if the risk was undertaken voluntarily and not under duty³.

A bare license to enter upon land is revocable ; and where leave and license is pleaded by the defendant and the plaintiff relies upon the revocation of the license, he must plead it specifically⁴.

Where leave and license is pleaded by the defendant and the plaintiff relies on an abuse of a license or authority given by law rendering the defendant a trespasser *ab initio*, he must raise the plea specifically in his reply avoiding the effect of the defence.⁵

Where the defendant sets up a prescriptive right, *i. e.*, an uninterrupted enjoyment as of right, the plaintiff may set up in his reply that the right was enjoyed by the defendant during the portion of the time by license. But where the plaintiff's case is that there was a verbal license for the whole period, he ought to raise it in his plaint and cannot set it up in his reply.⁶

- (xi) *Works of necessity*: Apart from authority of necessity which has already been dealt with, certain acts *prima facie* tortious are not actionable if done for the preservation of property or life. Such acts are commonly known as 'works

1. Warton's Law Lexicon, 14th Edn., p. 579.
2. *Haynes v. Harwood*, (1935) 1 K. B. 146.
3. *Outler v. United Dairies (London) Ltd.*, (1933) 2 K. B. 297.
4. Bullen & Leake, 8th. Edn., p. 882.
5. Bullen & Leake, 8th Edn., p. 883.
6. Bullen & Leake, 8th Edn., p. 849.

of necessity'. Thus, where the plaintiff an owner of land let the shooting rights over the land to one C., whose bailiff and head game-keeper the defendant was, and a fire broke out on the land and when men in the employ of plaintiff were endeavouring to beat it out, defendant set fire to strips of heather between the fire and a part of the shooting where were some nesting pheasants, the property of his master ; in an action of trespass against the defendant it was held that there being a real and imminent danger, the means taken by the tenant to avoid it were reasonably necessary in the sense that they were acts which in all the circumstances of the case a reasonable man may do to meet a real danger. It is not the law that the intervention of the tenant should be proved by the event to have been in fact necessary for the preservation of the property in the sense that, but for that intervention his property would have been destroyed or injured.¹

If a person picks up a man rendered insensible by an accident or a surgeon in such a case seeing that an immediate operation is necessary to save his life performs it without waiting for him to recover consciousness and give consent, such acts will amount to works of necessity and will constitute a good defence.²

(xii) *Private defence* : The defendant may plead by way of justification or excuse of an alleged trespass or wrongful act that such act was necessary for protecting himself or those under his care, or his or their property from injury or imminent risk of injury arising from another's act or omission or from natural causes. Thus, an assault may be justified, if made by a husband in defence of his wife, a master in defence of his servant, or a parent in defence of his child, or *vice versa* in each case. So also an owner of land is justified as against a trespasser who disturbs his possession, in using force, if necessary, for the purpose of keeping possession of the land and of removing the trespasser from it.³ Similarly, if the owner of land, who has been wrongfully kept out of possession by another without title, forceably

1. *Cope v. Sharpe*, (No. 2), (1912) 1 K.B. 496, reld. in *Kirby v. Oheesun*, (1913) 30 T. L. R. 15, on appeal, (1914) 79 J. P. 81 C. A.
2. Pollock on Torts, 14th Edn., p. 132.
3. *Weaver v. Bush*, (1798) 8 T. R. 78 ; *Bush v. Parker*, (1834) 1 Bing. N. C. 72.

enters thereon, no action will lie against him for damages for such entry.¹ In all these cases, the force used or the action taken should not only be reasonably necessary for the purpose of such protection, but also should not be in excess of what is reasonably required. Thus, in a case where the defendant was passing by the plaintiff's house, and the plaintiff's dog ran out and bit the defendant's gaiter, and on the defendant's turning round and raising his gun, the dog ran away, and he shot the dog as it was running away, it was held that the defendant was not justified in his act, as the dog was not actually attacking him at the time,² and such an act would not be an act of protection but one of revenge. But, on the other hand, where a vicious stallion repeatedly attacked on a road a pair of mares drawing the defendant's carriage, and finally entered the defendant's compound in spite of attempts to prevent it and continued the attacks until the defendant inflicted a severe wound on it with his spear, from the effect of which it ultimately died, it was held that the defendant's act was justified and that the owner of the stallion was not entitled to any damages.³ Similarly, while a person can put up an embankment on his land to protect it from an extra-ordinary flood, he cannot do other acts which may have the effect of diverting the mischief from his own land to the land of another person which would otherwise have been protected.⁴

In the matter of recaption of one's goods by entering on another's premises, justification may be pleaded in three cases, *viz.*, (1) where the occupier has wrongfully taken and placed the goods there,⁵ (2) where the goods had come upon the property by the felonious act of a third party,⁶ or (3) where the goods had come there by accident not due to the negligence or default of the owner.⁷

1. *Beddall v. Maitland*, (1881) 17 Ch. D. 174 ; *Jones v. Foley*, (1891) 1 Q.B. 730.
2. *Morris v. Nugent*, (1836) 7 C. & P. 572.
3. *Turner v. Jagmohan Singh*, (1905) I. L. R. 27 All. 531.
4. *Sami Ullah v. Mukund Lal*, A. I. R. 1921 All. 182 ; *Whalley v. Lancashire & Yorkshire Ry.*, (1884) 13 Q. B. D. 131. Cf. *Greyvensteyn v. Ilaltingh*, (1911) A. C. 355 ; *Gerrard v. Crowe*, (1921) 1 A. C. 395.
5. *Patrick v. Colerick*, (1838) 150 E. R. 1235.
6. *Higgins v. Andrews*, (1619) 81 E. R. 656.
7. Cf. *Goodwyn v. Cheveley*, (1859) 157 E. R. 989.

The defendant should give particulars showing how the necessity for the self-defence or protection of property arose, as for instance, that the plaintiff first assaulted and beat the defendant, or that the use of force was necessary in order to defend his possession of his goods and to prevent their wrongful removal by the plaintiff.

If a trespass on land was forceably made by the plaintiff, and the defendant pleads justification of an assault necessary to protect his possession, he need not allege or prove a previous request to the plaintiff to desist.¹ But he must allege and prove such previous request where the trespass was not attended with force.² The defendant generally avers that the force used or the act complained of was no more than was necessary for the lawful purpose alleged in the defence ; and whether he alleges it or not, if the plaintiff wants to show that excess force was employed, to combat the plea of justification, he should take out a specific issue in respect of it.

(xiii) *Plaintiff a wrongdoer* : That the plaintiff was a wrongdoer is not by itself a defence to justify any injury caused to him, for the rule is that although a trespasser is liable to an action for injury which he does, he does not forfeit his right of action for an injury sustained by him. Thus, where the plaintiff trespassed on the defendant's land by climbing over the latter's wall in pursuit of a fowl, and was injured by a man-trap like a spring gun set up by the defendant without notice in his garden, it was held that the defendant was liable in damages to the injury caused to the plaintiff.³

But, this circumstance of a plaintiff being the wrongdoer may be material for other defences recognised by law, *e. g.*, as evidence of the plaintiff's consent, contributory negligence, or absence of breach of duty on the part of the defendant. Thus, where the occupier of a premises, as a reasonable measure for preventing trespasses, had put up a barbed wire fence, a gate with iron spikes or a wall with broken glass, it was held that he was not liable to a trespasser or thief hurt by such things.⁴

1. *Polkinhorn v. Wright*, (1845) 8 Q. B. 197.
2. *Kumud Kanta v. Bignold*, A. I. R. 1923 Cal. 306.
3. *Barnes v. Ward*, (1850) 9 C. B. 392, 420.
4. *The Carlgarth*, (1927) P. 93 ; *Deane v. Olayton*, (1817) 7 Taunt, 489, 521.

Similarly an occupier is not liable where a trespasser is hurt by a vicious dog in the premises. On the same principle, it was held that a railway company was not liable to a person travelling without a ticket and injured by a collision;¹ and that a woman who agreed to live in immoral association with a married man on the faith of a false representation made by him was not entitled to sue him for deceit.²

- (xiv) *Acts in fulfilment of duty* : In a case where the plaintiff, a theatrical manager, sued the defendants who were members of a committee of theatrical employees called the Joint Protection Committee for inducing the theatre proprietors not to allow the plaintiff to use their theatre, on the ground that the wages given to the chorus girls were so low that the said chorus girls were compelled to resort to immorality, it was held that the defendants were justified in their action, as they owed a duty to their calling and its members to take all necessary steps to compel the plaintiff to pay his chorus girls a living wage, so that they should not be driven to supplement their earnings by misconduct for the purpose of gain.³

Justification of libel and slander : The plea that "words complained of are true in substance and in fact" is a good defence to an action for libel or slander. Justification is, however a dangerous plea, for if the defendant cannot prove it or withdraws from it, it may, and most probably will, aggravate the damages.⁴ The defendant has to prove that the whole of the defamatory matter is substantially true.⁵ If there is gross exaggeration the plea of justification will fail. But where a libel is in its nature divisible, a plea of justification may be pleaded as to part of it. Thus, where the plain-

1. *Grand Trunk Ry. Co. of Canada v. Barnett*, (1911) A. C. 361. Cf. *G. N. Ry. Co. v. Harrison*, (1854) 10 Ex. 376.
2. *Siveyer v. Allison*, (1935) 2 K. B. 403.
3. *Brimelow v. Casson*, (1924) 1 Ch. 302.
4. *Simpson v. Robinson*, (1848) 12 Q. B. 511 (Where the plaintiff during the trial offered to accept an apology if defendant would withdraw the plea of justification which the defendant refused to do, though he did not attempt to prove it :—Held : this conduct on the part of the defendant was proper to be left to the jury with reference to the question of malice as well as damages).
5. *Ingram v. Lawson*, (1838) 35 Bing. N. C. 66 ; *Khair-ud-Din v. Tara Singh*, (1926) I. L. R. 7 Lah. 491.

tiff, a proctor, declared on a libel in which he was alleged to have been thrice suspended from practice for extortion and the defendant pleaded justification as to one suspension :—Held : the plea was good.¹

In a defence of justification the defendant will be directed to give the following particulars :—

- (a) *Where the alleged libel is capable of more than one meaning*, the plaintiff will be entitled to the information whether defendant intended to justify one or more meanings.²
- (b) *Where the libel amounts to a specific charge* : In an action for libel contained in a review of a book written by the plaintiff, in which review it was stated that the plaintiff was by his own confession, a most barefaced liar, and the defendant justified, it was held, the plaintiff was entitled to the particulars of passages in his book on which defendants relied in support of defence of justification and such particulars must specify the pages in the book at which several passages relied on occurred, and the first and the last words of such passages.³ Where the libel alleged that the plaintiff, an owner and trainer of race horses, had been guilty of gross dishonesty in the training and running of horses and particularly that he had on several occasions conspired with other trainers and jockeys to defraud bookmakers and owners of race horses and the public generally for his own pecuniary gain, the defendants were ordered to give the following particulars of justification, viz., (i) the number of races, jockeys and horses with the weights carried by them, (ii) the instances of races in which horses were asserted to have been “pulled” by their jockeys acting under the plaintiff’s orders, (iii) the names of the persons with whom or through whom the defendants proposed to prove that the plaintiff had made the bets to which they intended to refer and the places and times at which such backings took place.⁴
- (c) *Where misconduct is alleged in general terms* : Where a libel charged an attorney with general misconduct, viz.,

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1. *Clarkson v. Lawson*, (1830) 6 Bing. 587 ; *Stiles v. Nokes*, (1806) 7 East 493 ;
Clarke v. Taylor, (1836) 2 Bing. L. C. 654.
 2. *Hennensy v. Wright*, (1888) 57 L. J. Q. B. 594, distinguished in *Digby v. Financial News*, (1907) 1 K. B. 502.
 3. *Devereux v. Clarke*, (1891) 2 Q. B. 582.
 4. *Wootton v. Sievier*, (1913) 3 K. B. 499,

gross negligence, falsehood, prevarication, and excessive bills of costs in the business he had conducted for the defendant, and the defendant pleaded that the words complained of were true in substance and in fact, it was held that a plea in justification, repeating the same general charges without specifying the particular acts of misconduct, was insufficient.¹

Similarly where a plea justifying an imputation of criminal offence is made, the defendant must give the particular facts from which he means to insist that the crime was committed by the plaintiff as charged.²

Where the plaintiff interprets the libel by an *innuendo* that he is of bad character, the defendant is entitled to give particulars of facts other than those mentioned in the libel.³

Particulars given must be relevant and must not be embarrassing.⁴

25. **Legal necessity** : See "Legal Necessity" under "Particulars", Chap XX.

26. **Lien** : Lien is a defence of confession and avoidance and should be specially pleaded. The subject may be considered under the following sub-heads :

(a) *Bailee's lien* : Where the bailee has in accordance with the purpose of the bailment rendered any service exercising labour and skill in respect of the goods bailed, he has, in the absence of a contract to the contrary, a right to retain such goods until he receives due remuneration for the services he has rendered in respect of them.⁵ In a suit by the bailor for return of the article bailed, the bailee, in a case where no remuneration was settled, should state—

- (i) the particular article delivered to him with date ;
- (ii) the services he was required to render ;

1. *Holmes v. Catsby*, (1803) 1 Taunt. 543, applied in *Hickinbotham v. Leach*, (1842) 10 M. & W. 361 and reld. in *Zierenberg v. Labouchere*, (1893) 2 Q. B. 183.

2. *Carpenter v. Jones* (1827) 6 L.J. O. S. K.B. 4; *Hickinbotham v. Leach*, *supra*.

3. *Maisel v. Financial Times Ltd.*, (1915) 84 L. J. K. B. 2145, fd. in *Mac Grath v. Black*, (1926) 161 L. T. Jo. 444, C. A.

4. *Markham v. Wernher, Beit and Co.*, (1902) 18 T. L. R. 763, H. L.

5. Sec. 170, Ind. Cont. Act, 1872.

- (iii) that he has rendered the said services ;
- (iv) that he has not received any, or adequate, remuneration for the services rendered, stating what is the amount of his due remuneration.
- (b) *Bankers', factors', wharfingers', attorneys' and policy-brokers' lien* : These persons may, in the absence of a contract to the contrary, retain as a security for a general balance of account, any goods bailed to them.¹ The particular goods bailed, with date and facts showing that there is a general balance of account, must be stated.
- (c) *Unpaid sellers' lien* : The unpaid seller of goods claiming a lien must state facts showing—
 - (i) that the goods were sold without any stipulation as to credit, or
 - (ii) that the goods were sold on credit but the term of credit has expired, or
 - (iii) that the buyer became insolvent (giving date), and
 - (iv) that he is in possession of the goods² (stating the capacity in which he is in possession).³

27. **Limitation** : O. VIII, r. 2, C. P. Code, enjoins that limitation is one of the matters to be specifically pleaded in a case where, if it is not so pleaded, the opposite party would be taken by surprise or issues of fact, not arising out of the plaint, would be raised.

O. VII, r. 11 (d) of the C. P. Code provides that the plaint shall be rejected where the suit appears from the statement in the plaint to be barred by any law. To the same effect is Sec. 3, Indian Limitation Act, which provides that "subject to the provisions contained in sections 4 to 25 (inclusive), every suit instituted, appeal preferred, and application made after the period of limita-

1. Sec. 171, Ind. Cont. Act, 1872.

2. Sec. 47, Ind. Sale of Goods Act, 1930, *Spartali v. Benecke*, (1850) 10 C. B. 212, 223. (Where by the contract the payment is to be made at a future day, the lien for the price which the vendor would otherwise have, is waived).

3. Sec. 47 (2), Ind. Sale of Goods Act, 1930, which says the seller may exercise the right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer,

tion prescribed therefor by the First Schedule shall be dismissed, although limitation has not been set up as a defence"¹.

The combined effect of the above provisions is, that where a suit is, on the face of it, barred, it would be dismissed although limitation has not been set up as a defence. Where a claim was barred by limitation on the very pleadings of the plaintiff but the trial Court did not dismiss the suit, the High Court will entertain the plea and dismiss the suit². The Court is not bound to dismiss, as barred, a suit which, on the face of it, is not barred³. In the latter case, therefore, the defendant who intends to rely on limitation, must plead facts showing that the plaintiff's claim is barred by any law⁴.

The Court of Appeal will not entertain a plea of limitation where such plea was not taken in the original Court and the determination of the question involves fresh investigation of facts.⁵ It should be noted that if a plea of limitation is intended to be taken in appeal, the appellant should take that point in his grounds of appeal⁶.

28. Privilege : In actions of defamation, privilege or privileged immunity is a good defence and must be specially pleaded. 'Privilege' is either absolute or qualified.

(a) *Absolute privilege :* In case of absolute privilege, no action lies, however untrue and malicious the statements may have been. Thus, in England, a member of Parliament cannot be molested outside Parliament by civil actions on account of anything said by him in either House. In India, Sections 28 and 71 of the Government of India Act, 1935, provide that no member of the Federal or any Provincial Legislature shall be liable to any proceedings in any Court in respect of anything said or any vote given by him in the Legislature or any Committee thereof. The

1. *Maqbul Ahmed v. Onkar Pralap Narain*, (1935) I. L. R. 57 All. 242 (P.C.).
2. *Narasingha v. Prohadman Tewari*, (1919) I. L. R. 46 Cal. 455.
3. *Sakharam Govind v. Trimbakrao*, (1921) I. L. R. 45 Bom. 694, 708;
Salamat Ali v. Nur Muhammad, (1934) I. L. R. 9 Luck. 475.
4. *Kedar Nath v. Mohesh Chandra*, (1918) 28 C. L. J. 216.
5. *Raghunath Das v. Sundar Das*, (1913-14) L. R. 41 I. A. 251.
6. Cf. O. XLI, r. 2, C. P. Code.

privilege is allowed to judges, magistrates and other persons exercising judicial function.¹

Parties², advocates³ and witnesses⁴ in a Court of Justice are afforded the like protection.

Official reports of proceedings of the Legislatures, Federal or Provincial, published by or under their authority are absolutely privileged⁵. So also newspaper reports of proceedings in a Court of Justice, if published contemporaneously with such proceedings.

- (b) *Qualified privilege* : "There is an important class of cases in which a middle course is taken between the common rule of unqualified responsibility for one's statements and the exceptional rules which give absolute protection to the kinds of statements covered by them. In many relations of life, the law deems it politic and necessary to protect the honest expression of opinion concerning the character and merits of persons, to the extent appropriate to the nature of the occasion but does not deem it necessary to prevent the person affected from showing, if he can, that an unfavourable opinion expressed concerning him is not honest. Occasions of this kind are said to be privileged, and communications made in pursuance of the duty or right incident to them are said to be privileged by the occasion."⁶

The defendant must satisfy the Court that the occasion is privileged, and it will be for the plaintiff to prove that

1. *Jagannath v. Rafat Ali*, A. I. R. 1934 All. 827; *Duraiswami v. Lakshmanan*, A. I. R. 1933 Mad. 537.
2. *Pachaiaperumal v. Dasi Thangam*, (1908) I. L. R. 31 Mad. 400; *Satish Chandra v. Ram Doyal*, (1921) I. L. R. 48 Cal. 388; *Ma Mya Shwe v. Maung*, (1924) I. L. R. 2 Rang. 333; *Ram Kirat v. Biseswar*, (1932) I.L.R. 11 Pat. 693.
3. *Sullivan v. Norton*, (1886) I. L. R. 10 Mad. 28 (F. B.); *Shira Kumar Devi v. Bacharam*, (1920-21) 25 C. W. N. 835; *Jagat Mohan v. Kali Pado*, (1922) I. L. R. 1 Pat. 371.
4. *Gunnesh Dutt v. Mugneeram*, (1872) 11 B. L. R. 321 (P. C.); *Nannu Mal v. Ram Prasad*, A. I. R. 1926 All. 672; *Sanjiri Reddi v. Kondagari Koneri Reddi*, (1926) I. L. R. 49 Mad. 315; *Madhab Chandra Ghose v. Nirode Chandra Ghose*, I. L. R. (1939) 1 Cal. 574
5. Secs. 28 (1) and 71 (1), Govt. of Ind. Act, 1935.
6. Pollock on Torts, 14th Edn., pp. 211, 212.

the communication "was not honestly made for the purpose of discharging legal, moral, or social duty, or with a view to the just protection of some private interest or of the public good by giving information appearing proper to be given, but from some improper motive and without due regard to truth".¹

29. Release : Release of a debt may be effected either by the express act of the creditor or by operation of law. Thus, where the debtor pays part of the debt, and the creditor gives a receipt that the money was received in full satisfaction, the receipt will operate as a release of the debt by the express act of the creditor. A release is always to be construed according to the particular purpose for which it was made². A release obtained by fraud and misrepresentation will be set aside³. There are cases in which a debt may be released by operation of law. Thus, where the payee of a promissory note appointed the maker his executor, it was held that the debt was discharged and an action could not be maintained on the note, even by a person to whom the executor had endorsed it⁴. A material alteration in a written contract without the consent of the party contracting will discharge him from all liability thereon⁵.

The defence of release must be specifically pleaded⁶.

30. Waiver : A right may be waived either by express words or by conduct inconsistent with the continuance of the right ; and even where there is no actual waiver, the person having the right may so conduct himself that it becomes inequitable for him to enforce it.⁷ Waiver, therefore, is a matter of special pleading.⁸

1. Pollock on Torts, 14th Edn., p. 212. For the defence of privilege, see Form Nos. 30 and 31 in Fraser on Libel, 7th Edn., pp. 314, 315.
2. *Solly v. Forbes*, (1820) 129 E. R. 871.
3. *Hirschfeld v. London, Brighton, etc. Rly.*, (1876) 2 Q. B. D. 1.
4. *Freakley v. Fox*, (1829) 9 B. & C. 130.
5. See "Alteration," pp. 385, 386.
6. See O. XIX, r. 15, R. S. C.
7. *Per Viscount Cave in P. Samuel & Co. v. Dumas*, (1924) A. C. 431, fd. in, *Kanahya Lal v. Assicurazioni Generali*, I. L. R. (1938) 2 Cal. 400.
8. *Ladhomai Prem Chand v. Budho*, A. I. R. 1933 Sind 1.

CHAPTER XVIII.

SET-OFF AND COUNTER-CLAIM.

Set-off : Set-off may be either legal or equitable. Again, it may be either a defensive set-off or a counter-claim.

1. *Legal set-off :* The conditions of a legal set-off under O. VIII, r. 6, of the C. P. Code, are—

(a) The suit must be one for the recovery of an ascertained sum of money.

(b) Such sum must be legally recoverable by the defendant or defendants, from the plaintiff or plaintiffs, as the case may be.

(c) Such sum must not exceed the pecuniary limits of the jurisdiction of the Court in which the suit is brought.

(d) Both parties must fill, in the defendant's claim to set-off, the same character as they fill in the plaintiff's suit,

2. *Equitable set-off :* O. XX, r. 19 (3), C. P. Code, recognises equitable set-off, which is set-off in respect of an unascertained sum. In a case where the cross demands arise out of the same transaction or are so connected together that they can be looked upon as part of one transaction, the Courts of Equity in England have held that the defendant may be allowed to plead a set-off and that it would be inequitable to drive him to a separate suit. The right of the defendant to plead equitable set-off has been recognised in India.¹ In pleading an equitable set-off the procedure of O. VIII, r. 6, C. P. Code, should be followed.²

3. *Defensive set-off and set-off by way of counter-claim, distinction between—*Set-off may be purely defensive *i.e.*, it may amount to an adjustment or satisfaction of the plaintiff's claim or it may be a counter-claim under which a defendant claims a decree for the surplus amount due to him.³

1. *Kistnasamy v. Municipal Commissioners for Madras*, (1868) 4 Mad. H.C.R. 120; *Vithaldas v. The Hyderabad Spinning & Weaving Co. Ltd.*, (1923) I. L. R. 47 Bom. 182; *Narendra Krishna v. Ashutosh*, (1930-31) 35 C. W. N. 17; *Jitendra Nath v. Jnanada Kanta*, A. I. R. 1936 Cal. 277; *Bharta v. Chet Ram*, A. I. R. 1934 All. 427; *Govinda Rao v. Rudrayya*, A. I. R. 1925 Mad. 830.

2. *Narasimha Rao v. Zamindar of Tiruvur*, (1919) I. L. R. 42 Mad. 873, 877.

3. *Jitendra Nath v. Jnanada Kanta*, A. I. R. 1936 Cal. 277. Cf. *Sundermal v. Ganesh Narayan*, A. I. R. 1937 Nag. 210.

Counter-claim : The word 'counter-claim' is liable to be misunderstood. A counter-claim properly so called need not relate to, or be in any way connected with, the plaintiff's claim or arise out of the same transaction. A set-off by way of counter-claim must arise from the same transaction as that which is the subject-matter of the plaintiff's suit. It follows, therefore, that every set-off can be pleaded as a counter-claim but not every counter-claim can be pleaded as a set-off.¹ The confusion in the use of the word 'counter-claim' arises on account of the common use of the phrase, "set-off by way of counter-claim." Whether counter-claim in the real sense, *i.e.*, in the sense of counter-claim which need not relate to, or be in any way connected with the plaintiff's claim, or which need not arise out of the same transaction, is permissible in India in the absence of any rules relating to the procedure for counter-claim, is one regarding which there are differences of opinion. According to the Calcutta High Court, the Court is not justified in applying its power of inherent jurisdiction relating to a new form of procedure for which no provision is made by the Indian law.² According to the said High Court, therefore, the defendant ought not to be permitted to set up a counter-claim (the said High Court not having made any rules therefor) in answer to the claim of the plaintiff but should file a separate suit.³

According to the Rangoon High Court, although strictly speaking, a counter-claim is a form of suit unknown to the Code of Civil Procedure, there is nothing to prevent a judge treating the counter-claim as a plaint in a cross-suit and hearing the two together, if he is so disposed, and if the counter-claim is properly stamped.⁴

In England, the modern counter-claim is entirely the creation of the Judicature Act, 1873. In India, the Civil Procedure Code of 1908, made no provision for counter-claim but by Sec. 128 left it to the High Courts to provide by Rules the procedure in suits by way

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1. *Vithaldas Gulabdas v. The Hyderabad Spinning & Weaving Co. Ltd.*, (1923) I. L. R. 47 Bom. 182, 190.
 2. *Gour Chandra Goswami v. Chairman, Nabadwip Municipality*, A. I. R. 1922 Cal. 1.
 3. *Per Costello J.*, in *Ahmad Kasim Molla v. Khatun Bibi*, (1933) I. L. R. 59 Cal. 833. Cf. *Currimbhoy & Co. v. Creet*, A. I. R. 1933 P. C. 29, 32 (where it was admitted that in a Mufassil Court a counter-claim is incompetent). Cf. *Mt. Bibi Shaima v. Bank of Bihar* A.I.R. 1938 Pat. 484.
 4. *Saya Baya v. Maung Kyaw Shun*, (1924) I. L. R. 2 Rang. 276, fd. in *Moiddeen Baba v. Chettyar Firm*, A. I. R. 1934 Rang. 160; cf. *Maung Ko Choke v. Muthuveerappa*, A. I. R. 1935 Rang. 116.

of counter-claim. Such Rules relating to counter-claim have been framed by the Bombay and the Madras High Courts. It is submitted that where no such Rules have been framed, the Courts cannot entertain a counter-claim where such counter-claim does not relate to, or is in any way connected with, the plaintiff's claim, or where it does not arise out of the same transaction. It is submitted that the view taken by the Calcutta High Court is correct.

In a counter-claim, if the balance is in favour of the defendant, judgment for such balance would be given to the defendant. A counter-claim is to be treated as an independent action.¹ Thus, if the plaintiff withdraws the suit with liberty to bring a fresh one, the counter-claim can be treated as a plaint and proceeded with on its merits.² If the plaintiff's claim is held to be frivolous, the Court will still grant the defendant the relief claimed in his defence.³ A counter-claim abates by reason of the omission to bring the heirs of the deceased defendant to the counter-claim on record.⁴

Bombay and Madras High Court O. S. Rules re : Counter-claim : The (O. S.) Rules and Forms of the Bombay High Court, Chap. VII, and Order V. of the (O. S.) Rules of the Madras High Court, provide the procedure in suits relating to counter-claim. The said rules are substantially based upon Orders VII, XIX and XXI of the Rules of the Supreme Court. These rules enable a defendant who has a valid cause of action of any description against the plaintiff to set up a counter-claim, unless his cause of action is of such a nature that it cannot be conveniently tried by the same tribunal or at the same time as the plaintiff's claim. A plaintiff who intends to defend a set-off or counter-claim shall have to file a written statement within a certain time after service upon him of the defendant's written statement containing a set-off or counter-claim. The defendant may plead a counter-claim against the plaintiff along with a third person. The third person must be served with a copy of the written statement and counter-claim and may appear and plead to it. He may, under the Madras Rules, enter appearance under protest. Before delivering any reply, he may apply to the Court or a Judge that the counter-claim may be excluded and the Court or a Judge may, on hearing such an application, make such order as shall be just. If,

1. *Per Bowen L. J., in Amon v. Bobbett*, (1889) 22 Q. B. D. 543.

2. *Moideen Baba v. Ohettyar Firm*, A. I. R. 1934 Rang. 160.

3. *Adams v. Adams*, (1892) 45 Ch. D. 426.

4. *Per Kania J., in Hirji Rauji v. Dawlatram*, I L. R. (1940) Bom.10.

in any case, in which the defendant sets up a counter-claim, the suit of the plaintiff is stayed, discontinued or dismissed, the counter-claim may nevertheless be proceeded with. Where in any suit, a set-off or counter-claim is established as a defence against the plaintiff's claim, the Court or Judge may, if the balance is in favour of the defendant, give judgment for the defendant for such balance, or may adjudge to the defendant such relief as he may be entitled to upon the merits of the case.

Mode of pleading counter-claim : A counter-claim is really an independent action by the defendant, against the plaintiff,¹ and is governed by the same rules of pleading as a plaint², and the reply to it, by the same rule as a defence. In England, under the Rules of the Supreme Court, where any defendant seeks to rely upon any grounds as supporting a right of counter-claim, he shall, in his defence, state specifically that he does so by way of counter-claim.³ It should properly have the word 'Counter-claim' prefixed to it as a heading so as to distinguish it from the defence. But "the mere absence of such heading would not invalidate a counter-claim which was otherwise properly pleaded".⁴ All material facts must be stated in a summary form in numbered paragraphs. A counter-claim may comprise several distinct causes of action so long as they can be properly joined in one independent action.⁵ But in that case, the grounds of counter-claim must be stated, as far as may be, separately and distinctly,⁶ and the relief prayed stated specifically, either simply or in the alternative.⁷

"Where the defendant pleads both a defence and a counter-claim, the paragraphs of the counter-claim are usually numbered as though they were a continuation of the paragraphs of the defence".⁸

"Where a defendant by his written statement sets up any counter-claim which raises questions between himself and the plaintiff along with any other persons, he shall add to the title of his

1. O. V, r. 3, Mad. High Court O. S. Rules ; Chap. VII, r. 130, Bom. High Court O. S. Rules.

2. O. V, r. 5, Mad. High Court, O. S. Rules.

3. O. XXI, r. 10, R. S. C. .

4. Bullen & Leake, 8th Edn., p. 561.

5. *Compton v. Preston*, (1882) 21 Ch. D. 138.

6. O. XX. r. 7, R. S. C. ; O.V, r. 7, Mad. High Court O. S. Rules ; Chap. VII, r. 131, Bom. High Court O. S. Rules.

7. O. XX, r. 6, R. S. C.

8. Bullen & Leake, 8th Edn., p. 561.

written statement a further title similar to the title in a plaint, setting forth the names of all the persons who, if such counter-claim were to be enforced by cross-suit, would be defendants to such cross-suit, and shall deliver copies of his written statement to such of them as are parties to the suit within the period within which he is required to deliver it to the plaintiff."¹

Limitation :

- (a) *In the case of a defensive set-off*, the set-off claimed must be recoverable at the date of the plaintiff's suit.²
- (b) *In the case of a counter-claim by way of set-off*, i.e., where a defendant claims a decree for the surplus amount due to him, the sum claimed by the defendant should be legally recoverable at the date when he makes the claim, i.e., at the date when he files his written statement.³
- (c) *In the case of counter-claim*, i.e., a claim which need not and does not arise out of the same transaction, the plaintiff must prove that the counter-claim was barred when it was pleaded.⁴

Jurisdiction : O. VIII, r. 6(1) of the Code provides that the ascertained sum claimed by the defendant by way of set-off must not exceed the pecuniary limits of the jurisdiction of the Court. The proper test is to see whether the aggregate of the ascertained sums which the defendant seeks to set-off does not exceed the pecuniary limits of jurisdiction of the Court.⁵

In the case of a counter-claim, where the Court had no jurisdiction to try the same, as the plaintiff resided and the whole of the cause of action arose outside the jurisdiction, it was held that the counter-claim must be struck out.⁶

Court-fees : The Court-fee payable on a written statement pleading a set-off or counter-claim is provided in Sch. I, Art. 1 of

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1. Ch. VII, r. 132, Bom. High Court O. S. Rules.
 2. *Jitendra Nath v. Jnanada Kanta*, A. I. R. 1936 Cal. 277 ; *Najan Ahmed v. Salemahomed*, A. I. R. 1923 Bom. 113 ; *Uma Prosad Singh v. Shiva*, A. I. R. 1939 Pat. 567 ; *Budhu v. Sital Singh*, A. I. R. 1939 Pat. 142.
 3. *Jitendra Nath v. Jnanada Kanta*, supra ; *Bharta v. Chet Ram*, (1934) I.L.R. 56 All. 821.
 4. *Najan Ahmed v. Salemahomed*, supra ; *Sundermal v. Ganesh Narayan*, A. I. R. 1937 Nag. 210.
 5. *Hoe Moe v. I. M. Seedat*, (1924) I. L. R. 2 Rang. 349.
 6. *Vithaldas Gulabdas v. The Hyderabad Spinning & Weaving Co. Ltd.*, (1923) I. L. R. 47 Bom. 182.

the Indian Court Fees Act, 1870. The defendant must pay the court-fee on the whole amount claimed as set-off.¹ Thus, where the defendant pleaded by way of set-off an amount larger than that claimed by the plaintiff and paid a court-fee on the excess of his claim over the plaintiff's, it was held that he was bound to pay *advalorem* court-fee on the whole sum and not merely on the excess.²

No counter-claim can be entertained unless the defendant stamps his counter-claim properly. According to the Rangoon High Court, the filing of the stamped paper in the Appellate Court will not validate the counter-claim in the Trial Court and, in such a case, the defendant's remedy is only to file a separate regular suit on his counter-claim.³

The Calcutta High Court has recently held that a document not properly stamped is not a nullity. Where, therefore, a written statement claiming a set-off is accepted by a Trial Judge through mistake or inadvertance, although not stamped, and the Trial Judge, although he subsequently directs the party to pay the court-fees, does not realise the full court-fees, the High Court can in Second Appeal under Sec. 12 (2), Court Fees Act, and Sec. 49, C. P. Code, direct the payment of additional court-fees.⁴

Costs : In an action where the plaintiff's claim is found to be substantially false and the defendant's claim to the set-off is allowed in full, the defendant should be allowed his costs.⁵ But "if the defendant can plead only a counter-claim and recovers an amount equal to or greater than the plaintiff's claim, the plaintiff will recover his costs of the claim and the defendant only his costs of the counter-claim."⁶ Where both claims and counter-claim fail, the proper method of taxation of costs is to tax the costs of the defendant except so far as they have been increased by the counter-claim, and to tax the costs of the plaintiff only so far as they have been increased by the counter-claim, with a set-off of the one against the other.⁷

1. *Rani Harsamukhi v. Agadha*, A. I. R. 1940 Pat. 18.

2. *Ohhakkan Lal v. Kanhaiya Lal*, (1923) I. L. R. 45 All. 218 ; *Lakshmanan Chettiar v. Ramanathan Chettiar*, A. I. R. 1935 Mad. 115 (1).

3. *Maung Po Choke v. Muthuveerappa*, A. I. R. 1935 Rang. 116.

4. *Jitendra Nath v. Jnanada Kanta*, A. I. R. 1936 Cal. 277.

5. *Jitendra Nath v. Jnanada Kanta*, *supra*.

6. See *Odgers on Pleading*, 11th Edn., p. 247 ; *Atlas Metal Co. v. Miller*, (1898) 2 Q. B. 500 ; *Christie v. Platt*, (1921) 2 K. B. 17 ; *applied*, *Continental Contractors v. Medway Oil etc. Co.*, (1927) 96. L. J. K. B. 967.

7. *Odgers on Pleading*, 11th Edn., p. 248 ; *James v. Jackson*, (1910) 2 Ch., 92, 93, 94.

CHAPTER XIX.

THIRD PARTY PROCEDURE.

Third party procedure has been prescribed by the original side Rules of the Bombay, Madras and Rangoon High Courts. They are based more or less on O. XVIA, R. S. C.

Third party notice : O. XVIA, r. 1, R. S. C. runs as follows :—

“(1) Where in any action a defendant claims as against any person not already a party to the action (in this Order called the third party)

(a) that he is entitled to contribution or indemnity, or

(b) that he is entitled to any relief or remedy relating to or connected with original subject-matter of the action and substantially the same as some relief or remedy claimed by the plaintiff, or

(c) that any question or issue relating to or connected with the said subject-matter is substantially the same as some question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them, the Court or Judge may give leave to the defendant to issue and serve a “third-party notice.”

(2) The Court or Judge may give leave to issue and serve a “third-party notice” on an *ex parte* application supported by affidavit, or, where the Court or Judge directs a summons to the plaintiff to be issued, upon the hearing of the summons.

The Bombay High Court O. S. Rule 142, Chap. VIII, is substantially the same.

The Rangoon High Court, O. S. Rule 164, Part II, Chap. I, is limited to a third-party notice by a defendant entitled to a contribution or indemnity. This is based upon the former O. XVI, r. 48, R. S. C.

The Madras Rule is also limited to the issue of a third-party notice by a defendant entitled to a contribution or indemnity but enables a third-party notice in any suit in which the defendant, while admitting his liability for the claim in the plaint, requires that the right of the plaintiff to the relief should be adjudicated

in the presence of any other person or persons so that the adjudication may be binding on such other person or persons.¹

The notice shall state the nature and grounds of the claim².

Effect of Third-party notice : The third-party, on being served, becomes a party to the suit with the same rights in respect of his defence against any claim made against him and otherwise as if he had been duly sued in the ordinary way by the defendant³.

Appearance and default of appearance of third party : If a person not a party to the suit, who is served with a third-party notice, desires to dispute the plaintiff's claim in the suit as against the defendant on whose behalf the notice has been given or his own liability to the defendant, the third party must enter an appearance in the suit, within 8 days from the service of the notice. In default of his so doing, he shall be deemed to admit the validity of the decree obtained against such defendants, whether obtained by consent or otherwise, and his own liability to contribute or indemnify, as the case may be, to the extent claimed in the third-party notice ; provided always that a person so served and failing to appear within the said period of 8 days may apply to Court or a Judge for leave to appear, and such leave may be given upon such terms, if any, as the Court or Judge shall think fit.⁴

Again, "where a third party makes default in entering an appearance in the suit, in case the suit is tried and results in favour of the plaintiff, the Judge who tries the suit may, at or after the trial, pass such decree as the nature of the case may require, for the defendant giving the notice against the third party : Provided that execution thereof be not issued without leave of the Judge until after satisfaction by such defendant of the decree against him. And if the suit is finally decided in the plaintiff's favour, otherwise than by trial, the Court or a Judge may, on application by motion, as the case may be, pass such decree as the nature of the case may require, for the defendant giving the notice against the

1. O. V-A. r. 2, Mad. High Court O. S. Rules.

2. Ch. VIII, r. 142, Bom. High Court, O. S. Rules ; O. V-A, r. 1, Mad. High Court O. S. Rules ; Part II, Chap. I, r. 164, Rang. High Court O. S. Rules.

3. Ch. VIII, r. 142 (3), Bom. High Court, O. S. Rules.

4. Ch. VIII, r. 143, Bom. High Court, O. S. Rules ; O. V-A, r. 3, Mad. High Court O. S. Rules ; Part II, Chap. I, r. 165, Rang. High Court O. S. Rules.

third party at any time after satisfaction by the defendant of the amount recovered by the plaintiff against him.”¹

Defendant claiming against co-defendant : “Where a defendant claims to be entitled to contribution or indemnity against any other defendant to the suit, a notice may be issued and the same procedure shall be adopted for the determination of such questions between the defendants as would be issued and taken against such other defendant, if such last-mentioned defendant were a third party ; but nothing herein contained shall prejudice the rights of the plaintiff against any defendant in the suit.”²

“Where a defendant claims to be entitled to contribution or indemnity against any other defendant to the suit, a notice may be issued and the same procedure shall be adopted for the determination of such questions between the defendants as would be issued and taken against such other defendant, if such last-mentioned defendant were a third party ; but nothing herein contained shall prejudice the rights of the plaintiff against any defendant in the suit.”³

“Where a defendant claims to be entitled to contribution or indemnity against any other defendant to the suit, a notice may be issued and the same procedure shall be adopted for the determination of such questions between the defendants as would be issued and taken against such other defendant, if such last-mentioned defendant were a third party ; but nothing herein contained shall prejudice the rights of the plaintiff against any defendant in the suit.”⁴

1. Ch. VIII, r. 144, Bom. High Court O. S. Rules = O. V-A, r. 4, Mad. High Court O. S. Rules = Part II, Ch. I, r. 166, Rang. High Court O. S. Rules.
2. Ch. VIII, r. 149, Bom. High Court O. S. Rules.
3. O. V-A, r. 8, Mad. High Court O. S. Rules.
4. Part II, Ch. I, r. 170, Rang. High Court O. S. Rules.

CHAPTER XX

PARTICULARS.

Object of particulars : Although pleadings must be concise, they must also be precise. For this purpose, all necessary particulars must be stated in the pleadings. In the words of Cotton L. J., "It is absolutely essential that the pleading not to be embarrassing should state facts which will put the opposite parties on their guard and tell them what they have to meet when the case comes on for trial."¹ The particulars serve to limit the generality of pleadings and enable the other party to know accurately what was the case to be brought against him,² and so to limit and define the issues to be tried and also to limit the right to discovery of matters relating to questions in issue as narrowed by the particulars.³ What particulars are to be stated must depend on the facts of each case.

"Particulars are really supplemental to the pleadings. They are in fact amendments of the pleadings."⁴ They are amendments of pleadings not in the sense that they may be used to fill gaps of material statements in pleadings. Their function is to fill in the picture by information sufficiently detailed to put the opposite party on his guard as to the case he has to meet and to prepare for trial.⁵

But while the plaintiff or the defendant is entitled to be told any and every particular which will enable him to properly prepare his case for the trial, neither party is entitled to pry into the brief of his opponent or to find out what is to be the evidence which is to be

1. *Per* Cotton, L. J. in *Philipps, v. Philipps*, (1878) 4 Q. B. D. 127 (In an action for a specific sum of money as the total amount due on an account containing many items, the plaintiff must state particulars showing how that figure is arrived at).
2. *Per* Thesiger L. J., in *Saunders v. Jones*, (1877) 7 Ch. D. 435, 451.
3. *Yorkshire Provident Life Assurance Co. v. Gilbert & Rivington*, (1895) 2 Q. B. 148, 152 (When a person has libelled another and has justified and has given particulars, he is not entitled to more than discovery of that which relates to those particulars); *Arnold and Butler v. Bottomley*, (1908) 2 K. B. 151.
4. *Per* Vaughan Williams, L. J., in *Milbank v. Milbank*, (1900) 1 Ch. 376, 385.
5. *Per* Scott L. J., in *Bruce v. Odhams Press Ltd.*, (1936) 1 K. B. 697.

produced at the trial.¹ As a general rule, particulars must be given but not such as will amount to discovery.² But where information asked for is clearly necessary to enable the party asking for it to prepare for trial, the information must be given even though it discloses some portion of the evidence on which the other party proposes to rely at the trial,³ and even where the other party is privileged from producing documents which would disclose such evidence.⁴

After particulars are furnished, all evidence not covered by the original paragraph should be excluded.⁵

Particulars part of pleadings : Particulars are part of pleadings in the sense that a party is bound at the trial by his particulars. He cannot go into matters not included therein.⁶ Thus, in an action on a *quantum meruit*, the plaintiff cannot without amendment recover more than the amount specified.⁷ Again, a party having delivered particulars in an action may be given leave to amend the particulars.⁸ If a plaintiff has given particulars of spécial damage, he will not be allowed at the trial to give evidence of any special damage which is not claimed either in the pleading or in the particulars.⁹

Particulars and "Statements of material facts"—distinction between—In a recent case, Scott L. J. pointed out the distinction between particulars and "statements of material facts". In that case the plaintiff complained that she was libelled by a newspaper article concerning certain aeroplane smuggling exploits of "an English-woman". The plaintiff was not referred to by name or description,

1. *Per Kikewich, J. in Humphries & Co. v. Taylor Drug Co.*, (1888) 39 Ch. D. 693. Cf. *Aga Khan v. Times Publishing Co.*, (1924) 1 K. B. 675, 680 ; *Wootton v. Sievier*, (1913) 3 K. B. 499.
2. *Turnock v. Sartoris*, (1888) 33 Sol. J. O. 58, C. A.
3. *Marriott v. Chamberlain*, (1885) 17 Q. B. D. 154 ; *Zierenberg v. Labouchere*, (1893) 2 Q. B., 183, 187, 188.
4. *Milbank v. Milbank*, (1900) 1 Ch. 376 ; *Odgers on Pleading*, 11th Edn., p. 178.
5. *Gauri Shankar v. Mst. Manki Kumcar*, (1923) I. L. R. 45 All. 624.
6. *Woolley v. Broad*, (1892) 2 Q. B. 317. Cf. *Doe d. Winnall v. Broad*, (1841) 2 Man. & G. 523.
7. *Hodge v. Matlock Bath U. D. C.*, (1910) 27 T. L. R. 129, C. A.
8. *Yorkshire Provident Assurance Co. v. Gilbert & Rivington*, (1895) 2 Q. B. 148, 152 ; *Olarapede v. Commercial Union Association*, (1883) 32 W. R. 262, C. A.
9. *Watson v. North Metropolitan Tramways Co.*, (1886) 3 Times Rep. 273,

but alleged that the words "an Englishwoman" referred to her. The defendants applied for particulars of facts from which it was to be inferred that the plaintiff was the person referred to. *Held*, that the statement of claim is under the present system of pleading lacking in a statement of material facts within the meaning of R. S. C., O. XIX, r. 4 (O. VI, r. 2, C. P. Code), and that it is liable to be struck out under R. S. C., O. XXV, r. 4 ; or a further and better statement of the nature of the claim might have been ordered under rule 7 (O. VI, r. 5, C. P. Code). Where there is an omission from the statement of claim of averments needed for the protection of defendant, there is a default under r. 6, and the defendant is entitled *ex debito justicie* to an order for particulars under r. 7.

"O. XIX, R. S. C., draws no express line of demarcation between "statement of material facts" and particulars and I am not sure that in some of the judgments in the reported cases the distinction between the two has always been kept as clear as is desirable ; but that there is a radical distinction is beyond question, and none the less so that in cases near the dividing line there is a penumbra where the two may and often do overlap, just as between night and day there is a zone of doubt which we call dusk.....The cardinal provision in rule 4 is that the statement of claim must state the material facts. *The word "material" means necessary for the purpose of formulating a complete cause of action ; and if any one "material" statement is omitted, the statement of claim is bad ; it is "demurrable" in the old phraseology, and in the new is liable to be "struck out" under R. S. C. Ord. XXV, r. 4, or "a further and better statement of claim" may be ordered under rule 7. Thus under either head the issue is appealable and not a matter of discretion.*"

"*The function of "particulars" under rule 6 is different. They are not to be used in order to fill material gaps in a demurrable statement of claim—gaps which ought to have been filled by appropriate statements of the various material facts which together constitute the plaintiff's cause of action. The use of particulars is intended to meet a further and quite separate requirement of pleading, imposed in fairness and justice to the defendant. Their function is to fill in the picture of the plaintiff's cause of action with information sufficiently detailed to put the defendant on his guard as to the case he has to meet and to enable him to prepare for trial. Consequently, in strictness, particulars cannot cure a bad statement of claim. But in practice it is often difficult to distinguish be-*

tween a "material fact" and a "particular" piece of information which it is reasonable to give the defendant in order to tell him the case he has to meet; hence, in the nature of things, there is overlapping. And the practice of sometimes putting particulars into the statement of claim and sometimes delivering them afterwards either voluntarily, or upon request or order, without any reflection as to the true legal ground upon which they are to be given, has become so common that it has tended to obscure the very real distinction between them."

"In a case where there is no omission of material facts under rule 4, whether particulars should be ordered is very often a matter of pure discretion—because it depends on a view of fairness or convenience which is essentially a matter of degree. But when particulars are asked because the statement of claim is defective in that it omits some essential averment—*i.e.*, some "material fact"—the question is not one of discretion and the adoption by the defendant of the lenient remedy of an application for particulars instead of the more stringent remedy of striking does not turn an issue of right into an issue of discretion. As *Philipps v. Philipps*, (1878) 4 Q. B. D. 127, is an illustration of the more stringent remedy, so *Palmer v. Palmer*, (1892) 1 Q. B. 319, is an illustration of the more lenient remedy; but if in the latter case the defendant had so chosen I think he would have been entitled to the more drastic remedy."

Degree of particularity : The plaint or the written statement ought always to give full particulars rendering further particulars unnecessary. Such particulars mean the best particulars which a reasonable man would require respecting the matters against which he was called upon to defend himself. As much certainty and particularity must be insisted on, as is reasonable, having regard to the circumstances and to the nature of acts themselves. 'To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry'. A party who pleads with unnecessary particularity may thereby fetter his hand at the trial³, or impose on himself an increased burden of

1. *Per* Scott L. J. in *Bruce v. Odhams Press Ltd.*, (1936) 1 K. B. 699.

1. *Rateliffe v. Evans*, (1892) 2 Q. B. 524, 532.

2. *James v. Smith*, (1891) 1 Ch. 384; on appeal 65 L. T. 544 C. A. (where instead of relying on the Statute of Frauds generally, the defendant pleaded S. 4 and he was not allowed to amend or avail of S. 7),

proof¹. A party who omits to plead a material fact may lose his case², and a party who pleads a material fact but with insufficient detail may be ordered to give particulars and to pay costs. An order is often made for the best particulars plaintiff can give³.

Particulars—in respect of what matters ordered : The jurisdiction of the Court to order particulars depends upon O. VI, r. 4 of the C. P. Code (O. XIX, r. 6, R. S. C.).

O. VI, r. 4 says that “in all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated⁴ in pleading”.

Further and better particulars—when ordered : O. VI, r. 5 says that ‘a further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading may in all cases be ordered, upon such terms, as to costs and otherwise, as may be just’.

Rule 5 does not permit the submission of new material altogether based on an entirely different cause of action. This would be really repugnant to rule 7 of the same Order which unequivocally prohibits the raising of any new ground of claim or the alleging of any fact inconsistent with previous pleadings⁵.

The defendant, if he so desires, should apply for further and better particulars under r. 5, otherwise it will not be open to him to make a grievance of any vagueness in the plaintiff's pleadings at an appellate stage⁶.

1. *West v. Bazendale*, (1850) 9 C. P. 141.
2. *Collette v. Goode*, (1878) 7 Ch. D. 842 (In an action for damages for an alleged infringement of plaintiff's copyright in a song, the defendant pleaded that the time of first publication was not truly entered on the register. Held, the defendant was not at liberty to prove that the name of the publisher had been untruly stated); Cf. *Byrd v. Nunn*, (1877) 7 Ch. D. 284 :
3. *Odgers on Pleading*, 11th Edn., p. 181.
4. The word “stated” in the rule means stated expressly or by necessary implication : *La Radiotechnique v. Weinbaum*, (1928) 1 Ch. 1.
5. *Mehnga Dass v. Maya Singh*, A.I.R. 1937 Lah. 795.
6. *K. C. De v. Hira Bewa*, I.L.R. (1937) 1 Cal. 491.

Particulars—in respect of what matters not ordered :

(a) When the onus of establishing a positive or negative allegation lies on the plaintiff, the Court will not order the defendant to give particulars of his traverse of that allegation¹. But particulars of a traverse involving affirmative allegation must be given².

(b) No particulars will be ordered of an immaterial allegation³.

(c) Particulars will not be exacted where it would be oppressive or unreasonable, as where the information is not in the possession of either party, or could only be obtained with great difficulty, or where the particulars are not applied for till the last moment.⁴

Additional particulars : A party who wants to amend or add to particulars already delivered should apply for leave to deliver further particulars.⁵ The application should be made a reasonable time before the trial. At the trial leave to amend particulars is as a rule refused.⁶ When the application is made a reasonable time before the trial, it will generally be allowed upon terms, unless the opposite party will be seriously prejudiced by such amendment or such injury will be caused to him as cannot be compensated by costs,⁷ or if the effect of the proposed amendment is to introduce a new and inconsistent case.

Application for particulars : An application for particulars or

1. *Weinberger v. Inglis*, (1918) 1 Ch. 133; *La Radiotechnique v. Weinbaum*, (1928) 1 Ch. 1; *Collins v. Charles Booth & Co., Ltd.*, A.I.R. 1921 Sind 106.
2. *Mac Lulich v. Mac Lulich*, (1920) P. 439 (suit for restitution of conjugal rights. The wife by her petition alleged that the husband withdrew from co-habitation with her and had kept and continued away from her without just cause. The husband by her answer alleged that he had "just cause" for withdrawing from co-habitation and "reasonable cause" for refusing to render conjugal rights. Held, petitioner was entitled to particulars of any charges or facts on which the respondent relied as justifying his conduct).
3. *Cave v. Torre*, (1886) 54 L. T. 515; *Gibbons v. Norman*, (1885) 2 T. L. R. 676; *Gaston v. United Newspapers Ltd.*, (1915) 32 T. L. R. 143.
4. Odgers on Pleading, 11th Edn., p. 181.
5. *Yorkshire Provident etc., Co. v. Gilbert & Rivington*, (1895) 2 Q. B. 148; *Kent Coal Concessions v. Duguid*, (1910) A. C. 452 H. L. (E.).
6. *Moss v. Malings*, (1887) 33 Ch. D. 603.
7. *Olarapede v. Commercial Union Association*, (1883) 32 W. R. 252 C. A.

further and better particulars may be made at any time.¹ As a rule, however, it should be made after the necessity for it arises. If there is undue delay, the application may be refused.² To permit applications for particulars being used for purposes of delay, r. 7A, of O. XIX, R. S. C., provides that before applying for particulars by summons or notice a party may apply for them by letter and in dealing with the costs of application for particulars, the provisions of this rule shall be taken into consideration by the Court or Judge. In India we have no such rule, but the practice at least on the original side of the High Courts is to apply for particulars by letter in the first instance. Sometimes at the hearing, particulars are ordered on the oral application of parties.³

Particulars—how delivered : Ordinarily, the plaint should contain the particulars required by O.VII, fr. 1 to 8 of the C. P. Code.⁴ According to the O. S. Rules of the Bom. High Court, in cases of debt, there shall be annexed to and filed with the plaint particulars of the plaintiff's claim.⁵

According to English practice, if particulars are less than three folios in length, they should be set out in the pleading. If more, a statement to that effect should be inserted and particulars delivered separately.⁶ In India there is no settled practice. Particulars of any length are sometimes set out in the body of the plaint and sometimes set out in a schedule annexed to the plaint. When a further and better statement of particulars is ordered under O. VI, r. 5, C. P. Code, the order itself may, and generally does, provide as to how it is to be delivered, whether by letter or otherwise. According to the O. S. Rules of the Mad. High Court, when a party is ordered to give further and better particulars of a matter alleged in a plaint or written statement, or otherwise, the same shall be drawn up in the form prescribed for the written statement of a defendant, and shall be endorsed with a reference to the order directing the same and presented to the Registrar within the time thereby limited.

Time for delivery of particulars : The order for particulars should limit the time within which they are to be delivered. Particulars

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- 1. *Thomson v. Birkley*, (1892) 47 L. T. 700.
 - 2. *Gauraud v. Fitzgerald*, (1889) 37 W. R. 265.
 - 3. Cf. Chap. VI, r. 58, O. S. Rules, Mad. High Court.
 - 4. Cf. Chap. VII, r. 1, O. S. Rules, Cal. High Court.
 - 5. Chap. VI, r. 96, O. S. Rules Bom. High Court.
 - 6. Annual Practice, 1938, p. 344.

of claim may be ordered before defence, where without a statement of particulars it is impossible that the defendant could be in a position to decide how to plead to the statement of claim.¹ The defendant does not waive his rights to have particulars by delivering a defence.²

Postponement of particulars till after discovery : In some cases, it may so happen that the plaintiff is unable to give particulars of his claim before discovery of documents. Such cases usually arise out of the relation of principal and agent or out of any fiduciary relation between the parties. In the absence of such relationship between the parties to the action, such discovery has never been allowed except under special circumstances, such as one party keeping back something which the other was entitled to know³. In deciding whether particulars should be ordered before discovery, the judge must exercise a reasonable discretion in every case after carefully looking at all the facts and taking into account all special circumstances⁴. In every case, before ordering that no particulars should be delivered by the plaintiff before discovery, the Court should take into consideration—

- (a) the position of the parties ;
- (b) whether the case set up by the plaintiff is one having a substantial foundation or is merely a fishing case ;
- (c) whether the particulars are all that the plaintiff can furnish ;
- (d) whether the defendant had means of knowing the facts in dispute and the plaintiff has not ;
- (e) whether there are any special circumstances, such as one party keeping back something which the other was entitled to know.

1. *Per Greer L. J., in Bruce v. Odhams Press Ltd.*, (1936) 1 K. B. 697, 705 (In an action of libel the plaintiff should give particulars of allegations in the statement of claim that the words complained of were published of the plaintiff. In other words, the plaintiff must state facts from which it is to be inferred that the words were published of the plaintiff).
2. *Sachs v. Spielman*, (1898) 37 Ch. D. 295.
3. *Per Lord Esher M. R., in Zierenberg v. Labouchere*, (1893) 2 Q. B. 183, 188.
4. *Per Chitty J., in Waynes Merthyr Co. v. Radford*, (1896) 1 Ch. 29, 35.

Illustrations :—

(a) Plaintiffs sued the defendants for passing off coal not from the plaintiffs' colliery as coal obtained from that colliery. The plaintiffs gave one instance when two distinct frauds were committed when supplying coal to the City of London Brewery and added that on diverse occasions the defendants had taken orders from the same Brewery Co. and diverse other persons for coal from the plaintiffs' colliery, and fraudulently supplied coal not purchased from the plaintiffs. The defendant took out summons for delivery of particulars before discovery. Chetty, J. *held* "In this case no particulars will be ordered before discovery, because (1) this is not a fishing case but one having a substantial foundation ; (2) the defendants by careful examination of the books have the means of discovery whether any other frauds similar to those alleged (which are admitted) have been committed, specially having regard to the position of parties and the admitted facts and having regard to the circumstance that many of these alleged frauds are within the defendants' means of knowledge and are not within the knowledge of the plaintiffs : *Waynes Merthyr Co. v. Radford* (1896) 1 Ch. 29, 36.

(b) Plaintiffs sued for damages for breach of covenant in restraint of trade without specifying the various heads of claim for damages. They were ordered to deliver to the defendant a statement in writing showing the various heads of claim for damages alleged to have been sustained by them. The plaintiffs appealed from the said order. They said, "We cannot until discovery of documents give the heads of our claims except drawing upon our imagination and putting into our statement every head of claims we can think of ; and we cannot limit because we are in ignorance of the facts." Lindlay, L. J., in discharging the order, *held*, that the plaintiffs could usefully comply with the order until they had seen the books : *Maxim Nordenfelt v. Nordenfelt*, (1893) 3 Ch. 122, 127.

(c) The plaintiff sued the defendant as a stock-broker employed by him and alleged that the defendant in many of the transactions dealt himself as principal and also charged the plaintiff with moneys not paid. The plaintiff delivered interrogatories asking for the particulars of the dealings on behalf of the plaintiff and the names of persons with whom the defendant had dealt and the amounts paid. The defendant refused to answer on the ground that the plaintiff was not entitled to this information until after decree. *Held*, by Cotton and Bowen L. JJ., that the plaintiff was entitled to discovery in order to enable him to give details of the frauds alleged. Bowen L. J. at p. 379 observed as follows, "Ought the generality of an allegation of fraud be a bar to the right to discovery ? It seems to me that the very fact that the pleader is unable to plead except in general terms, is in many cases the reason why he should have discovery from the other party, so as to enable him to plead the fraud in detail. If at a particular stage of action you are stopped by reason of your ignorance of some fact which is known only to the other party, that is the very reason why you should have discovery of that fact from him." The same learned judge observed at p. 377, as follows : "In the present case the plaintiff's right to discovery arises not out of fraud but out of the relation of principal and agent. It is true the discovery is wanted for the purpose of proving the fraud but the right to it does not depend

upon that"; *Litch v. Abbotts*, (1886) 31 Ch. D. 374, fd. in *Rama Krishniah v. Satyanandan*, A. I. R. 1932 Mad. 284.

(d) Plaintiffs sued for an account of secret profits earned by the defendant as the plaintiffs' agent. The charges against the defendant were stated in general terms, *viz.*, "that the defendant purchased goods at prices higher than the current prices and had secretly received from the vendors allowances or commission." The defendant denied the statement and also pleaded a settled account in bar of the action. The plaintiffs took out summons for discovery of documents. The defendants applied for particulars of frauds alleged. Baron V. C. in ordering discovery before particulars held as follows: "The plaintiff's case is that they are unable to give particulars but they state general facts. The particulars are enough, they are all that the plaintiffs can furnish. There are no particulars that they can prove but are contained in the defendant's books. They say that they have not given evidence because they cannot, but if the defendants furnish them with the papers and books of account they will then give the particulars. The settled account is no answer to that right of discovery"; *Whyte v. Ahreens*, (1884) 26 Ch. D. 717, 719, discussed in *Sacks v. Spielman*, (1888) 37 Ch. D. 295, 299, and both followed in *Rama Krishniah v. Satyanandan*, A. I. R. 1932 Mad. 284.

(e) Plaintiffs who were the executors of a married woman sued her husband to establish that a quantity of the furniture, etc., comprised in an inventory which had been taken of the goods in the defendant's house belonged to the separate estate of the wife. The husband applied for particulars of demand showing which chattels they claim. Cotton, L. J. (at p. 112) in directing that the application ought to stand over till the husband made an affidavit which of the articles belonged to the wife, held, "where the defendants had means of knowing the fact in dispute and the plaintiff has not, the defendant is not entitled to particulars until he has given discovery." Bowen, L. J. (p. 112) observed, "it is good practice and good sense that where the defendant knows the facts and the plaintiffs do not, the defendant should give discovery before the plaintiffs deliver particulars"; *Millar v. Harper*, (1888) 38 Ch. D. 110.

Exception: The principle that where the defendant knows the fact and the plaintiff does not, the defendant should give discovery before the plaintiff delivers particulars does not apply to an action of libel in which the defendant pleads justification.

Illustrations :

(a) The plaintiffs sued the defendants for libel setting out a great many statements as libellous. The libel was to the effect that the plaintiffs were "charity swindlers and imposters". The defendants pleaded generally to the whole a justification that it was true. The plaintiffs took out a summons for particulars. The defendants supplied some particulars but did not give the instances or the times or occasions on which the swindles were alleged to have been done or the names of the persons whose money was alleged to have been misappropriated. They contended that they should be allowed discovery by way of interrogatories and inspection before being called upon to do so. Lord Esher,

M. R., held (p. 188), "Such discovery has never been allowed in the absence of some relationship between the parties to the action, except under special circumstances, such as one party keeping back something which the other was entitled to know. Here the justification for want of sufficient particulars is not a well pleaded defence, and till there is such a defence there can be no right to discovery, in the absence of both the relationship of which I have spoken or of any special circumstances." Kay L. J. at pp. 189-90 held, "If the defendant says that he is unable to state any such facts without discovery, the answer is simple and conclusive—he ought not to have published the libel, and cannot plead any justification for having done so. The case of a charge of fraud against a trustee, by pleading only, where no libel has been published otherwise, is essentially different. There the fiduciary relation, and the circumstance that the facts are generally known only to the defendant, or at least that he has means of knowledge not in the first instance equally accessible to the plaintiff, may justify the Court in requiring the defendant to make discovery before the plaintiff is called on to give particulars, because the fiduciary relation of the defendant to the plaintiff entitles the plaintiff to all the knowledge which the defendant may have, and it is not uncommon, when a conflict arises between the right of the plaintiff to discovery and the right of the defendant to particulars, in such cases to postpone the giving of particulars until the discovery has been made. But to apply this practice to the case of libel would be to sanction the publication of a libel when the libeller knows no facts justifying the libellous statement because he believed he could by the process of discovery elicit such facts." : *Zierenberg v. Labouchere*, (1893) 2 Q. B. 183.

(b) To an action by a firm of stock and share dealers for a libel in a newspaper, being that it meant that the plaintiffs carried on their business in an improper manner and were fraudulent stock and share dealers and persons who could not be trusted in business dealings, the defendant pleaded justification and delivered particulars of the plea, in which he alleged that the plaintiffs were not members of the London Stock Exchange, but were concerned in running a "bucketshop" and that they did not carry on the ordinary and legitimate business of stock brokers, but were entirely dependent for their profits upon the losses made by their customers. In a further set of particulars the defendant gave the names of, and extracts from, certain pamphlets on methods of money-making issued by the plaintiff. In neither set of particulars did the defendant give any specific instance of the commission by the plaintiffs of any fraud or improper act, or the name of any person alleged to have been defrauded by, or to have suffered loss at the hands of, the plaintiffs. The defendant having taken out a summons for an order that he be at liberty to inspect the books of the plaintiffs for a certain period :—*Held*, that as the particulars of justification contained no specific instances of the misconduct alleged, they were too general to entitle the defendants to inspection of the plaintiff's books." : *Arnold & Butler v. Bottomley*, (1908) 2 K. B. 151.

Effect of omission to give particulars ordered : In the order for particulars it is usual to limit the time within which they are to be delivered and to impose other terms. In the case of a plaintiff, the order for particulars generally states that "unless such particu-

lars are delivered within days, all further proceedings be stayed until the delivery thereof." According to the English practice, if particulars are not delivered in spite of the said order, the defendant may apply to Court for dismissal of the suit for want of prosecution. He is not prevented from doing so by reason of the fact that the suit has been stayed.¹ The order directing the plaintiff to deliver particulars may itself provide that the action shall be dismissed unless particulars are supplied within a specified time.²

In the case of a defendant, it is usual to order, that 'in default of particulars, he shall be precluded from giving evidence in support thereof on the trial of the action'.³

In India, it seems that the English practice is generally followed.⁴ There are not, however, many reported cases bearing on the point. In a case where the order for particulars directed that a specified sum of costs should be paid before the delivery of the particulars, the Allahabad High Court held, that if the order for payment of costs is disobeyed, then, if the plaintiff is in default, he should have his action stayed, and if the defendant is in default, his defence would be struck out.⁵

In a case where the defendant, who was ordered to give particulars by a certain time, failed to do so, the Madras High Court held, that the Court has jurisdiction to strike out his defence even though such penalty is not explicitly added to the order directing particulars and that the discretion exercised by the original Court in striking out a defence on that ground should not be interfered with in Appeal.⁶ In another case, the defendant who made default,

1. *La Grange v. McAndrew*, (1879) 4 Q.B.D. 210; Yearly Practice, 1938, p. 301.
2. *Davey v. Bentinck*, (1893) 1 Q. B. 185 C. A. fd., in *Nedungadi Bank Ltd. v. Official Assignee of Madras*, (1930) I. L.R. 53 Mad. 645.
3. See Form, App. K., No. 14, R. S. C.
4. Cf. *Vasudevan v. Nedungathiripad*, A. I. R. 1932 Mad. 316 (where the suit was dismissed because the plaintiff did not comply with the order for particulars.).
5. *Gouri Shankar v. Manki Kunwar*, (1923) I. L. R. 45 All. 624, expd., in *Nedungadi Bank Ltd. v. Official Assignee of Madras*, *supra*.
6. *Nedungadi Bank Ltd. v. Official Assignee of Madras*, *supra*, fd. in *Vasudevan v. Nedungathiripad*, *supra* (per Curgenven J. at 318: "It is difficult to see what other course a Court could adopt upon the failure of a plaintiff to furnish the information required by O. VI, r. 5, C. P. Code except to dismiss the suit.).

in furnishing particulars, sought to do so after a formal subsequent amendment of the plaint. The Nagpur High Court held that the amendment of the plaint being of a formal nature, did not re-open the case so as to give the defendant a fresh opportunity to furnish the particulars.¹

Effect of not asking for particulars : If a party makes general allegations where he ought to plead with particulars, and the opposite party also omits to ask for particulars and goes to trial, the judge may make an order directing particulars to be given on the moment, if he thinks that the opposite party will be taken by surprise, or adopt some other course which would prevent the trial becoming abortive. But in a case of this nature, the plaintiff is not entitled to say that the other side could have got the necessary information if they asked for it and, therefore, he ought to be permitted to prove his allegations although they are of a general nature².

In a libel action, where the plea of justification was taken in general terms and no particulars were asked for, and the parties went to trial and the trial Court admitted evidence upon the plea of justification, in spite of objections, the Court of Appeal held, that the evidence was not admissible without an amendment³. But if evidence was admitted without objection, the party who omitted to object cannot be heard to say afterwards that under the general allegation evidence was given of a nature which took him by surprise⁴.

Instances of particulars required or refused :—

Except in cases where a party is permitted to state particulars after discovery, all particulars of material facts should be stated at the outset, and if not so stated, the party desiring particulars may take an order for particulars from Court. The following are instances of particulars required or refused.

1. *Gunba Paiku Kunbi v. Ganpatsao*, A. I. R. 1937 Nag. 376.
2. *Raj Chandra v. Mahim*, A. I. R. 1926 Cal. 549 (where a general allegation of special damage was made).
3. *Per Palles C. B.*, in *Hewson v. Cleve*, (1904) 2 I. R. 536, 545.
4. *Per Costello J.*, in *Ananta Lal v. Soudamini*, (1929-30) 34 C. W. N. 809 (where the plaintiff made an allegation of fraudulent conspiracy in general terms); *Beni Madho v. Basanto Kunbi*, (1916) 35 I. C. 252 (case of fraud where the party aggrieved raised no objection and fought out the case at the first hearing as though the pleadings were in proper form). Cf. *K. C. De v. Hira Bewa*, I. L. R. (1937) 1 Cal. 6; *Bharat Dharma Syndicate Ltd., v. Harish*, (1936-37) 41 C. W. N. 746 (P. C.).

- (1) **Accident** : In an accident case, the plaintiff must give particulars of the injuries mentioned in the plaint together with the time and place of the accident and the particular acts of negligence complained of¹.
- (2) **Account** : Where the plaintiff only claims an account, no particulars will be ordered².

Where the plaintiff claims to recover a definite sum made up of a number of items, he will be ordered to give particulars of demand³.

Where the plaintiff claims an ascertained sum as well as an amount to be ascertained by an account, and states facts which are sufficient *prima facie* to induce the Court to order an account, no order will be made for particulars (dates and items) of the moneys had and received, the object of the action being to obtain the necessary information from the defendant : such particulars will form part of future account⁴.

Merely because an account is asked for will not prevent the Court from ordering particulars ; but if the Court sees that an account will be necessary, it will not order particulars. Thus, if in a foreclosure action, the plaintiff had been in receipt of rents and profits, and the defendant alleged that he did not know what to pay or tender, the fact that plaintiff asked for an account would not be sufficient reason to refuse to give particulars⁵.

- (3) **Account stated** : See heading "Account stated" under "Special Defences", Chap. XVII.
- (4) **Acknowledgment of liability** : Where in a suit in respect of some right or property, the plaintiff relies upon an acknowledgment, or successive acknowledgments, of liability within the meaning of S. 19, Ind. Lim. Act, 1908, he must state the following particulars :

(i) That there was an acknowledgment⁶, or that there were

1. See Form No. 13, App. K, R. S. C. ; cf. *Liladhar v. Hiralal*, I.L.R. (1937) Bom. 268 ; *Bengal N.W.By. Co. v. Mutukdhari*, (1937) I.L.R. 16 Pat. 672.
2. *Carr v. Anderson*, (1901) 18 T. L. R. 206, C. A.
3. *Augustinus v. Neninckx*, (1880) 16 Ch. D. 13.
4. *Blackie v. Osmaston*, (1884) 28 Ch. D. 119.
5. *Per North J., in Kemp v. Goldberg*, (1895) 36 Ch. D. 505, 507.
6. Any kind of right may be acknowledged and not merely debts, *e. g.*, a right to enforce a decree or judgment (Expl. III to S. 19), a right to compensation for a tort, a claim to immovable property or the plaintiff's

- successive acknowledgments, of liability in writing signed by the party against whom the right or property is claimed or by some person through whom he derives title or liability.
- (ii) Date of execution of the acknowledgment showing that it was executed within the prescribed period next before the institution of the suit; and if there were successive acknowledgments, then the date of the first acknowledgment and the date of each of the subsequent acknowledgments showing that it was made within the "new period" arising from the last preceeding acknowledgment.
 - (iii) Mode of acknowledgment (whether made in correspondence, or in will or in deed or in any proceedings, such as plaint, written statement, petition, affidavit or in any other document whatsoever).
 - (iv) That the acknowledgment relates to the particular debt or liability sued for.¹
 - (v) If the acknowledgment is qualified by a condition, that the condition is fulfilled.²
- (5) **Acquiescence**: See under "Special Defences," Chap. XVII.
- (6) **Admiralty action**: The rule as to giving the opposite party particulars of any general allegation in pleadings is strictly observed in admiralty actions. Thus, where plaintiffs (cargo owners) sued the ship owners for delivery of cargo in a damaged condition, alleging that the damage was occasioned by the defective condition of the vessel, particulars were ordered of the alleged defects.³

right to turn the defendant out of possession of some property. Cf. *Ramhit v. Satgur*, (1880) I. L. R. 3 All. 247 (F.B.). In the case of a debt, there must be a clear and unambiguous recognition of an existing debt, or part of it, or of the subsisting relationship of debtor and creditor: *Benode Behary v. Raj Narain*, (1903) I. L. R. 30 Cal. 699 (S. C.), on appeal, (1904) I. L. R. 31 Cal. 195. If a definite sum smaller than the sum claimed is acknowledged to be due, only the sum acknowledged is taken out of the Statute: *Ohandra Kumar v. Ramdin*, (1911-12), 16 C. W. N. 493; *Carlender v. Abdul*, (1921) I.L. R. 43 All. 216.

1. *Per Fawcett J.*, in *Pranjivandas v. Bai Mani*, (1921) I.L.R. 45 Bom. 934, 940; *Bhagwan Ganpati v. Madhav Shankar*, (1922) I. L. R. 46 Bom. 1000, 1003, *fg. Hiratal v. Narsilal*, (1913) I. L. R. 37 Bom. 326 (P. C.).
2. *Maniram Seth v. Seth Rupchand*, (1905-06) I. L. R. 33 I. A. 165; *Ramamurthy v. Gopayya*, (1917) I. L. R. 40 Mad. 701; *Nanak Chand v. Omkar Nath*, A. I. R. 1934 Lah. 973(2).
3. *The Rory*, (1882) 7 P. D. 117.

Where a vessel at anchor was run into and damaged by a vessel in motion, in an action for damages by the owners of the vessel at anchor, the allegation in the statement of claim that the defendant's vessel "did not take proper and seaman-like measures to keep "clear" of the plaintiff's vessel was struck out as the plaintiffs could give no particulars."¹

In salvage actions, particulars of the services rendered must be given. A fuller statement of claim than that given in Form No. 6 of App. C to the R. S. C. should generally be made.²

- (7) **Adultery**: Particulars of any alleged adultery must be stated in the pleading specifying when and where the alleged acts of adultery were committed. The party pleading adultery must give the best particulars which he can extract from the witnesses upon whom he relies to prove his case.³ A general charge of adultery should not be allowed to stand but should be accompanied by at least one charge specific as to date and place.⁴

Where in an action to recover a debt on an I. O. U., against the widow and administratrix of a publican, who is alleged to to have given the I. O. U. to the plaintiff, the defence was that the I. O. U., if given by him, was given in consideration of adultery committed or to be committed between the plaintiff and the deceased, *held*, the defendant must give such particulars as she could of any such acts of adultery as she intended to rely upon.⁵

- (8) **Adverse possession**: Adverse possession is a mixed question of law and fact. A party claiming title by adverse possession must plead and prove facts from which he asks the Court to draw the inference that the proved facts amount in law to adverse possession.⁶

To prove title by adverse possession it must be shown that the possession was actual, physical, exclusive, hostile and con-

1. *The Kanawha*, (1913) 108 L. T. 433.
2. *The Isis*, (1883) 8 P. D. 227.
3. *Hartopp v. Hartopp & Cowley (Earl)*, (1902) 71 L. J. P. 78.
4. *Brown and Latey on Divorce*, 1931 Edn., p. 399.
5. *Coates v. Croyle*, (1888) 4 T. L. R. 735.
6. *Shiromani Gurdwara Parbandhak Committee v. Prem Das*, (1933) I. L. R. 13 Lah. 677; *Jogendra Nath Mukherjee v. Rajendra Nath*, (1921-22) 26 C. W. N. 890.

tinued during the time necessary to create a bar under the Statute of limitation. In other words, the person claiming title by adverse possession must show that his possession extended for the full statutory period, at least 12 years before the suit, and that such possession was hostile to the real owner and amounted to a denial of his title to the property claimed.¹

Thus, in a suit for declaration of title and possession, the defendant may plead adverse possession in the following manner ;

"In.....19.....the plaintiff claimed to be the owner of the land in suit and demanded possession of the said land from the defendant. By letter dated.....the defendant unequivocally denied the plaintiff's title and has remained in actual, physical, and exclusive possession of the said land without interruption to the knowledge of the plaintiff (or without any attempt at concealment) since....."

or

"The defendant has been in continuous, exclusive possession of the property in suit by collecting the rents, issues and profits thereof and appropriating the same to his own use since.....On.....the plaintiff demanded the half share of the profit of the said property from the defendant. On the same date the defendant by letter denied the plaintiff's title and refused to pay him any share of the said profits."

If, in any of the above cases, the defendant simply pleads that he is the owner of the property by adverse possession, his opponent would be entitled to the following particulars : (a) the nature of possession, i. e., whether the possession was actual, physical possession or possession through tenant ; (b) the period of possession ; (c) whether the possession was continuous ; (d) whether the possession was hostile, and if so, how ; (e) whether the possession was to the knowledge of the person possessed against, and if so, how.

1. *Surendra Kumar Roy v. Ahmad Nawab*, (1936) I. L. R. 63 Cal. 300 ; *Silla Bakhsh Singh v. Subadar*, A. I. R. 1932 Oudh. 140 ; *Ejaz Ali v. Special Manager, Court of Wards*, (1934) 61 C. L. J. 102, 109 ; *Sris Chandra Nandy v. Baijnath*, (1935) I. L. R. 14 Pat. 327 (P.O) ; *Sm. Amina Bibi v. Akhoy Kumar*, (1934) 61 C. L. J. 373 ; *Rangappa v. Ramaswami*, A. I. R. 1925 Mad. 1005.

Adverse possession—where certain relationship between the parties exists :

In the following cases, where certain relationship between the parties exists, no adverse possession can be claimed unless there was a clear denial of the owner's title accompanied by an overt act showing unequivocally the assertion of a hostile title :

(i) *Between co-owners*¹ : The person basing his title on adverse possession against his co-owner must plead and prove, (a) that he had expressly repudiated the title of his co-owner (giving the date and manner of such repudiation, that is, whether verbally or in writing) ; (b) that such repudiation was accompanied by an overt act (stating what it was), showing unequivocally the assertion of a hostile title, to the knowledge of the co-owner ; (c) that he has been in exclusive continuous possession (stating the nature of possession) of the property in suit to the knowledge of his opponent (or without any attempt at concealment) since.....(showing that possession continued during the time necessary to create a bar under the Statute of limitation).

(iii) *Between landlord and tenant* : Possession as a tenant, however long, cannot be adverse to the landlord². A person who was a tenant can only be said to have held adversely to the owner of the property when his character as tenant ceases and he becomes a trespasser on the land. The character of tenant as a tenant ceases only when the tenancy is determined and not before³. A tenancy is not determined by a mere disclaimer by the

1. *Bakhsh Shah v. Ghulam Ali Shah*, A. I. R. 1935 Lah. 63 ; *Mam Raj v. Ohlotu*, A. I. R. 1933 Lah. 763 (1) ; *Jagadeshchandra v. Taiyab Sarder*, (1934) I. L. R. 61 Cal. 377 ; *Kanhaya v. Trikha*, A. I. R. 1935 Lah. 651 (where the same principle was applied to a transference from a co-sharer) ; *Biswanath Chakravarti v. Rabija Khatun*, (1928-29) 33 C. W. N. 46 (where the question of adverse possession by co-tenants against the purchaser from a co-tenant was raised) ; *Mahendra Narayan v. Dakshina Ranjan*, (1935) 61 C. L. J. 537 (where adverse possession was claimed against reversioners after the death of the female life holder of the property) ; *Ambika Prosad v. Sada Sheo Lal*, (1933) I. L. R. 55 All. 173 (adverse possession between co-tenants).
2. *Monmotha v. Anath Bundhu*, (1920-21) 25 C. W. N. 106.
3. *Ramaswami v. Thayammal*, (1903) I. L. R. 26 Mad. 488 (case of a monthly tenant).

tenant during the continuance of the tenancy unless the disclaimer or repudiation is accepted by the landlord¹. Where, after the expiry of the period fixed in a lease, the tenant continues in possession as tenant on the same terms expressed in the lease, he cannot claim adverse possession². But, if a tenant for a term of years or from year to year had disclaimed during the continuance of the tenancy and continued in possession after the tenancy came to an end by effluxion of time, such possession is not that of a tenant holding over. Under such circumstances the tenant forfeits his position as tenant and ought to be entitled to the advantage which results from his known adverse possession³. Although a tenant holding over after the expiry of his term, becomes a tenant on sufferance (unless he has disclaimed), the representatives of a tenant on sufferance are however, mere trespassers and suit for possession against them will fall under Art. 144 of the Ind. Lim. Act⁴.

In a suit by the landlord for ejectment and possession, the defendant must plead facts showing—(a) that the tenancy (stating whether monthly, or for a term of years, or from year to year) was determined (by whom, how, when and under what circumstances; or, if the tenancy was for a term of years or from year to year, that the said tenancy came to an end on.....by effluxion of time); (b) that he disclaimed the landlord's title (how and when, and if the disclaimer was during the continuance of the tenancy, adding, that the said disclaimer was accepted by the landlord, stating how and when); (c) that after such disclaimer (or acceptance of the disclaimer by the landlord, as the case may be) he has been in exclusive possession (stating nature of possession, that is, whether actual physical possession or possession

1. *Bejoy Chand Mahatab v. Gurupada Haldar*, (1927-28) 32 O. W. N. 720 ; *Sheshamma Shettati v. Chickaya Hegade*, (1902) I. L. R. 25 Mad. 507 ; *Muhammad Hassan v. Sohara*, A. I. R. 1924 Lah. 389.
2. *Chandrika Prosada v. Bombay Baroda & C. I. Ry.*, A. I. R. 1935 P. C. 59.
3. *Ittappan v. Manavikrama*, (1898) I. L. R. 21 Mad. 153, 163, 164.
4. *Vadapalli Narasimham v. Dronamraju*, (1908) I. L. R. 31 Mad. 163.

through tenants) continuously to the knowledge of the landlord or without any attempt at concealment.

- (iii) *Between licensor and licensee* : A licensee cannot claim title only by possession. He has got to plead and prove that the possession was adverse to the knowledge of the licensor¹.
- (iv) *Between mortgagor and mortgagee* : The rule applicable to the case of adverse possession claimed by a tenant against the landlord is applicable to the case of mortgagee in possession who sets up a title by adverse possession against his mortgagor. Thus, a person who lawfully comes into possession of land as a mortgagee, cannot by setting up during the continuance of such relation any title adverse to that of the mortgagors or their successors in interest, inconsistent with the real legal relation between them, and that however notoriously and to the knowledge of the other party, acquire by the operation of the law of adverse possession, a title as owner, or any other title inconsistent with that under which he was let into possession.²

Where there are joint-mortgagors and one of them redeems the property and holds it subsequent to such redemption, his position is that of a lienor and his possession cannot become adverse to his co-sharers except by the assertion of an exclusive title and submission to the right thus set up, in analogy to the provision which bars an excluded sharer generally after the lapse of 12 years from the time when he becomes aware of his exclusion.³

Adverse possession in favour of the mortgagee will not run during the subsistence of the right to redeem but after the expiry of the term of the mortgage.⁴ In a suit for redemption, the mortgagee setting up adverse possession, has to plead that the term of the mortgage or the right to redeem expired (stating when) and that since such time

1. *Kodoth Ambu Nayar v. Secy. of State for India*, (1924) I.L.R. 47 Mad. 572.
2. *Bakha Singh v. Ram Narain Singh*, (1925) I. L. R. 47 All. 73, *fg. Seshamma Shettati v. Chikaya Hegade*, (1902) I. L. R. 25 Mad. 507.
3. *Ramchandra Yashvant v. Sadashiv Abaji*, (1887) I. L. R. 11 Bom. 422, *expd. in Sambhu bin Hannanta v. Nama bin Narayan*, (1911) I. L. R. 35 Bom. 438.
4. *Mata Din v. Ahmed Ali*, (1912) I. L. R. 34 All. 213 (P. C.).

he has been in continuous possession for the full statutory period adversely to the mortgagor (stating facts showing such adverse possession).

- (v) *Between limited owner and reversioner* : An assertion of right as against a limited owner, say, a female holder of property for life, is of no avail as against the reversioners whose interest accrues on the death of the life-holder.¹ By adverse possession is meant the possession by a person holding the land on his own behalf of some person other than the true owner having a right to immediate possession.²

Illustration.

A bhagdar died leaving him surviving his widow, mother and daughter. The daughter was excluded from succeeding to bhag properties according to special custom existing in the village. The widow re-married in 1905 and the mother transferred the bhag land in 1910 and died in 1920. The suit was brought by a reversioner in 1925 to recover possession of the bhag land against the daughter who resisted the suit on ground of adverse possession. *Held*, that the possession of the daughter, if adverse to that of the mother, was of no avail against the reversioner, because he was not entitled to immediate possession till the death of the mother. The suit will not be barred till 12 years have elapsed since the death of the widow in 1920 : *Bai Manchha v. Tribhovan Lallubhai Patel*, A. I. R. 1932 Bom. 434.

- (vi) *Between trustee and beneficiary* : A person who holds property on an express trust cannot prescribe for a title by adverse possession against a beneficiary ; and the trustee's legal representatives or assigns (not being assigns for valuable consideration) are also in no better position than the trustee himself.³

Under Sec. 10 of the Indian Limitation Act, the manager of property, comprised in a Hindu, Mahammadan or Buddhist religious endowment shall be deemed to be a person in whom property is vested in trust for a specific purpose, and suits against such manager or against such legal representatives or assigns (not being assigns for valuable consideration) shall not be barred for any length of time

The rule, that an express trustee cannot prescribe for a

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1. *Mahendra Narain v. Dakshina Ranjan*, (1935) 61 O. L. J. 537.
 2. *Bejoy Ohunder v. Kally Prosonno*, (1879) I. L. R. 4 Cal. 327.
 3. *Srinivasa Moorthy v. Venkata*, (1911) I. L. R. 34 Mad. 257 (P. C.) ; *Sheo Pershad v. Karim Buz*, A. I. R. 1935 All. 458. (1).

title by adverse possession, does not prevent a stranger to the trust, who takes possession of the property independently of the trustee, from acquiring title by adverse possession.¹ A trustee who has not accepted the trust,² or a trustee who has obtained a proper discharge,³ is in the position of a stranger and may set up title by adverse possession.

(9) **Agency** : Agency may be constituted⁴—

(a) by express appointment by the principal in writing or by word of mouth, or by a person duly authorised by the principal to make such an appointment ;

(b) by implication of law from the conduct or situation of the parties,⁵ or from the necessity of the case ;⁶ or

(c) by subsequent ratification by the principal of acts done on his behalf.

Appropriate particulars must be set forth in each case showing that the agency was duly constituted.

(10) **Agreement** : When a party relies on an agreement, he should state the date of the agreement, the parties thereto, and the place where the agreement was arrived at, and whether it was an agreement in writing, or by parol, or partly by parol and partly by letter, or whether it is the result of a series of documents. It is not necessary to set out the agreement *verbatim*, but it is necessary to state whether the agreement is in writing or by parol, and if it is in writing, to set it out so far as to show the effect of it.⁷

1. *Manickammal v. Murugappa*, A. I. R. 1935 Mad. 483.
2. *Surendra Krishna v. Bhuhaneswari Thakurani*, (1933) I.L.R. 60 Cal. 54, 73.
3. *Srinivasa Moorthy v. Venkata*, (1911) I. L. R. 34 Mad. 257 (P. C.) ; *Sheo Pershad v. Karim Bux*, A. I. R. 1935 All. 458 (1) ; *Ram Swarup v. Thakur Ramchandraj*, A. I. R. 1935 Nag. 35.
4. Bowstead on Agency, 9th Edn., pp. 13, 14.
5. *Dalby v. Pullen*, (1830) 1 Russ. & M. 296 (where property is sold under a decree, a solicitor, having the management of the sale, is in the conduct thereof, deemed to be the agent of all parties to the suit, as between them and the purchaser).
6. e. g., in the case of a shipmaster, an agency of necessity arises from the emergencies of the voyage.
7. *Perthesiger, L. J.* in *Turquand v. Fearon*, (1879) 48 L. J. Q. B. 703, 704 ; *Hussey v. Horne-Payne*, (1879) 4 A. C. 311 (where a Court has to find a contract in a correspondence, and not in one particular note or memorandum formally signed, the whole of that which has passed between the parties must be taken into consideration).

An agreement may be implied from circumstances in the conduct of the parties. In such a case the circumstances from which the agreement is to be implied must be stated.¹ See 'Contract', *infra*.

- (11) **Alteration** : See 'Alteration' under 'Special defences', Chap. XVII.
- (12) **Amount claimed** : Where a plaintiff claims to recover a definite sum made up of a number of items he will be ordered to give particulars of demand, though he will not be ordered to do so if he only claims an account.² If an account is asked for, and the Court sees that an account will be necessary, there may be very good reason for saying that no particulars should be given, and that the account shall not be given twice over. But it does not follow that merely because an account is asked for, particulars should be refused. Thus, if in a case of a simple foreclosure action, the plaintiff had been in receipt of rents and profits, and the defendant said he did not know what he was to pay or tender, the fact that plaintiff asked for an account would not be sufficient reason to refuse to give particulars.³
- (13) **Assignment** : The assignee must introduce such averments in his statement of claim as would disclose how his title is derived.⁴ In a suit by the assignee of an actionable claim,⁵ the plaintiff must state, that the assignment in his favour was in writing signed by the transferor or his duly authorised agent. If, in such a suit, he wants to hold the debtor liable for any payment made to his transferor after the assignment, he must further allege that the debtor was a party to the transfer or that he had received notice thereof in writing either from the transferor or the transferee or their respective agents duly authorised.⁶

1. *Brogden v. Metropolitan Ry. Co.*, (1877) 2 A. C. 666, 679, 680.

2. *Blackie v. Osmaston*, (1885) 23 Ch. D. 119.

3. *Per* Worth J., in *Kemp v. Goldberg*, (1887) 36 Ch. D. 505, 507.

4. *Per* Jessel M. R., in *Secar v. Lawson*, (1880) 16 Ch. D. 121, 124.

5. For definition of actionable claim, see Sec. 3, Transfer of Property Act, 1882.

6. Secs. 130 and 131, Transfer of Property Act, 1882. Notice must be in writing : *Mulraj v. Viswanath*, (1912-13) L. R. 40 I. A. 24. Notice is not necessary to perfect the title of the assignee of the debt, but until the debtor received notice of the assignment in accordance with the law,

(14) **Belief—particular grounds of :** A man who sets up as his defence that he believed a statement and has reasonable grounds for so doing, ought to state the grounds of his belief. Thus, in an action against directors of a company claiming compensation in respect of untrue statements contained in the prospectus of the company, where the defendants by their defence alleged that they *bona fide* believed the statements to be true, and they had reasonable grounds for their belief, Collins L. J. directed defendants to deliver particulars of the grounds of their belief, adding at the same time that if a defendant is unable to analyse the grounds of his belief, he must say so.¹

(15) **Bills of Exchange :** In a suit on a bill of exchange the following material facts with particulars should be given :

- (i) the capacity in which the plaintiff sues :
- (ii) the capacity in which the defendant is sued, whether as drawer, indorser or acceptor, etc. ;
- (iii) the date of the bill and the date on which it becomes due² ;
- (iv) presentment for acceptance, to the maker, acceptor or drawee, as the case may be, (showing how, when, where and to whom the presentment was made) ;³
- (v) facts excusing presentment⁴ or delay in presentment ;⁵
- (vi) the date of dishonour by non-acceptance or non-payment ;
- (vii) expenses, if any, of noting,⁶ with date ;
- (viii) notice of dishonour or notice of protest.⁷

Note : It is not necessary to plead consideration.⁸

his dealings with the original creditor will be protected : *Gopalakrishna v. Gopalakrishna*, (1910) I.L.R. 33 Mad. 123, 128, 129.

1. *Alman v. Oppert*, (1901) 2 K. B. 576.

2. A bill of exchange, in which no time for payment is specified, is payable on demand : Sec. 19, Neg. Inst. Act, 1881.

3. Secs. 61, 64, 66, 68, 69, 70, 71, 75, Neg. Inst. Act, 1881.

4. Sec. 76, Neg. Inst. Act, 1881.

5. Sec. 75A, —do—

6. Cf. Sec. 100 & 101, Neg. Inst. Act, 1881. For protest of foreign bills, see Sec. 104.

7. Sec. 102, Neg. Inst. Act, 1881.

8. Sec. 118, —do—

(16) **Breach of contract** : Particulars of breach of contract must be stated in the words of contract itself, either negatively or affirmatively, according as the contract is affirmative or negative. 'If the contract is to do more things than one, or to do one or other of two things, the plaintiff must state that the defendant has done none of them or else set out precisely what and how much he has done. Where the effect only of the contract is stated the breach should be alleged in words co-expressive with it.'¹

(16a) **Breach of conditions in a contract** : Where the breach of certain conditions in contract forms the subject-matter of the plaintiff's complaint, the defendant is entitled to know, the conditions and the exact manner in which they have been violated.²

(17) **Breach of duty** : It is necessary to state facts upon which duty is founded. Thus, where the plaintiff alleged that the defendants were possessed of land with a canal and cuttings intersecting the same and of bridges across the canals and cuttings which land and bridges were used, with the consent and permission of the defendants, by persons proceeding to and coming from the docks ; that they wrongfully and improperly kept and maintained the land and bridges and maintained them in so improper a state and condition, that one G., passing over the bridges, fell into one of the cuttings and was drowned, it was held that the declaration disclosed no actionable breach of duty on the part of the defendants.³

Where the action is brought for the breach of some statutory duty arising independently of contract, the Statute should be referred to and the facts which bring the case within it sufficiently stated in the pleadings.⁴

(18) **Breach of trust**⁵ : It is not enough for the plaintiff to allege that the defendant committed breaches of trust. He

1. Bullen & Leake, 8th Edn., p. 40.

2. *Jamshed v. Kunjilal*, A. I. R. 1938 Nag. 530.

3. *Gautret v. Egerton*, (1867) L. R. 2 C. P. 371.

4. Bullen & Leake, 8th Edn., p. 41.

5. For Form of particulars of breaches of trust, see App. C. Sec. II, Form No. 9., R. S. C.

must state particulars of the alleged breaches.¹ Thus, where the legatee of a leaseholder claiming an account on the footing of wilful default from the executors, by his statement of claim, stated that the defendants in various ways misapplied part of the rents of the leaseholds, and thereby injured the plaintiff and committed breaches of trust :—*Held* : the general allegations of breaches of trust ought to be struck out unless the plaintiff furnished particulars.²

If a trustee refuses to show account, a beneficiary has a clear right to sue for an account and to be allowed to formulate his charges of wilful default and breaches of trust after inspection. But where a beneficiary has had an opportunity of seeing the trust accounts, he must formulate his charges at the outset, or at any rate, before the issues are framed.³

- (19) **Breach of warranty** : A warranty is a stipulation collateral to the main purpose of the contract. Whether a stipulation is collateral to the main purpose of the contract, or is essential to the main purpose of the contract (in which case, it is a condition), depends in each case upon the construction of the contract. The stipulation may be a condition, though called a warranty in the contract,⁴

Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition or elect to treat the breach of condition as a breach of warranty and not as a ground for treating the contract as repudiated.⁵

Any affirmation at the time of sale can only be a warranty, provided it appear on evidence to be so intended.⁶ Therefore, in case of a breach of warranty, all facts showing or tending to show an intention on the part of either or both the parties that there should be contractual liability in res-

1. O. VI, r. 4, C.P. Code ; *In re Wrightson*, *Wrightson v. Cooke*, (1908) 1 Ch. 789 ; *Rathnasabapathy v. Ammakannammal*, A. I. R. 1930 Mad. 78.
2. *In re Anstice*, *Anstice v. Hibbell*, (1885) 54 L. J. Ch. 1104.
3. *Shirinbai Dinshaw v. Navroji Pestonji*, A. I. R. 1936 Bom. 30.
4. Sec. 12, Ind. Sale of Goods Act, 1930.
5. Sec. 13, Ind. Sale of Goods Act, 1930.
6. *Heilbut Symons & Co., v. Buckleton*, (1913) A. C. 30, 49, 51.

pect of the accuracy of the statement must be alleged and proved. For particulars in specific cases, see "Forms of pleadings."

- (20) **Business—loss of** : In a suit, where the plaintiff claims as special damage a general loss of customers or a falling off of the plaintiff's business caused by the slander of the plaintiff in his business, it is sufficient to allege and prove, as special damage, a general loss of customers without showing who the persons were who had ceased to deal with the plaintiff or that they were the persons to whom these statements were made.¹ But if the plaintiff desires to prove loss of particular customers he must give particulars of loss of particular customers.²

In an action for personal injuries in which the plaintiff claimed, *inter alia*, £4000/- for loss of business, it was held that the defendants were entitled to particulars of the loss of business.³

In a suit for an infringement of a registered trade mark, where the plaintiff alleged that the use by the defendant of the plaintiff's trade mark was calculated to induce diverse persons to buy the defendant's goods as and for the plaintiff's, and also alleged that it had in fact induced diverse persons to do so, it was held that the defendant was entitled to be told who those diverse persons were.⁴

In an action to restrain the defendants from fraudulently selling inferior qualities of goods manufactured by the plaintiffs as their best quality, the plaintiffs were ordered to give particulars of the names and addresses of the persons to whom the goods had been sold as well as the times and places of such sale.⁵

1. *Riding v. Smith*, (1876) 1 Ex. D. 91 ; *Evans v. Harries*, (1856) 1 H. & N. 251 ; *Wingard v. Cox*, (1876) W. N. 106.
2. *Bluck v. Lovering*, (1885) 1 T. L. R. 497 D. C. (where the evidence of the plaintiff to prove loss of particular customers was rejected on the ground that such evidence was in the nature of special damage not claimed).
3. *Watson v. North Metropolitan Tramways Co.*, (1886) 3 T. L. R. 273.
4. *Humphries & Co. v. Taylor Drug Co.*, (1888) 39 Ch. D. 493.
5. *Duke v. Wisden*, (1897) 77 L. T. 67.

- (21) **Coercion** : Under Sec. 15 of the Indian Contract Act, 'Coercion' is the committing or threatening to commit any act forbidden by the Indian Penal Code, or the unlawful detaining, or threatening to detain any property to the prejudice of any person whatever with the intention of causing any person to enter into an agreement.¹ This definition of coercion, as the Judicial Committee have pointed out, applies to the consideration whether there has been "free consent" to an agreement so as to render it a contract under Sec. 10.

'Coercion' under Sec. 72 of the Indian Contract Act, which says "a person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it" is there used in its general and ordinary sense as an English word and its meaning is not controlled by the definition in Sec. 15. Thus, where A. in execution of a decree against B., attached C.'s property and took possession of it, and C. on being ousted from his property paid the sum claimed under protest, it was held that C. was entitled to recover the money paid under 'coercion' within the meaning of Sec. 72.²

Where coercion is exercised with the intention of causing any person to enter into an agreement, facts amounting to coercion under Sec. 15 must be alleged; that is, what criminal act or acts was or were committed or threatened, and also how, when and where.

In a case under Sec. 72, the compelling circumstances under which the payment was made, rendering such payment involuntary, must be alleged.³

- (22) **Collision** : The plaintiff in a case of collision is bound to state the cause of the collision, as accurately and distinctly as possible, leaving nothing to inference.⁴ He is bound to plead facts from which law will infer that the collision was occasioned by the default of the defendant but not to plead the legal inference.⁵ He is bound to state

1. *Bansraj Das v. Secy of state*, A. I. R. 1939 All. 373.

2. *Selh Kanhaya Lal v. National Bank of India*, (1912-13) L. R. 40 I. A. 56, 65, 66; *Ah Choon v. T. S. Firm*, (1927) I. L. R. 5 Rang. 653.

3. *Vasant Rao v. Behari Lal*, I. L. R. (1938) Nag. 382.

4. *The Lady Anne*, (1850) 15 Jur. 18.

5. *The East Lothian, Kilgour v. Alexander*, (1861) 14 Moo. P. C. C. 271.

the circumstances of the collision so far as they are known to him and also state in specific terms the particular acts of negligence which according to him caused the collision.¹ He should also state the time and place of the accident and also the particulars of the injuries.²

- (23) **Collusion** : "Collusion is an agreement or compact between two or more persons to do some act in order to prejudice a third person or for some improper purpose. Collusion in judicial proceedings is a secret agreement between two persons that the one should institute a suit against the other, in order to obtain the decision of a judicial tribunal for some sinister purpose, and appears to be of two kinds : (1) where the facts put forward as the foundation of the sentence of the Court do not exist ; (2) when they exist, but have been corruptly preconcerted for the express purpose of obtaining the sentence."³ In each case, the facts giving rise to an inference of collusion must be stated.

- (24) **Condition of mind** : "Wherever it is material to allege malice, fraudulent intention, knowledge or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred."⁴ But where knowledge is alleged the party may be ordered to state whether he relies on notice, and if so, to give particulars of it.⁵

- (25) **Consideration** : The consideration for any contract not in writing registered etc. under Section 25, Ind. Cont. Act, is material and should be set out,⁶ except in the case of negotiable instruments where the consideration is presumed.⁷ Consideration of a negotiable instrument will be presumed, if the suit is brought on the bill or note but not on the original consideration.⁸ Therefore, consideration must be plea-

1. *W. J. Rees v. John Young*, (1920-21) 25 C. W. N. 519, 520 (col. 2.)

2. See "Accident", *supra*.

3. Wharton's Law Lexicon, 14th Edn., p. 212.

4. O. VI, r. 10, C. P. Code. Cf. *Mt. Hazrabi v. Mt. Fatmabi*, A. I. R. 1938 Nag. 204 (insanity).

5. Yearly Practice, (1939) p. 328.

6. *Cooke v. Rickman*, (1911) 2 K. B. 1125, 1130.

7. Sec. 118, Neg. Inst. Act, 1831, and O. VI, r. 13, C. P. Code (O. XIX, r. 25, R. S. C.).

8. *Niemeyer v. E. M. Mamooji*, A. I. R. 1938 Rang. 461.

ded where the suit is based on the original consideration. In each case the particular consideration must be pleaded.¹

- (26) **Conspiracy** : "A conspiracy is an agreement by two or more persons to carry out an unlawful common purpose or to carry out a lawful common purpose by unlawful means. It is an offence under the criminal law. But there may be civil conspiracies, i. e., conspiracies which may be the foundation of an action ; and there are undoubtedly cases in which two or more persons can render themselves liable to civil proceedings by combining to injure the plaintiff, although if one of them did the same act by himself, he would escape all liability."² Actions of this kind are common in connection with trade disputes. A combination of two or more persons to injure a man in his trade by inducing his customers or servants to break their contracts with him or not to deal with him or continue in his employment is, if it results in damage to him, actionable.³

Thus, in an action for conspiring to injure the plaintiffs by inducing certain persons by threats to break their contracts with the plaintiffs and by preventing persons from entering into contracts with the plaintiffs, the defendant is entitled to particulars stating the name of each such contractor, the kind of threat in each case, by whom it was made and when and how (whether verbally or in writing).⁴ So where the statement of claim alleged that certain directors had instigated and concurred in the liquidator's application for the purpose of escaping from their liability to calls, Kay J. ordered the plaintiff to give particulars stating whether the instigations alleged were verbal or in writing, and if verbal, by whom it was made, and, if in writing, the date of the writing and the motive which

1. See Sec. 2, Ind. Cont. Act, for definition of consideration.

2. See Wharton's Law Lexicon, 14th Edn., p. 239 ; *Bhola Nath-Shankar Das v. Jachmi Narain*, (1931) I. L. R. 53 All. 316.

3. *Quinn v. Leatham*, (1901) A. C. 495. But compare Sec. 18, Ind. Trade Unions Act, 1926.

4. *Per Esher, M. R.*, in *Temperton v. Russell*, (1893) 9 T. L. R. 319 C. A. (In this case the defendants were also charged with threatening to impose fines on the workmen if they did not give up the work. *Held*, that was sufficient by way of particulars, the defendants were not entitled to particulars comprising the names of the workmen).

actuated the board of directors¹. In a case where the statement of claim alleged a conspiracy to publish libels, the plaintiff was ordered to deliver to the defendants particulars of the conspiracy alleged, giving the acts and communications, oral or in writing, of all or any of the defendants, with dates and places of such acts and communications if oral, and if in writing, identifying the documents².

(27) *Contract*: In a suit founded on contract, the pleader should state—

- (a) the parties to the contract ;
- (b) the date of the contract ;
- (c) the place where the contract was made and where it was to be performed ;
- (d) whether the contract was verbal,³ or in writing⁴ or or in writing registered, or implied⁵ ;
- (e) the terms of the contract ;
- (f) the consideration for the contract⁶, except where consideration is to be presumed ; and lastly

1. *Briton Medical etc. Association v. Britannia Fire Association*, (1888) 59 L. T. 888.
2. *Vacher & Sons, Ltd. v. London Society of Compositors and others*, unreported. See Fraser on Libel and Slander, 7th Edn., p. 252.
3. A party alleging a verbal contract will not be ordered to state in whose presence it was made, as this would be compelling him to name his witness : *Odgers on Pleading*, 11th Edn., p. 115.
4. If the contract is in writing, the pleading should sufficiently identify the document. If a written contract is contained in several documents these should all be identified : *Turquand v. Fearon*, (1879) 48 L. J. Q. B. 703.
5. In the case of an implied contract, the facts from which the implications arise must be stated, *e.g.*, in an action for money had and received, the facts which make any receipt by the defendant a receipt to the use of the plaintiff must be stated. But where any contract is to be implied from a series of letters or conversations or otherwise from a number of circumstances, it shall be sufficient to allege such contract and to refer generally to such letters, conversations or circumstances without setting them out in detail. And if in such a case the person so pleading desires to rely in the alternative upon more contracts than one as to be implied from such circumstances, he may state the same in the alternative : O. VI, r. 12, C. P. Code (O. XIX, r. 24, R. S. C.). Cf. *Brojden v. Metropolitan Ry. Co.*, (1877) 2 A. C. 666 (contract inferred from a long series of letters).
6. See 'Consideration', *supra*.

(g) the particular breaches¹ complained of.

"If the covenant or clause of the contract sued on contains in itself a proviso or exception (*e.g.*, "fair wear and tear excepted"), this should be stated, and then the breach must be stated in such manner as to show that the case does not fall within the proviso or exception. But if the exception occurs in some distinct and separate part of the deed or document, no reference need be made to it; it will be for the defendant to set it up, if he relies on it."²

Wherever the contents of any document are material, it shall be sufficient in any pleading to state the effect thereof, without setting out the whole or any part thereof unless the precise words of the document or any part thereof are material³.

If there are several covenants in the same deed or several promises in the same written or verbal agreement, it is sufficient to set those covenants or promises of which there are alleged breaches. It is not necessary to set out the whole agreement if the part omitted did not qualify that which was stated⁴.

It is not necessary to aver any matter which happens to be part of the contract, if such matter would be implied by law. Thus, in an action on a guarantee to pay, in case the principal should not, it is not necessary to set out the contingency that the principal should not pay; that being an implied exception in law, from the nature of the guarantee. Nor, in such an action, is it necessary to make a demand for payment from the principal, unless the making of such demand were a part of the contract⁵.

Where an agreement between the parties has been altered or modified by a subsequent agreement, both the original and the subsequent agreement as it stands after alteration or modification alone may be pleaded⁶.

1. For particulars of breach of contract, see 'Breach of contract,' *supra*.

2. Bullen & Leake, 8th Edn., p. 39.

3. O. VI, r. 9, C. P. Code (O. XIX, r. 21, R. S. C.).

4. *Tempest v. Rawling*, (1810) 13 East 18.

5. *Mayor v. Wilks*, (1827) 5 L. J. O. S. K. B. 306; *Kans'hi Ram v. Owen Roberts*, A.I.R. 1939 Lah. 565. Cf. *Tidy v. Batman*, (1934) 1 K.B. 319.

6. *Boone v. Mitchell*, (1822) 1 B. & C. 18.

- (28) **Contributory negligence**: Where the defendant pleads contributory negligence, the question arises, "whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary or common care or caution that, but for such negligence on his part the misfortune would not have happened¹. The issue of contributory negligence is a question of fact².

Contributory negligence, to afford a defence, must be that of the plaintiff himself or that of his servants. The contributory negligence of a third person, not being the servant of the plaintiff will not suffice³.

Children may be guilty of contributory negligence if they are old enough to have a sense of discrimination⁴.

In every case of contributory negligence it must be shown that the plaintiff might by the exercise of ordinary care have avoided the consequences of the defendant's negligence,⁵ or that the defendant could not, by the exercise of care on his part, have avoided the consequences of the neglect or carelessness of the plaintiff.⁶

The onus of proving affirmatively that there was contributory negligence on the part of the person injured rests, in the first instance, upon the defendants.⁷ Therefore, in a defence of contributory negligence, particulars of the plain-

1. *Tuff v. Warman*, (1858) 5 C. B. N. S. 573, 585.
2. *Kanshi Ram v. Owen Roberts*, A. I. R. 1939 Lah. 565; *Tidy v. Battman* (1934) 1 K. B. 319.
3. *The Bernina* (2), (1887) 12 P.D. 58, 89; *Chaturbhuj v. Hiralal*, I.L.R. (1937) Bom. 268.
4. *M. & S. M. Rly. Co. v. Jayammal*, (1924) I. L. R. 48 Mad. 417.
5. *Bridge v. The Grand Junction Ry. Co.*, (1838) 3 M. & W. 244.
6. *Tuff v. Warman*, *supra*; *Radley v. L. & N. W. Ry.*, (1876) 1 A. C. 754, 759; *Madhava Rau v. Fernandes*, (1894) I. L. R. 17 Mad. 368; *Tidy v. Battman*, *supra*.
7. *Wakelin v. L. & S. W. Ry.*, (1886) 12 A. C. 41, 47; *Jones v. G. W. Ry. Co.*, (1931) 47 T. L. R. 39; *Nani Bala v. Auckland Jute Co. Ltd.*, (1925) I. L. R. 52 Cal. 602 (If the Court is unable to discover to what extent the negligence of the plaintiff or that of the defendant contributed to bring about the accident, the defendant is entitled to succeed, for *impari delicto potior est conditio defendantis*).

tiff's acts or conduct contributing to the injury must be stated¹.

(29) **Copyright** : In a suit for infringement of copyright the plaintiff must plead facts showing that he is the owner of the copyright², and that the defendant has infringed the said copyright³. Copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by the Copyright Act, 1911, conferred on the owner of the copyright⁴. Thus, production of the whole or substantial part of a work in any material form whatsoever without the consent of the owner of the copyright is infringement of the copyright. If, therefore, the plaintiff alleges that the defendant has copied a substantial part of his work, he ought to specify the infringing copy⁵ and point out the objectionable portions thereof. Where is an action for infringement of copyright the defendant alleges that he was not aware of the existence of the alleged copyright, he must allege circumstances showing that the infringement was innocent⁶.

(30) **Cruelty** : Any person alleging cruelty must plead it specifically as the acts of cruelty are well within his knowledge⁷. Particulars of the alleged acts of cruelty should be set out in the petition⁸. If certain acts of cruelty is alleged to have taken place in the presence of certain per-

1. *Martin v. McTuggart*, (1906) 2 I. R. 120 ; *Toppin v. Belfast Corpn.*, (1909) 2 I. R. 181 ; *In re : "Rabenfels"*, (1929) I. L. R. 56 Cal. 763 ; *Krishna Murari v. Dixit Chaturbhuj*, A. I. R. 1933 All. 214 ; *Mathuranayagam Pillai v. Municipal Council, Madura*, A. I. R. 1937 Mad. 152.
2. Sec Sec. 5, Copyright Act, 1911.
3. *Performing Right Society v. Indian etc. Restaurant*, I. L. R. (1939) Bom. 295 ;
4. Sec. 2, read with Sec. 1, Copyright Act, 1911.
5. "A copy is that which comes so near to the original as to suggest that original to the mind of every person seeing it" : *Per Kekewich L. J.*, in *Hanfstuengl v. Smith (W. H.) & Sons*, (1905) 1 Ch. 519 ; *Gopal Das v. Jagannath Prasad*, I. L. R. (1938) All. 370.
6. *Performing Right Society v. Indian etc. Restaurant*, *supra*.
7. *Austin v. Austin*, (1871) 41 L. J. P. & M. 8.
8. *Walker v. Walker*, (1912) 107 L. T. 655.

sons, the particulars and names of such persons may be ordered to be given¹.

- (31) **Custom** : Subject to the exceptions noted hereunder, if a party intends to set up a custom, either of the family, of a class or of a locality², or one affecting agricultural³ or non-agricultural⁴ tenancy, or any custom or usage of trade⁵ or of agency⁶, as the case may be, he must plead the same specifically⁷, which means, that all the incidents of the custom must be pleaded with clearness and precision⁸.

1. *Bishop v. Bishop*, (1901) P. 325.
2. Custom to be valid must be ancient, certain, reasonable and continuous : *Ramalakshmi v. Sivanantha*, (1871-72) 14 M. I. A. 570 ; *Hurpurshad v. Sheo Dyal*, (1875-76) I. L. R. 3 I. A. 259, 285. It should not be immoral or against public policy or be expressly forbidden by statute : *Kailash v. Padmakishore*, (1918) I. L. R. 45 Cal. 285 ; *Mookka Kone v. Ammakutti Ammal*, (1928) I. L. R. 51 Mad. 1 (F.B.). *Aisha Bibi v. Negum Bibi*, I.L.R. (1939) Kar. 475 ; *Jadunath v. Bisheshar*, A.I.R. 1939 Oudh 17 ; *Ajai Verma v. Vajai Kumari*, (1938-39) 43 C.W.N. 585 (P.C.) ; *Hari Sudan De v. Radhik Prasad* (1938) 66 C. L. J. 270 ; *Babusaheb v. Lazmanappa*, A.I.R. 1938 Bom. 492.
3. For agricultural customs, cf. Sec. 183 Beng. Ten. Act, 1885 ; *Palakkhari v. Manners*, (1896) I. L. R. 23 Cal. 179.
4. For non-agricultural customs, see *Ananda Mahan Saha v. Gobinda Chandra*, (1915-16) 20 C. W. N. 322.
5. Cf. Secs. 1 and 62 of the Ind. Cont. Act, 1872, and Sec. 16 (3) of the Ind. Sale of Goods Act, 1930. Usages of trade are imported into contracts as implied terms. Length of time during which a usage has existed is immaterial although it is of some importance in determining whether it has become established : *Edelstein v. Schuler*, (1902) 2 K. B. 144. It may be in the course of growth or of recent origin : *Bechuanaland Exploration Co. v. London Trading Bank*, (1898) 2 Q. B. 658 ; *Moult v. Halliday*, (1893) 1 Q. B. 125 ; cf. *Juggomohun Ghose v. Manickchand*, (1857-1860) 7 M. I. A. 263. Cf. *Jai Pershad v. Chartered Bank of India*, A. I. R. 1929 Lah. 536 (A court cannot take judicial notice of a mercantile custom at variance with the statutory rights of a party to the contract, where it was neither pleaded nor proved).
6. See 'Agent' under "Classes of Persons", Chap. IX.
7. *Serumah Umah v. Palathan*, (1885) 15 Suth. W. R. (P. C.) 47.
8. *Badrudin v. Tej Ram*, A. I. R. 1929 All. 233 (where the incidents of the custom were not pleaded) ; *Jateshwari Protap Narain Singh v. Pateshwari*, A.I.R. 1938 All. 345.

Custom should be sufficiently defined for its application to the facts of the case only. It is unwise to plead custom beyond what is necessary for the facts of the case and thereby to assume a greater burden of proof.¹

A special custom must be pleaded with particularity.²

A justification under a custom must contain averments to show that the defendant's case is within the custom.³

If custom is pleaded by the plaintiff the defendant cannot plead another custom repugnant to it without a traverse.⁴

Exceptions: To the rule that custom relied on must be pleaded there are exceptions ;

- (1) Customs judicially recognised need not be pleaded.⁵ Where there are several reported cases in which any custom or usage has been established this fact of itself will cause the Court to take judicial notice of it.⁶ The risk, however, of not pleading any such custom is with the defendant because if he fails to prove the alleged custom by reference to judicial decisions alone, he shall not be permitted to prove the same by evidence *aliunde* because he has not pleaded it.
- (2) General customs, such as the customs of merchants, the customs of the realm, or with reference to inn-keepers and carriers need not be pleaded because they are such as are recognised carriers, by the judges without any evidence.⁷

(32) **Damages :**

(a) **General or Nominal Damage :** In many cases a plaintiff may be entitled to general or nominal damage without proof of actual loss. Thus, a plaintiff is entitled to at least nominal damages wherever there is a breach of contract or

1. *Thakur Rudra Pratap v. Thakur Nirman Prasad*, A. I. R. 1923 Oudh 61.
2. *Bennet v. Evans*, (1673) 89 E. R. 232.
3. *Lincoln (Bp.) v. Atwood*, (1673) 89 E. R. 74.
4. *Kenchin v. Knight*, (1749) 1 Wils., 253.
5. *Baqridi v. Rahim*, A. I. R. 1926 Oudh 352 ; *Jadu Lal Sahu v. Janki' Koer*, (1908) I.L.R. 35 Cal. 575, *affd.* in (1912) I.L.R. 39 Cal. 915 (P. C.) ; *Chand Koer v. Pem Raj*, 1938 A. M. L. J. 79 ; *Daso Venkatesh v. Ramchandra*, I. L. R. (1938) Bom. 810.
6. *Re: Parker, Ex parte Turquand*, (1885) 14 Q. B. D. 636 (C. A.) ; *Re: Matthews, Ex parte v. Powell*, (1875) 1 Ch. D. 501 ; *Hemendra Nath Roy v. Jnanendra*, (1936) I. L. R. 63 Cal. 255 ; *Banarsi Das v. Sumat Prasad*, A. I. R. 1936 All. 641 ; *Daso Venkatesh v. Ramchandra, supra*.
7. *R. v. Yarborough (Lord)*, (1828) 2 Bli. N. S. 147.

any injury to the right arising out of that contract.¹ In an action for maliciously and without reasonable and probable cause presenting a petition to wind up the company, it was held that all that was necessary was that the plaintiff company must have sustained some damage as the law takes notice of.² Similarly in a case for trespass to land³ or for words actionable *per se*,⁴ no actual damage need be alleged or proved. It is sufficient to state, "whereby the plaintiff has suffered damage," or "whereby the plaintiff has been injured in his credit and reputation."

(b) **Special Damage** : "Special damage is such a loss as the law will not presume to be the consequence of the defendant's act but which depends in part at least on the special circumstances of the case. It must therefore always be explicitly claimed on the pleadings."⁵

Where special damage is claimed particulars showing its nature and extent and showing with dates and items how the amount claimed is made up, must be given.⁶

The expression "special damage", as Bowen L. J. pointed out⁷, is apt to mislead and care is required to find out in what particular sense it is used in such context. That learned judge also pointed out that the expression has three different meanings: "In the first place it means actual damage

1. *Marzetti v. Williams*, (1830) 1 B. & Ad. 415 (where nominal damages were awarded to a customer against his banker for refusal to pay a cheque although the plaintiff did not prove that the refusal had caused him any actual damage).
2. *Quartz Hill Gold Mining Co. v. Eyre*, (1883) 11 Q. B. D. 674, *fd.* in *Kumarasamia Pillai v. Udayar Nandan*, (1909) I. L. R. 32 Mad. 170, 172, and *Nanjappa Chettiar v. Ganapathi*, (1912) I. L. R. 35 Mad. 598, 604 (a suit for damages for attachment before judgment).
3. *Fay v. Prentice*, (1845) 1 C. B. 828 (where damage was awarded against defendant for erecting a cornice which projected over defendant's garden).
4. *Ashby v. White*, (1703) 2 Ld. Rayne 938 (Plaintiff can maintain an action for slanderous words though he did not lose a penny by reason of the speaking them); *Suraj Narain v. Sila Ram*, A. I. R. 1939 All. 461; *Bastiram v. Bansidhar*, (1939) M. L. R. 133 (civ); *Narayana Sah v. Kannamma Bai*, (1932) I. L. R. 55 Mad. 727.
5. *Odgers on Pleading*, 11th Edn., pp. 196, 197. Cf. *Khurshed Husnain v. Secy. of State*, A. I. R. 1937 Pat. 302.
6. *Rateliffe v. Evans*, (1892) 2 Q. B. 521, 528.
7. *Rateliffe v. Evans*, *supra*, appd. in *Nanjappa Chettiar v. Ganapathi*, *supra*.

arising out of special circumstances of the case which if properly pleaded, may be super-added to the general damage which the law implies in every breach of contract and other infringement of an absolute right, *i. e.*, the particular damage which results from the particular circumstances of the case. In the second place where no actual and positive right has been disturbed and where it is the damage done that is the wrong, the expression denotes the actual and temporal loss which has in fact occurred and is also called particular damage. In the third place in actions brought for a public nuisance such as the obstruction of a river or a highway, the expression means that actual and particular loss which the plaintiff must allege and prove that he has sustained beyond what is sustained by the general public if his action is to be supported such particular loss being the cause of action. Dealing with the case before him, which related to a statement maliciously published by the defendant about the business of the plaintiff, the learned Judge observes that the allegation of special damage necessary to support the action would vary according to the circumstances of the case, while damage is the gist of such an action it is not always necessary, he observes, to prove the actual loss specially and with certainty and "cases may occur where a general loss of custom is the natural and direct result of the slander, and where it is not possible to specify particular instances of the loss." "In all actions accordingly on the case where the damage actually done is the gist of the action, the character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved."

In another case where the plaintiff relied on the loss of particular customers it was held that he must give their names and addresses.¹

In an action of infringement of a registered trade mark where the plaintiff alleged not only that the use by the defendant of the plaintiff's trade mark was calculated to

1. *Watson v. North Metropolitan Tramway Co.*, (1896) 3 T. L. R. 273.

induce diverse persons to buy the defendant's goods as and for the plaintiff's but also that it has in fact induced diverse persons to do so, he was ordered to state who those diverse persons were (their names and addresses).¹

(33) **Defamation** : See "Libel" and "Slander", *infra*.

(34) **Delusion** : It is provided in O. XIX, r. 25(a), R. S. C. that in probate actions where it is pleaded that the testator was not of sound mind, memory and understanding, particulars of any specific instances of delusion shall be delivered before the case is set down for trial, and, except by leave of the Court or a Judge, no evidence shall be given of any other instances at the trial. There is no corresponding rule in India but on general principles this rule ought to be applied.

(35) **Easement** :² Easements may be acquired in exceptional cases, *e. g.*, under an Act of Legislature or under a decree of Court. Omitting these exceptional cases, easements may be acquired by—

- (a) express grant from the owner of the servient heritage in favour of the dominant heritage ;
- (b) implied grant or reservation arising out of an express grant of tenement or heritage. Such easements are either easements of necessity³ or *quasi*-easements.⁴
- (c) local custom ;⁵
- (d) estoppel ;⁶
- (e) prescription or long continued enjoyment.⁷

1. *Humphries & Co. v. Taylor Drug Co.*, (1888) 39 Ch. D. 693.

2. For definition of 'Easement', see U. N. Mitra's Limitation Act, 6th Edn., Vol. 1, p. 457, 458.

3. *Wutxler v. Sharpe*, (1893) I. L. R. 15 All. 278, 291 (an easement of necessity over the grantors of other lands passes as an incident to the grant ; for without it he cannot derive any benefit from the grant.)

4. See U. N. Mitra's Limitation Act, 6th Edn., Vol. 1, pp. 521-529.

5. See U. N. Mitra's Limitation Act, 6th Edn., Vol. 1, pp. 529-532. Cf. *Palanianli v. Puthirangonda*, (1897) I. L. R. 20 Mad. 389 ; *Shri Narain v. Jadoo Nath*, (1900-01) 5 C. W. N. 147.

6. See U. N. Mitra's Limitation Act, 6th Edn., Vol. 1, p. 532.

7. do do pp. 532 onward ; *Kumar Manmatha Nath Miller v. Rakhal Chandra*, (1932) 56 C. L. J. 274 (the question of immemorial user or lost grant must be pleaded in every case).

In case of disturbance of an easement the relief awarded to the dominant owner should not be more extensive than what is necessary to its beneficial enjoyment.¹

An easement is extinguished when the dominant owner expressly or impliedly releases it to the servient owner.

Where easement by prescription is claimed, facts showing how the easement was acquired, *e.g.*, whether by enjoyment for the full statutory period must be clearly stated.² In case of disturbance of easements, the plaintiff must state facts showing that the disturbance has deprived him of the beneficial enjoyment of the property to which he is entitled.³ In case of extinction of easements the facts that the dominant owner expressly or impliedly released it to the servient owner must be pleaded with date.

In order to claim a right of way as an easement of necessity, it must be shown that it is one without which the property retained upon a severance cannot be used at all. It is not enough, if it is shown that it is merely necessary to the reasonable enjoyment of the property.⁴

To establish a customary easement, facts must be alleged showing that the custom is reasonable, certain, and the user was not permissive or exercised by stealth or force and the right was exercised by such a length of time as to suggest that by agreement or otherwise the user had become the customary law of the locality.⁵

(36) **Estoppel**: See under "Special Defences," Chap XVII.

(37) **Executor de son tort**: The liability of an executor *de son tort* is founded on possession or the factum of dealing with the assets of the deceased.⁶ He is liable to the extent of the assets that has come to his hands. In a suit by the rightful executor or administrator or any creditor or legatee of the deceased, the plaintiff must state that the defendant is in possession and is dealing with the assets of the deceased,

1. See U. N. Mitra's Limitation Act, 6th Edn., Vol. 1, pp. 597-8.

2. *Madaroo Khan v. Munawar Khan*, A. I. R. 1939 Oudh 111.

3. *Abdulla Haroon v. Municipal Corporation, Karachi*, A. I. R. 1939 Sind 39.

4. *Ramnandan Marwari v. Ramjibin Marwari*, A. I. R. 1939 Pat. 164; *Rajlu Naidu v. Malak*, I. L. R. (1939) Nag. 580.

5. *Ganpatrao v. Sheikh Badar*, A. I. R. 1939 Nag. 193.

6. Cf. Sec. 2 (ii), C. P. Code, and Sec. 304, Ind. Suc. Act, 1925.

together with the period during which he had been in possession. If the plaintiff does not know the extent of the assets that has come to the hands of the defendant, he may ask for discovery before particulars. See '*Executor de son tort*' under 'Classes of persons', Chap. IX

(38) **Extra-ordinary expenses** : Where a contract provided that the contractor was to indemnify the employees against claims in respect of damages caused by excessive weight or extra-ordinary traffic over any highway in carrying out the works and against all costs and expenses in respect thereof, in an action by the employers to recover extra-ordinary expenses, particulars of the average expenses of repairing other similar highways and of such highways were ordered.¹

(39) **Fair comment** : See "Special Defences", Chap XVII

(40) **Fatal Accidents Act, XIII of 1855** : Under Sec. 1 of the Act, every action for damages shall be for the benefit of the wife, husband, parent and child, if any, of the person whose death shall have been so caused, and shall be brought by and in the name of the executor, administrator or representative of the person deceased.

Under Sec. 3 of the Act the plaintiff in any such action or suit shall give full particulars of the person or persons for whom, or on whose behalf, such action or suit shall be brought, and of the nature of the claim in respect of which damages are sought to be recovered.²

(41) **Forfeiture** : A tenant may incur forfeiture by disclaiming the landlord's title or by committing breaches of covenants or conditions of the lease when it is stipulated that they shall occasion forfeiture. In a suit by a landlord for ejectment, particulars of disclaimer (whether verbal or in writing) and the nature of the disclaimer (whether the tenant set up a title in himself or any other person), and of the particular breaches (as the case may be) must be given. A plaintiff who relies on particular breaches will not be allowed to give evidence of other breaches.³

1. *Colechester Corpn. v. Gepp*, (1912) 1 K. B. 477 C. A.; cf. *Morpeth Rural Council v. Bullocks, etc., Co.*, (1913) 2 K. B. 7, C. A.

2. *Mrs. E. V. Penheiro v. M. Minney*, (1934) 1 L. R. 61 Cal. 480; *Goolbai v. Pestonji*, A. I. R. 1935 Bom. 333; *River Steam Navigation Co. v. Hiralal*, (1933-34) 38 C. W. N. 553.

3. *Doe Dem. Winnall v. Broad*, (1841) 2 Man. & G. 523.

Under sec. 111(g) of the Tr. of Prop. Act, it is necessary for the lessor to give a notice to the lessee showing his intention to take advantage of the forfeiture before the right to institute a suit can arise.¹

Particulars of notice (whether verbal or in writing, with date and the person on whom the notice was served) must be given.

The service of the notice required by sec. 114A, Tr. of Prop. Act., and the lessee's non-compliance therewith being a condition precedent to the lessor's right of action to recover possession, the due performance by the lessor of the statutory condition is implied and need not be pleaded in the plaint.²

The defendant may plead that the forfeiture, if any, was waived by the person entitled to take advantage of it, 'by express declaration or by any act inconsistent with it, or admitting a continuing tenancy, as by receiving rent accrued due since the breach, or distraining for the same, or by subsequently encouraging the tenant to make subsequent improvements; but he must have fully known of the act of forfeiture at the time of waiver, otherwise it will be no waiver.'³

- (42) **Fraud⁴** : Fraud is of infinite variety and it is impossible to lay down a comprehensive definition of fraud. In England 'at Common Law, fraud is actionable under the heading of *deceit*. In equity and upon the equitable principles which are now applicable in any Court of law, fraud may be described as an *infraction of the rules of fair dealing*. For an action at law intention and representation are material. In equity, an act or its consequences to the person aggrieved may be of greater importance than the intention of the defendant or any representation made to the plaintiff, and

1. *Prakash Chandra v. Rajendra*, (1932) I. L. R. 58 Cal. 1359; *Creet v. Gangaraj Gulraj Firm*, I. L. R. (1937) 1 Cal. 203.
2. *Gates v. Jacobs*, 89 L. J. Ch. 319 (case under s. 147, Law of Prop. Act, 1925 which is equivalent to S. 114 A, Tr. of Prop. Act). Cf. *Pravat Chandra Syam v. Bengal Central Bank*, I. L. R. (1938) 2 Cal. 434.
3. Wharton's Law Lexicon, 14th Edn., p. 429.
4. For elements of 'fraud in contract, see Sec. 17, Ind. Cont. Act. For distinction between legal and moral fraud, see *Umrao Begum v. Rahmat Ilahi*, I. L. R. 1939 Lah. 433,

the same may be said of acts which have been stigmatised as fraudulent.¹

In India the pleadings contain in a majority of cases vague and gross allegations of fraud. The pleader drafting a pleading ought to get proper instructions to enable him to plead fraud with sufficient particularity. The responsibility of the pleader in this matter was emphasised by Woodroffe, Coxe and Chatterjee JJ., in a Calcutta case thus : "It is not sufficient to plead instructions. Counsel have a responsibility in the matter and are not justified in making serious charges of fraud and crime unless they are personally satisfied that there are reasonable grounds for putting them forward."²

If relief is claimed on the ground of fraud, particulars of fraud must be set out,³ except in case where a party is unable to give particulars before discovery.⁴

General allegations of fraud, however strong the words in which they are stated, do not even amount to an averment of fraud of which any Court can take notice.⁵ A party pleading one kind of fraud cannot on failure to prove it set up another kind of fraud and try to get a decree on that basis.⁶

1. Wharton's Law Lexicon, 14th Edn., p. 434.
2. *Weston v. Peary Mohan*, (1913) I. L. R. 40 Cal. 898.
3. *Lloyds Bank Ltd. v. P. K. Guzdar & Co.*, (1929) I.L.R. 56 Cal 868 ; *Creet v. Gangaraj-Gulraj*, I.L.R. (1937) 1 Cal. 203 (the circumstances from which fraud can be inferred must be set forth) ; *James Eggay Taylor v. United Africa Co.*, A. I. R. 1937 P. C. 10 ; *Bharat Dharma Syndicate Ltd v. Harish Chandra*, (1937) L. R. 61 I. A. 143.
4. *Leitch v. Abbott*, (1886) 31 Ch. D. 374. See 'Postponement till after discovery' under 'Particulars' Chap. XX.
5. *Per Lord Selbourne*, in *Wallingford v. Mutual Society*, (1880) 5 A. C. 685, 697 ; *Gunga Narain Gupta v. Tiluckram*, (1888) L. R. 15 I. A. 119 ; *Bal Gangadhar Tilak v. Shrinivas*, (1914-15) L. R. 42 I. A. 135, 151, 152 ; *Rajnarin v. Majlis*, A. I. R. 1928 Pat. 112 ; *Hare Krishna v. Umesh*, (1921) 6 P.L.J. 373 (F.B.) ; *V.P.L. Firm v. E. K. S. M. Chattyar Firm*, A. I. R. 1933 Rang. 169 ; *Gajendra Shah v. Shankar Bux*, A. I. R. 1935 Oudh 16.
6. *Kondi Rajji v. Chunilal*, (1929) I. L. R. 53 Bom. 75 ; *Suraj Bakhsh v. Ajudhiya*, A. I. R. 1928 Oudh 330. For proof of fraud, see *Bon Behari v. Satish Kantha*, (1924) 39 C. L. J. 165.

In every case particulars of the specific fraud alleged must be given showing how, by whom and when, it was committed.

In the case of a fraudulent misrepresentation it should be stated when, by whom and how (whether verbally or in writing) the alleged representations were made and it should also be stated that the party aggrieved was induced to act on a false belief by the representations which the party making them knew to be false or did not believe to be true.¹

Coercion, undue influence, fraud and misrepresentation are all separate and separable categories in law. It is true they may overlap or may be combined. But it must appear what ground or grounds are taken up under each head.²

Fraud and forgery are also different things, and when forgery is alleged it excludes the idea of having a document executed by fraud.³

Where there is an allegation of *fraud*, an allegation of *undue influence* based on the same facts is unnecessary.⁴

To call a deed both '*fraudulent*' and '*bogus*' is not a clear piece of pleading. Though fraud may be present in both cases, a deed may be fraudulent without being bogus and hence the two pleas should be kept distinct.⁵

Where *concealed fraud*⁶ is alleged by the plaintiff it is incumbent on him, if he seeks the benefit of Section 18 of the Ind. Lim. Act, to distinctly and in detail allege the particular fraud by which he was kept from the knowledge of his right of suit against the defendant.⁷ The fraud alleged must be the fraud of the person who sets up the Statute or some one through whom he claims.⁸ In England, if con-

1. *United Motor Finance Co. v. Addison & Co.*, (1936-37) 41 C. W. N. 482 (P. C.); cf. *John Minas Apcar v. Louis Caird Malchus*, I. L. R. (1939) 1 Cal. 389.
2. *Bal Gangadhar Tilak v. Shrinivas*, (1914-15) I. L. R. 42 I. A. 135, 151.
3. *Promode Nath v. Harishee Bagdhi*, A. I. R. 1929 Cal. 78, 80.
4. *Narayan Bhat v. Akkerbai*, (1917) 33 I. C. 576.
5. *Godbole v. Mt. Nani Bai*, A. I. R. 1938 Nag. 546.
6. For what is meant by '*concealed fraud*,' see *Willis v. Earle Hoice*, (1893) 1 Ch. 545, 552.
7. *Gulab Rai v. Tulsi Ram*, A. I. R. 1927 All. 437; *Sm. Swarnamoyee v. Prabodh Chandra*, (1931-32) 36 C. W. N. 758 (where a person who had a duty to speak was held guilty of fraud); *Biman Chandra v. Promotha* (1922) I. L. R. 49 Cal. 886.
8. *In re, McCallum*, (1931) 1 Ch. 143,

cealed fraud is not pleaded with particularity, the pleading may be struck out under O. XXV, r. 4, R. S. C., or under the inherent jurisdiction of the Court.¹ In India, in the absence of any specific rule, the pleading may be struck out under the inherent jurisdiction of the Court.

In a suit to set aside a decree on the ground of fraud, the allegation of fraud practised upon the Court must be clear, definite and specific.² In such a suit a mere averment that the case was false or that it was obtained by perjured evidence is not sufficient. Something more should be proved in support of the allegation of fraud.³

(43) **Fraudulent intention** : The circumstances from which the fraudulent intention is to be inferred must be stated.⁴

(44) **Guarantee** : A "contract of guarantee" is a contract to perform the promise or discharge the liability of a third person in case of its default.⁵ Such a contract results when at the instance of the debtor the surety guarantees payment to the creditor.⁶

In a suit on a guarantee the plaintiff must state (i) the name of the principal debtor ; (ii) the name of the creditor ; (iii) the promise made or the liability undertaken by the principal debtor ; (iv) the guarantee given by the surety (stating, whether verbal⁷ or in writing, with date) ; (v) the default made by the principal debtor (stating what and when).

1. See Odgers on Pleading, 11th Edn., p. 132.

2. *Jivan Singh v. Kuar Reoti*, A. I. R. 1930 All. 427 ; *Nanda Kumar v. Ram Jiban*, (1914) I. L. R. 41 Cal. 990, *fd. in Radha Krishun v. Nokh Lal*, A. I. R. 1923 All. 566 ; *Maung Kyaw Hlaing v. Chettyar Firm*, A. I. R. 1933 Rang. 123.

3. *Muktamala v. Ram Chandra*, (1926-27) 31 C. W. N. 258, 261, *folg. Mahomed Golab v. Mahomed Sulliman*, (1894) I. L. R. 21 Cal. 612 ; *Punjab Commercial Syndicate v. Punjab Co-operative Bank*, (1926) I. L. R. 6 Lah 512. ; *Durgabati v. Taharulla Mia*, (1939-40) 44 C. W. N. 849 (where the earlier cases have been reviewed).

4. O. VI, r. 10, C. P. Code.

5. Sec. 126, Ind. Cont. Act, 1872.

6. *Periyamianna v. Banians & Co.*, (1925) I. L. R. 49 Mad. 156, 172, 185.

7. In India, a guarantee may be either verbal or in writing : Sec. 126, Ind. Cont. Act, 1872. In England, a guarantee is within the Statute of Frauds and therefore not actionable without a memorandum or note.

In a suit based on a *continuing guarantee*, in addition to other particulars, the series of transactions over which the guarantee extends must be stated.¹ In the case of a continuing guarantee, the legal representatives of the deceased surety are not liable, unless the surety bond, contained the additional stipulation that the surety's heirs and legal representatives would be bound by the sums of the security bond in the same way in which he was bound by them.² This, however, would be a material statement of fact as distinguished from particulars.

In a suit based on a continuing guarantee, the surety may plead that on a certain date the guarantee was revoked by him as to future transactions by notice to the creditor³ (stating whether the notice was verbal or in writing and when the notice was given).

Where the surety pleads discharge from suretyship, he must specifically state the grounds for his discharge,⁴

(45) **Heirship**: See 'General Rules of Pleading', Chap. XII, p. 341.

(46) **Immorality**⁵ :

(47) **Illegality**: See 'Consideration' under 'Special Defences', Chap. XVII.

(48) **Inevitable accident**: See under 'Special Defences', Chap. XVII.

(49) **Inheritance**: See 'Heirship', *supra*.

(50) **Innuendo**: Where the words complained of are not *prima facie* defamatory, or where it is not clear that they applied to the plaintiff, the plaintiff must be careful to insert in the plaint, in the former case, an averment specifying the defamatory meaning of the words complained of, and in the latter case, an averment specifying that the plaintiff is the person to whom the words applied. Such an averment is called an *innuendo*⁶.

1. Sec. 129, Ind. Cont. Act, 1872.

2. Sec. 131, Ind. Cont. Act, 1872; *Durga Priya Chowdhury v. Durga Pada Roy*, (1928) I. L. R. 55 Cal. 154, 158, 159, 160.

3. Sec. 130, Ind. Cont. Act, 1872; *Durga Priya Chowdhury v. Durga Pada Roy*, *supra*.

4. See Secs. 133-139, Ind. Cont. Act, 1872, and the Ills. under the sections.

5. *Devanandan v. Harihar*, A. I. R. 1935 Pat. 140; *Rajeswar v. Mangniram*, A. I. R. 1933 Nag. 89.

6. *Bruce v. Odhams Press, Ltd.*, (1936) 1 K. B. 697. (Where the plaintiff was not identified either by name or description he was required to

Where the plaintiff extends the meaning of the natural words by an *innuendo*, it is open to the defendant to plead that the words in that extended sense are true and to deliver particulars justifying both the words and the *innuendo*.¹

- (51) **Insanity**: It is open to plead general insanity without pleading the circumstances from which insanity is to be inferred, and lead evidence in proof of general insanity. It is, however, the duty of the Court to scrutinise the pleadings, and when the pleas appear to be distinctive of the case of usual insanity, it will not be proper to infer usual insanity from the statement of some witnesses ignoring the pleading².
- (52) **Legal necessity**³: Alienations by the natural guardian of a Hindu minor, or alienations by the manager of a joint Hindu family or by a limited owner, such as, a Hindu widow, can only be justified by legal necessity. In a suit by the alienee, say, the mortgagee, for enforcement of the mortgage, the plaintiff must allege (a) either there was legal necessity in fact, or (b) that before he gave the loan, he enquired into the necessities for the loan as represented to him and did all that was reasonable to satisfy himself as well as he could with reference to the parties with whom he was dealing that the necessities (such as, making addition to, and improvements in, the family house) existed, and that the guardian or the limited owner, as the case may be, was acting in the particular instance for the benefit of the estate and that the plaintiff acted in good faith in the matter. He need not allege or prove further the application of the money.⁴

plead the facts on which he relied as showing that words were published of the plaintiff). See *Capital & Counties Bank v. Henty*, (1882) 7 A. C. 741, 748; *Jacobs v. Schmaltz*, (1890) 62 L. T. 121; *Gerald Lord Strickland v. Carmelo Mifsud Bonnici*, A. I. R. 1935 P. C. 34.

1. *Maisel v. Financial Times, Ltd.*, (1915) 84 L. J. K. B. 2145.
2. *Mt. Hazrabi v. Mt. Fatmabi*, A. I. R. 1938 Nag. 204.
3. For what is legal necessity, see Mulla's *Hindu Law*, 9th Edn., p. 275. Cf. *Shitu Prasad Singh v. Ajab Lal*, (1939) I. L. R. 18 Pat. 306.
4. *Hunoomanpersaud v. Mt. Babooee*, (1856) 6 M. I. A. 393, 423 (alienation by a natural guardian). See *Jagat Narain v. Mathura Das*, (1928) I. L. R. 50 All. 969 F. B. (for meaning of the words, "for the benefit of the estate"); *Nagindas v. Mahomed*, (1922) I. L. R. 46 Bom. 312;

Plea of want of legal necessity should take the following term : The alleged necessity did not exist or the facts relied on do not amount to legal necessity, or the alienee made no reasonable enquiries to satisfy himself as regards the existence of legal necessity and that the alienee did not act in good faith.

- (52) **Libel** : In an action for libel the plaintiff must identify the publications, giving the date and place of each publication, and set out the precise words complained of.¹ If the words complained of are contained in a letter or other private communication, the name of the person or persons to whom publication is alleged must be given. If the name of the person to whom publication is alleged be unknown, he must be indicated in some manner that will identify him. Where a statement of claim alleged a publication to a named person and "diverse other persons", the plaintiff will be directed to give to the defendant the names of the other persons. In default of delivery of such particulars the plaintiff will be precluded from proving any publication other than those of which particulars have been delivered². But this is not necessary in case of publication in a newspaper or other document which has a wide circulation³.

Where the plaintiff is not identified by name or description, facts showing that the words were published of the plaintiff must be stated⁴.

Where an *innuendo* is pleaded it is necessary to state what is the precise offence imputed by the words⁵, and the

Durgaprasad v. Jewdhari, (1935) I. L. R. 62 Cal. 733; *Anant Ram v. Collector of Etah*, (1918) I. L. R. 40 All. 171 (mortgage by manager of joint family); *Lalla v. Avadh Naresh Singh*, 1939 O. W. N. 920.

- 1 *Harris v. Warre*, (1879) 4 C. P. D. 125, 128. If the plaintiff cannot quote the exact words because the libel or a copy of it is in the possession of the defendant, or some third party, he should find out as nearly as he can the exact words of the libel from the persons to whom the defendant has shown it and should insert those words and amend his plaint after discovery : Fraser on Libel and Slander, 7th Edn., pp. 245, 246.
- 2 *Davey v. Bentinck*, (1893) 1 Q. B. 185, 188; *British Legal etc. v. Sheffield*, (1911) 1 Ir. R. 69; *Russel v. Stubbs*, (1913) 2 K. B. 200 (n).
- 3 See Annual Practice, 1938, p. 350.
- 4 *Bruce v. Odhams Press, Ltd.* (1936) 1 K. B. 697 (The omission to state such facts is an omission of a material statement of facts).
- 5 Fraser on Libel and Slander, 7th Edn., p. 247.

facts and circumstances which made the words convey a special or secondary meaning of a defamatory character to the person to whom they were published.¹

Unnecessary particulars may be ordered to be struck out. Thus, where the statement of claim alleged that the libel complained of was an unfair and inaccurate report and gave particulars of the alleged unfairness and inaccuracy of the report, Scrutton J., ordered those paragraphs of the statement of claim which purported to give such particulars to be struck out.²

Where the words affect the plaintiff in the way of his office or profession or trade, the pleader should insert an averment to that effect. It is not necessary, as in the case where the words are spoken, to allege that at the time of the publication complained of, the plaintiff held such office or practised such profession or trade. It is sufficient for the plaintiff to allege and prove that 'he has at any time held the office or practised the profession or trade in question'.³ 'It is not necessary for the plaintiff to specify in his statement of claim the amount of general damages which he claims.'⁴

Defences to an action for libel may take the form of Justification,⁵ Fair Comment,⁶ Absolute⁷ or Qualified Privilege, Apology⁸ and Payment into Court, Accord and Satisfaction, Release, *Res Judicata*, Statutes of Limitation and Death of Parties. For most of these items, see appropriate headings under 'Special Defences', Chap. XVII.

(53) **Malice** : "Malice in common acceptance means ill will

1. *Capital and Counties Bank v. Henty*, (1887) L. R. 7 A. C. 741, 744, 771.
2. *Tooth v. The News of the World* (unreported). See Fraser on Libel and Slander, 7th Edn., p. 244.
3. *Boydell v. Jones*, (1838) 4 M. & W. 446; *Bellamy v. Burch*, (1847) 16 M. & W. 590; Fraser on Libel and Slander, 7th Edn., pp. 12, 25, 249.
4. *London and Northern Bank, Ltd. v. George Newnes, Ltd.*, (1900) 16 T. L. R. 433 C. A.
5. Justification must be pleaded specifically and distinctly : *Ajit Singh v. Radha Kishen*, A. I. R. 1931 Lah. 246.
6. *Truth & Sportsman, Ltd. v. George Stanley Thompson*, A. I. R. 1933 P.C. 36.
7. *Kam Kirat Kamkar v. Biseswar Nath*, (1933) I. L. R. 11 Pat. 693.
8. In England, apology is a Statutory defence under the Libel Act, 1843. In India, it has a bearing on the question of mitigation of damages.

against a person, but in its legal sense it means a wrongful act done intentionally without just cause or excuse.’¹

‘Ill-will or improper motive is often called actual or express malice or malice in fact, to distinguish it from malice in law, which merely denotes absence of legal excuse.’²

In the law of defamation the defence that the occasion was one of qualified privilege, may be rebutted by proof of actual malice.³ Similarly, proof of actual malice may take a criticism *prima facie* fair outside the right of fair comment.⁴ In an action for Slander of Goods, proof of actual malice is necessary.⁵

Malice is the gist of the action for malicious prosecution.⁶

“Wherever it is material to allege malice, fraudulent intention, knowledge or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred.”⁷

Express malice or malice in fact ought to be specifically pleaded, where such malice is the foundation of the cause of action, thus: “On.....the defendants contriving and intending to injure the plaintiff in his said business and to prevent and diminish the sale of his.....falsely and maliciously printed and published and caused to be printed and published to one.....of and concerning the plaintiff,

1. *Per* Bayley, J. in *Bromage v. Prosser*, (1825) 4 B. & C. 247 at 255; *Somerville v. Hawkins*, (1851) 10 C. B. 583.
2. Wharton's Law Lexicon, 14th Edn., p. 622.
3. *Clark v. Molyneux*, (1877) 3 Q. B. D. 237; *Stuart v. Bell*, (1891) 2 Q. B. 341, 351 C. A. (Malice in fact includes every wrong feeling in a man's mind); cf. *Royal Aquarium etc. Soc. v. Parkinson*, (1892) 1 Q. B. 431, 443, 444, (C. A.)
4. *Thomas v. Bradbury, Agnew & Co.*, (1906) 2 K. B. 627, 640.
5. Read the discussion of this subject in Fraser on Libel and Slander, 7th Edn., pp. 49-52. Cf. *Balden v. Shorter*, (1933) Ch. 427.
6. *Gaya Parshad v. Bhagat Singh*, (1907-08) 35 I. A. 189; *Albert Bonnan v. Imperial Tobacco Co.*, A. I. R. 1929 P. C. 222; *Taharat Karim v. Abdul Khaliq*, A. I. R. 1938 Pat. 529 (Malice does not necessarily connote personal spite but only means an indirect or improper motive rather than a desire to vindicate the law).
7. O. VI, r. 10, C. P. Code,

and of and concerning him as such manufacturer and seller as aforesaid and of and concerning him in the way of the said business and in relation to the quality of the said....., the following words, namely,.....¹.

Where only legal malice is necessary to be proved, the malice implied from defamatory words need not be alleged.² But it is the invariable practice in an action on libel to allege that the defendant published the words falsely and maliciously.³

- (54) **Malicious prosecution** : In a suit for malicious criminal prosecution the plaintiff must prove—(a) that he was prosecuted by the defendant ; (b) that the proceedings complained of terminated in favour of the plaintiff if from their nature they were capable of so terminating ; (c) that the prosecution was instituted against him without any reasonable and probable cause ; and (d) that it was so instituted with a malicious intention.⁴

Under (a), the fact showing that the plaintiff was prosecuted by the defendant and also when, how, for what alleged offence, and before which criminal Court he was so prosecuted, must be stated. As to whether the prosecution was by the defendant is a question of some nicety. There is no difficulty where the prosecution was instituted by the defendant himself against the plaintiff. The defendant will be liable as prosecutor although he may not have figured as complainant in the criminal Court, if the prosecution is launched on the information supplied by the defendant.⁵

A defendant will be regarded as the prosecutor if the prosecution is lodged by one of his agents. Upon this doctrine is founded the liability of a corporation for malicious prose-

1. Cf. Form No. 22 in Fraser on Libel and Slander, 7th. Edn., p. 309.
2. *Mercer v. Sparks*, (1597) Owen 51.
3. See Fraser on Libel and Slander, 7th Edn., p. 244.
4. *Balbhaddar Singh v. Badri Sah*, (1926) I. L. R. 1 Luck. 215, fd. in *U. Soe v. Maung Ngwe Tha*, (1928) I. L. R. 5 Rang. 51 ; *Shubrats v. Shamsuddin*, (1928) I. L. R. 50 All. 713 ; *Mauji Ram v. Ohaturbhuj*, A. I. R. 1939 P. C. 225 ; *Narayana Mudali v. Peria Kalathi*, A. I. R. 1939 Mad. 783 ; *Taharat Karim v. Abdul Khalig*, A. I. R. 1938 Pat. 529.
5. *Periya Goundan v. Kuppa Goundan*, (1919) I. L. R. 42 Mad. 880 ; *Shanmugha Udayar v. Kandasami*, (1920) 12 L. W. 170.

cution by one of its employees acting within the scope of his employment.¹

Where the defendant has given the police a report which is false to his knowledge and results in prosecution by them and has taken a principal part in the conduct of the case both before the police and the magistrate, his liability is that of a prosecutor.²

Where the defendants conspired to prosecute the plaintiff maliciously and without reasonable and probable cause and in furtherance of their design one of the defendants figured as a complainant in a cognisable offence of which information was lodged by him to the police and the latter prosecuted the plaintiff on the faith of the prosecution, it was held that the defendants prosecuted the plaintiff.³

The plaintiff ought to state when and how the prosecution commenced. According to the Bombay High Court and the Chief Court of Oudh, a prosecution commences when a complaint is made.⁴

According to the Calcutta,⁵ Madras,⁶ Allahabad,⁷ Patna⁸ and Rangoon⁹ High Courts, prosecution commences only after issue of the process to the plaintiff to appear. If no process is however actually issued but an order for issue of process is formally recorded, and the accused appears, the prosecution must be deemed to have commenced.¹⁰

1. *Chatra Serampore Co.-Op. Credit Society v. Becharam Sarkar*, (1937-38) 42 C. W. N. 1219.
2. *Gayaparshad Tewari v. Bhagat Singh*, (1907-8) I. L. R. 35 I. A. 189.
3. *Muhammad Sherif v. Nasir Ali*, (1930) I. L. R. 53 All. 44.
4. *Ahmedbhai v. Framji*, (1904) I. L. R. 28 Bom. 226; *Gur Saran Das v. Israr Haidar*, A. I. R. 1927 Oudh 471.
5. *DeRozario v. Gulab Chand*, (1910) I. L. R. 37 Cal. 358; *Golap Jan v. Bholanath*, (1911) I. L. R. 38 Cal. 880; *Nagendra Nath Roy v. Basantu Das*, (1929) I. L. R. 57 Cal. 25.
6. *Sheik Meeran Sahib v. Ratnavelu Mudali*, (1914) I. L. R. 37 Mad. 181; *Sanjivi Reddi v. Koneri Reddi*, (1925) I. L. R. 49 Mad. 315; *Arunachella Mudaliar v. Chinnamunusamy Chetti*, (1926) M. W. N. 527; cf. *Govindaraja Pillai v. Vanchinatham Pillai*, A. I. R. 1939 Mad. 492.
7. *Ali Muhammad v. Zakar Ali*, (1931) I. L. R. 53 All. 771.
8. *Subhay Chamar v. Nand Lal*, (1928) I. L. R. 8 Pat. 285.
9. *Gowri Singh v. Bokka Venkanna*, (1935) I. L. R. 13 Rang. 704.
10. *Zahiruddin Mohammad v. Budhi Bibi*, (1933) I. L. R. 12 Pat. 292.

Under (b), the plaintiff must state when the proceedings terminated in his favour and how (whether by acquittal,¹ or discharge,² or by discontinuance,³ or by quashing for some defect in the proceedings⁴).

(55) **Misconduct**: "The Court will require of him who makes a charge that he shall state that charge with as much definiteness and particularity as may be done both as regards time and place."⁵ The particulars ought to give full information as to what facts are relied on and the nature of the charge.⁶ Thus, in an action against a broker alleging unfair accounts and excessive commission, particulars were ordered of accounts alleged to be unfair, and of the transactions in respect of which excessive commission was charged.⁷ Where the plaintiffs furnished a long list of entries which they alleged to be false, they were required to state the nature of the impropriety, falsehood or fraud alleged against each item.⁸ Similarly where a libel charged an attorney with general misconduct, full particulars of the plea of justification were ordered.⁹ In a suit by the son impeaching the alienation by a Hindu father the pleading must show with precision how exactly it came about at the particular time that the particular money was needed and used for the particular immorality charged.¹⁰

(56) **Misrepresentation**¹¹: The plaintiff must state the nature and extent of each alleged misrepresentation, by whom and to whom it was made, and whether verbally or in writing, in the latter case identifying the document. In

1. *Balbhaddar Singh v. Badri Sah*, (1926) I. L. R. 1 Luck. 215 (P. C.).
2. *Venu v. Coorya*, (1881) I. L. R. 6 Bom. 376.
3. *Walkins v. Lee*, (1839) 5 M. & W. 270.
4. *Johnson v. Emerson*, (1871) L. R. 6 Ex. 329.
5. *Per* Lord Penzance, in *Marriner v. Bishop of Bath and Wells*, (1893) P. 145, 146.
6. *Gordon-Cumming v. Green*, (1891) 7 T. L. R. 408.
7. *Harbord v. Monk*, (1878) 38 L. T. 411.
8. *Newport etc. Engineering Co. v. Paynter*, (1886) 34 Ch. D. 83, 93, 94.
9. *Holmes v. Catesby*, (1809) 1 Taunt. 543.
10. *Jagdish Narain v. Hazari Lal*, A. I. R. 1932 All. 467.
11. For definition, see Sec. 18, Ind. Cont. Act; for distinction between fraud and misrepresentation, see *Niaz Ahmed Khan v. Parsottam Chandra*, (1931) I. L. R. 53 All. 374.

the following cases particulars of mis-representation were ordered :—

(a) *Where money was obtained by false and fraudulent representations :* Where the claim alleged that the sum of £900/- was obtained from the plaintiffs by the false and fraudulent representation of the defendant that he was in a position to sell a mining grant belonging to the plaintiffs and had found a purchaser for the same and further by false and fraudulent representations the defendant induced the plaintiff to enter into an agreement dated.....with one....., particulars of the false and fraudulent representations alleged in the statement of claim, and whether the representations first therein alleged were oral or in writing and when and where made and what was the nature of the false and fraudulent representations second therein mentioned and whether oral or in writing and when and where made were ordered.¹

(b) *Where a grant of patent was obtained by false representations :* In an action for infringement of the patent, the defendants alleged that the patent was granted upon representations made in the course of the application and prior to the grant and that each of such representations was untrue and by reason of such representations the Crown was misled and the grant was void :—*Held :* the defendant must give particulars with dates and items, must state as to each such alleged misrepresentation, whether the same was made orally or in writing, and, if orally, the terms thereof and so far as possible the dates and the persons by and to whom they were respectively made, and, if in writing, identifying so far as possible with dates and parties all material documents.²

(c) *Where fraudulent misrepresentations were contained in a prospectus :* Where a statement of claim for fraudulent misrepresentation in a prospectus relating to a company contained a general allegation that the prospectus comprised many untrue and misleading statements and then set out certain specific instances of misrepresentation, it was held

1. *Seligmann v. Young*, (1884) W. N. 93.

2. *Tecalemit v. Ex-a-Qun*, (1926) 44 R. P. C. 62, C. A.

that evidence of the alleged misrepresentations not specifically pleaded could not be admitted.¹

- (57) **Mistake** : A mistake may be one of fact or of law. A mistake as to a matter of fact essential to an agreement, renders the agreement void.² The mistake may be common to both parties.³ The Courts may rectify an instrument on the grounds of mistake of fact.⁴ A party has a right to resist specific performance of a contract on the ground of mistake.⁵ For particulars to be given of a mistake as to a matter of fact essential to the agreement, see 'Illustrations' to Sec. 20, Indian Contract Act, 1872.

A contract is not voidable because it was caused by a mistake as to any law in force in British India⁶ ; but a mistake as to a law not in force in British India has the same effect as the mistake of fact.⁷

- (58) **Money had and received** : An action for money received by the defendant for the use of the plaintiff lies when the defendant has received money which in justice and equity belongs to the plaintiff under circumstances which rendered the receipt by the defendant receipt for the use of the plaintiff.⁸ It is a common law action grounded upon an implied contract on part of the defendant.⁹ The action lies for money

1. *Per North J.*, in *Symonds v. City Bank*, (1886) 34 W. R. 364, 365.
2. Sec. 20, Ind. Cont. Act, 1872; *Secretary of State for India v. Sheth Jeshingbhai*, (1893) I. L. R. 17 Bom. 407; *Nursing Dass Kothari v. Ohuttoo Lall*, (1923) I. L. R. 50 Cal. 615; *Ram Rattan v. Municipal Committee, Amritsar*, A. I. R. 1939 Lah. 511; *Kuchwar Lime and Stone Co. v. Secy. of State* (1937) I. L. R. 16 Pat. 159. A decree, however, cannot be set aside on the ground that it was obtained on account of the mistake of the parties: *Kazim Ali Khan v. Om Prakash*, A. I. R. 1937 All. 731.
3. *Huddersfield Banking Co. v. H. Lister & Son*, (1895) 2 Ch. 273; *P. C. Muthu Chettiar v. Venkatachalam Chetty*, A. I. R. 1935 Mad. 284.
4. *U. Shree Thaung v. U. Kyaw Dun*, A. I. R. 1930 Rang. 12; cf. *Madharji v. Ramnath*, (1906) I. L. R. 30 Bom. 457.
5. Sec. 26 (1) and (b). Specific Relief Act.
6. *Katherine Stiffles v. Carr Mackartich Martin*, (1934-35) 39 C. W. N. 174.
7. Sec. 21, Ind. Cont. Act, 1872.
8. *Per Smith J.*, in *Phillips v. London School Board*, (1898) 2 Q. B. 447, 453; cf. *Bradford Corpn. v. Ferrand*, (1902) 2 Ch. 655, 662; *Hirji Mulji v. Cheong S. S. Co.*, (1926) A. C. 497.
9. *Sinclair v. Brougham*, (1914) A. C. 398, 404.

paid by mistake or upon a consideration which happens to fail or money obtained through imposition or extortion and so on. In an action for money had and received the plaintiff must allege and prove that the defendant himself or his agent actually received the money or that something happened which is equivalent to a receipt thereof by the defendant.¹ The plaintiff also must allege facts showing that the money sought to be recovered was received by the defendant under such circumstances as to create a privity between him and the plaintiff.² There are cases in which the plaintiff may waive a tort committed by the defendant through the medium of which he has received money of the plaintiff and sue for money had and received.³ In such cases the plaintiff ought to state facts showing that the defendant tortiously took and retained the plaintiff's money and that the plaintiff is waiving the tort and is suing for money had and received.

- (59) **Negligence** : Negligence in law is the breach of duty to take care, and want of care is actionable at the suit of a person who has suffered damage because the defendant has acted in breach of a common law duty towards him or of a statutory duty towards the public at large or a class of the public of which he is a member.⁴ Negligence is a question of law or fact or of mixed fact and law. It is a question entirely of law where the case falls within a general settled rule or principle of law. More often the inference of negligence is to be drawn from given facts and circumstances. Sometimes it is only necessary to decide whether the defendant has shown a want of care which would have been expected in the ordinary course of events in the circumstances.⁵ In each case particulars of facts showing negligence or of contributory negligence must be pleaded.

- (60) **Notice** : See 'Knowledge', *supra*. For pleading of Notice

1. Cf. *Prince v. Oriental Bank Corpn.*, (1878) 3 A. C. 325, 328.
2. *Robbins v. Fennell*, (1847) 11 Q. B. 248.
3. *Neate v. Harding*, (1851) 6 Ex. 349.
4. *P. B. Bose v. M. R. N. Chettiar Firm*, A. I. R. 1938 Rang. 185 (S. B.) ;
cf. *Kanshi Ram v. Owen Roberts*, A. I. R. 1939 Lah. 565.
5. See Wharton's Law Lexicon, 14th Edn., p. 685.

as condition precedent, see 'Condition precedent' under Special Defences, *supra*.

(61) **Novation** : Sec. 62 of the Indian Contract Act provides that if the parties to a contract agree to substitute a new contract for it or to rescind or alter it, the original contract need not be performed. Therefore, where it is pleaded that a new contract was substituted for the old, all particulars such as whether the agreement was verbal or in writing, when, where and between whom the agreement was arrived at must be pleaded. Similarly, particulars have to be given of the agreement to rescind or alter the original contract.

(62) **Nuisance** : "A nuisance is any unauthorised act which, without direct physical interference materially impairs the use and enjoyment by another of his property, or prejudicially affects his health, comfort or convenience."¹

Nuisance is of two kinds : (i) public ; (ii) private.

In case of a public nuisance, the Advocate-General, or two or more persons having obtained the consent of the Advocate-General may institute a suit, though no special damage has been caused, for a declaration and injunction or for such other relief as may be appropriate to the circumstances of the case.²

A private individual who is specially injured by it beyond the rest of the public may also sue for removal of a public nuisance.³

Particulars of nuisance must be given and where special damage is claimed particulars of such special damage must also be given.⁴

(63) **Partition** : In suits for partition of joint family properties the plaint should specify the respective shares of the parties, the properties sought to be partitioned and the claims of the parties for maintenance, residence, etc. The Original Side Rules of the Madras High Court specially provide for matters to be specified in the plaint in a suit for partition.

1. Wharton's Law Lexicon, 14th Edn., p. 705.

2. Sec. 91, C. P. Code. Cf. Sub-Clause (2) of the Section.

3. *Raj Chandra Halder v. Mahim*, A. I. R. 1926 Cal. 549.

4. *Raj Chandra Halder v. Mahim*, *supra*.

O. XXXI, rr. 1 and 2 of the O. S. Rules of the said High Court run as follows :

"1. All persons entitled to share in the property of an undivided family, or to maintenance, or residence, or to an allowance in respect of marriage, shall be joined as parties to suit for partition of the joint property. (Form of plaint, Form No. 92)."

"2. The plaint shall specify the several members of the undivided family, and their relationship, and the shares to which they are respectively entitled, or the allowances or residences which it is proposed to allot to them respectively ; and unless a general account is prayed for, the particular items of joint property of which division is sought, the incumbrances, charges, and outgoings, if any, to which the same are subject, and the net value of each item ; and shall also state whether any debts or liabilities of the family are outstanding or unsatisfied. If it is alleged that any co-owner has alienated any portion of the joint property, or his interest therein, for other than family purposes or his own interest, the alienee shall be made a party to the suit, and the plaint shall set out the particulars of the alleged alienation."

(64) **Passing off :** In a passing off action the question is whether the defendant's action, by misleading description or by colourable imitation of known marks, packages and so forth, naturally tended to cause an ordinary dealer or purchaser to think he was dealing with the plaintiff or buying the plaintiff's goods. Facts showing the wrongful conduct of the defendant should be set out with particulars. If the defendant merely denies the allegations of the plaintiff, and makes no affirmative allegation, he will not be ordered to give any particulars of his traverse.¹ See 'Trade Mark', below.

(65) **Patent—INFRINGEMENT OF :** The question of infringement of a patent is a mixed question of law and fact. In an action for an infringement of a patent the plaintiff should allege the existence of the patent and his property therein. He has got to prove that his process has been counterfeited or imitated by the defendant. It is necessary for him to

1. *La Radiotechnique v. Weinbaum*, (1928) 1 Ch. 1.

give the particulars of the breaches consisting of the alleged infringement of his right.¹ The defendant who denies the case of the plaintiff must give particulars as to who he alleges to be the true and first inventor.² The essential feature necessary to the validity of a patent is novelty, and the defendant therefore must deliver with his Defence particulars of any objections which he intends to urge against the validity of the patent.³

- (65) **Performance of contract :** A party relying upon the performance of a contract must state the *mode of performance* and the *time of performance*. Where a party to a contract undertakes to do some particular act and the contract is silent as to the time of performance, the law implies that it shall be executed within a reasonable time looking at all the circumstances of the case.⁴ Where *notice* is necessary to be given of any fact on which the occurrence of a contract may depend, such notice must be pleaded and particulars, such as date, and whether the notice was verbal or in writing, must be given. Generally, where there is knowledge in one party and not in the other, notice is necessary. Thus, where a landlord agrees to repair the inside of a house, the tenant must give notice of the disrepair.⁵ Where a *demand or request to perform* is necessary, such demand or request must be alleged. Thus, in the case of a bill of exchange, promissory note or cheque, no right of action arises till a demand has been made. Where a surety promises to pay on demand if the principal defaults, he does not become liable till demand is made.⁶ In each case the date of demand, the place where the demand was made, and whether the demand was verbal or in writing must be stated.

Excuses for non performance, such as, (i) impossibility either initial or supervening, (ii) breach by the other party, (iii) renunciation, (iv) prevention of performance by promisee

1. *Lallubhai v. Chiman Lal*, (1936) I. L. R. 60 Bom. 261.
2. *Gillette Industries Ltd. v. Yeshwant Brothers*, A. I. R. 1938 Bom. 347.
3. Odgers on Pleading, 11th Edn., p. 175. Cf. *Gillette Industries Ltd. v. Yashwant Brothers*, *supra*.
4. *Per Lord Blackburn*, in *Postlethwaite v. Freeland*, (1880) 5 A. C. 599.
5. *Makin v. Watkinson*, (1870) L. R. 6 Ex. 25.
6. *Sicklemore v. Thistleton*, (1817) 6 M. & S. 9.

and (v) rescission by agreement, must be pleaded with particularity.

- (67) **Rectification** : "When, through fraud or a mutual mistake of the parties, a contract or other instrument in writing does not truly express their intention, either party or his representative in interest, may institute a suit to have the instrument rectified ; and if the Court finds it clearly proved there has been fraud or mistake in framing the instrument, and ascertain the real intention of the parties in executing the same, the Court may in its discretion rectify the instrument so as to express that intention so far as this can be done, without prejudice to rights acquired by third persons in good faith and for value."¹

Where fraud is relied on, particulars of fraud must be given. Where mutual mistake is relied on, it must be alleged that there was a common intention different from the expressed intention and a common mistaken supposition that the intention was rightly expressed in the instrument.²

- (68) **Representation** : Where it is alleged that the defendant made representation to the plaintiff, particulars will be ordered as to whether the representation was verbal or in writing and also when and where it was made.

- (69) **Representative capacity** : Ordinarily the capacity in which the plaintiff sues or the defendant is sued ought to be stated in the cause-title.³ See heading "Representative Parties", Chap. VI, pp. 51, 52.

- (70) **Repudiation** : Repudiation of a contract is its renunciation rendering the repudiator liable to be sued for breach of contract and entitling the repudiatee, on accepting the repudiation, to treat the contract as at an end.⁴ It consists in the expression of an intention to break the contract. In some cases the effect of a breach may amount to a repudiation. Such cases generally occur in contracts for

1. Sec. 31, Specific Relief Act, 1877 ; *Venkatachalam Chelliar v. P. L. A. R. M. Firm*, A. I. R. 1939 Rang. 90.

2. *Bepin Krishna v. Priya Brata*, (1921-22) 26 C. W. N. 36, 41 ; *Madhanji v. Ramnath*, (1905) I. L. R. 30 Bom. 457 ; *U. Shwe Thawng v. U. Kyaw Dun*, A. I. R. 1930 Rang. 12.

3. *Seth Har Bax v. Lachman*, A. I. R. 1925 Nag. 183.

4. *Per Lord Blackburn*, in *Mersy Steel & Iron Co. v. Naylor*, (1884) 9 A. C. 434.

instalment deliveries where the seller makes no delivery or defective delivery in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments. It is a question in each case whether the breach of contract is a repudiation of the whole contract or not¹. In the first case, particulars of repudiation showing an intention to break the contract must be clearly stated and also the date of such repudiation and whether the repudiation was verbal or in writing. In the second case, the terms of the contract and the particulars of the breach and circumstances of the case amounting to a repudiation of the whole contract must be stated.

- (71) **Revocation** : Revocation is the "undoing of a thing granted or destroying or making void of some deed that had existed until the act of revocation made it void. It may be either *general*, of all acts and things done before ; or *special*, to revoke a particular thing²". The subject of particulars is dealt with under the following two heads :

- (a) *Revocation of proposals and acceptances* : Under Sec. 4 of the Indian Contract Act, the communication of a revocation is complete as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it ; as against the person to whom it is made, when it comes to his knowledge.

Under Sec. 5 of the said Act, a proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards ; and an acceptance may be revoked before the acceptance of the communication is complete as against the acceptor, but not afterwards.

Under Sec. 6 of the Indian Contract Act, a proposal is revoked

(i) by the communication of notice of revocation of the proposer to the other party ;

(ii) by the lapse of the time prescribed in such proposal for its acceptance, or, if no time is so prescribed,

1. Sec. 38 (2) Ind. Sale of Goods Act, 1930.

2. Wharton's Law Lexicon, 14th Edn., p. 884.

by the lapse of a reasonable time, without communication of the acceptance ;

(iii) by the failure of the acceptor to fulfil a condition precedent to acceptance ; or

(iv) by the death or insanity of the proposer, if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance.

Particulars in the above cases should be given with necessary dates.

- (b) *Revocation of agency* : An agency is terminated (i) by the principal revoking his authority ; (ii) or, by the agent renouncing the business of the agency ; (iii) or, by either the principal or agent dying or becoming of unsound mind ; (iv) or, by the principal being adjudicated an insolvent under the provisions of any Act for the time being in force for the relief of any insolvent debtor¹.

Where the agency is revoked by the principal, such revocation may be either express, as by direct and formal writing, publicly advertised, or, by informal writing to the agent privately, or, by parol, or implied from circumstances, as by appointing another person to do the same act, where the authority of both would be incompatible². Particulars of the time and manner of revocation must be alleged.

Exceptions :

The exceptions to the power of the principal to revoke his agent's authority at his pleasure, are—

(i) where the agent has himself an interest in the property which forms the subject-matter of the agency and there is no express contract that the agency can be terminated to the prejudice of such interest ;

(ii) where the authority has been partly exercised so far as regards such acts and obligations as arise from acts already done in the agency.³

(72) *Right of way :*

(a) *Private right of way* : In an action to restrain obstruction to a private right of way the plaintiff ought to

1. Sec. 201, Ind. Cont. Act.

2. Wharton's Law Lexicon, 14th Edn., p. 884 ; Sec. 207, Ind. Cont. Act.

3. Sec. 204, Ind. Cont. Act.

show whether he claims the right by prescription or by grant. He ought also to allege with reasonable certainty the *terminii* of the way and its course.¹ But he is not bound to give the precise dates and parties of the lost grants.²

(b) *Highway* : In pleading a highway it is not necessary to state either the *terminus a quo* or the *terminus ad quem*.³ But it is sometimes more convenient to state the *terminii* where a party relies alternatively on the allegation of a public highway and on the allegation of a private right of way. If embarrassment is caused to the opposite party by the uncertainty of the allegation, the party pleading may be ordered to give particulars of the *terminii* and the course of the alleged highway.⁴ In case of highway it is generally necessary to plead that it has been such from time immemorial or to state how or when it became a highway. But where the defendant alleged that the road was dedicated to the public by the plaintiff and her predecessors in title, an order for particulars was made that the defendant should state the specific acts of dedication, a specific declaration of intention to dedicate, and set forth the nature and dates of such acts or declarations and the names of the persons by whom the same were done or made.⁵

- (73) **Satisfaction** : Satisfaction is "the recompense for an injury done or the payment of money due and owing". In India, a dispensation or a remission by a promisee of the performance of the whole or any part of the promise made to him does not require to be supported by consideration and there need not be a proposal of the dispensation or remission which is accepted.⁶ The defendant relying on the satisfaction of a debt need not plead any agreement or contract but he must state the date of remission and whether it was wholly or in part and the acceptance by the creditor of the sum in full satisfaction.

1. *Harris v. Jenkins*, (1882) 22 Ch. D. 481.

2. *Palmer v. Guadagni*, (1906) 2 Ch. 494.

3. *Rouse v. Bardin*, (1790) 1 H. Bl. 351.

4. *Spedding v. Fitzpatrick*, (1888) 38 Ch. D. 410.

5. *Spedding v. Fitzpatrick*, *supra*.

6. Sec. 63, Ind. Cont. Act ; *Chettyar v. A. K. R. etc. Firm*, A. I. R. 1939 Rang. 84, *fg. Chunna Mal Ram Nath v. Moolchand Ram Bhagat*, (1927-28) L. R. 55 I. A. 154.

See, "Accord and satisfaction" under "Special Defences", Chap. XVII.

(74) **Seduction**: In an action for the seduction of his daughter by the defendant, the plaintiff alleged that the defendant who engaged his daughter as servant seduced her whilst in his service whereby she had become pregnant, and that in consequence of her pregnancy plaintiff lost her services. The defendant, before defence, applied for particulars of the alleged immoral intercourse. *Held*: that the defendant without denying the seduction on oath was not entitled to an order for such particulars¹. In a later case, upon similar facts, a Divisional Court ordered particulars². In two later cases, however, it has been held, following the earlier authority, that particulars of the time and place of the alleged seduction will not be ordered on the application of the defendant before delivering his defence unless the application is accompanied by an affidavit stating his intention to deny the seduction³.

(75) **Slander**: In an action for slander, the defendant is entitled to particulars of the persons to whom the slander is alleged to have been uttered. Thus, where a statement of claim alleged that T., "at the request and by direction of the defendant, falsely and maliciously spoke and published of and concerning the plaintiff" certain slanderous words, it was held that the defendant was entitled to particulars of the persons to whom they were uttered⁴. He is also entitled to the particulars of the place where the slander is alleged to have been uttered⁵. He is entitled to the particulars of the names of persons to whom the alleged slander was uttered even before the delivery of the defence⁶. In a case where the names of persons who may have heard the defendant utter certain slanders in a public room were asked for, an order that "the plaintiff is to deliver the

1. *Thomson v. Birkely*, (1882) 47 L. T. 700, consd. in *Sachs v. Speilman*, (1887) 37 Ch. D. 295.

2. *Kelly v. Briggs*, (1888) 85 L. T. Jo. 78.

3. *Knight v. Engle*, (1889) 61 L. T. 780; *Hanna v. Keers*, (1896) 2 I. R. 226.

4. *Bradbury v. Cooper*, (1883) 12 Q. B. D. 94.

5. *Per A. T. Lawrence J.*, in *Olegg v. Bromley*, (unreported) cited in Fraser on Libel, 7th Edn., p. 250 (n).

6. *Roselle v. Buchanan*, (1886) 16 Q. B. D. 656.

best particulars he can give of the persons present" when the slanders were uttered, was made¹. An application for such particulars was refused in one case on the ground that it was made too late².

Where the plaintiffs named certain persons to whom a libel was published and stated that it was also published to others whose names were unknown and that they would rely upon the publication thereof to every person to whom they might discover it was published, it was held that the plaintiffs were not to be at liberty to give evidence as to any other publication as to words alleged, unless they gave particulars before giving notice of trial³.

Where the plaintiff alleges that by reason of the publication of the words complained of, he has been injured in his business or trade, the defendant is entitled to particulars of the specific damage alleged⁴.

- (76) **Trade mark**: The ordinary rule that the parties must state the facts upon which they rely with sufficient particularity to prevent their opponents being taken by surprise at the trial, applies to trade mark cases. So if the plaintiff alleges that actual deception has occurred, he will be ordered to give particulars of the persons deceived.⁵ And if the defendant pleads that the plaintiff's trade mark is invalid, he must give particulars of the invalidity alleged.⁶ In a passing-off case in which the plaintiffs alleged that their cigars had come to be known by a name consequent on the use of red band, they were ordered to give particulars of the dates when the cigars in question first became known by the name, as well as certain particulars as to the alleged passing-off.⁷

If a motion to expunge the plaintiff's mark is made by

1. *Williams v. Ramsdale*, (1887) 36 W. R. 125.
2. *Gouraud v. Fitzgerald*, (1889) 37 W. R. 55, upheld by the Court of Appeal in 37 W. R. 265 (C. A.); *Fraser on Libel*, 7th Edn., p. 251.
3. *Russel v. Stubbs, Ltd.*, (1913) 2 K. B. 200 (n) (H. L.).
4. *Fraser on Libel*, 7th Edn., p. 252, 253.
5. *Humphries v. Taylor Drug Co.*, (1888) 39 Ch. D. 693; *Whitstable Oyster Fishery Co. v. Hayling Fisheries Ltd.*, (1901) 18 R. P. C. 434.
6. *Rowland v. Michell*, (1897) 1 Ch. 71; *Grosvenor Chemical Co. v. Greenfield*, (1909) 1 R. 32.
7. *Imperial Tobacco Co. Ltd. v. Purnell & Co.*, (1903) 20 R. P. C. 718.

way of reply to the usual interlocutory application on behalf of the plaintiff for an interim injunction, and both the motion and application stand over to the trial, unless there are affidavits sufficiently showing what the defendant's case is upon his motion to expunge, he is frequently directed to deliver particulars of it. Where a defendant alleges common use of the mark in question, he may be ordered to give particulars of such user, for instance, the date of first user in the trade, and the names and addresses of a certain number of persons alleged to have used the mark.¹ But if a defendant pleads that the article in question is generally known by the name which the plaintiff alleges is distinctive, and does not rely on particular users, he will not be ordered to give particulars of the general knowledge or of general use.² Where a defendant alleges user by himself he may be ordered to give particulars of the user alleged.³ So also if he sets up abandonment of the trade mark by the plaintiff⁴, or acquiescence in infringement.⁵

- (77) **Undue influence**: Undue influence being a species of fraud must be pleaded with precision.⁶ At least the facts on the record must be such as to justify the inference of undue influence, for it is the duty of the Court to see that the adversary of the party pleading under influence is not taken by surprise. Allowing a fair latitude of construction, acts covered by the phrase undue influence must range themselves under one or other of two heads—coercion or fraud.⁷ In a suit to set aside a contract alleged to have been induced by undue influence it is necessary to plead, (a) the relations subsisting between the parties,⁸ (b)

1. *Aquascutum Ltd. v. Moore*, (1903) 20 R. P. C. 610; *Schwepkes v. Gibbens*, (1905) 22 R. P. C. 601
2. *Boake (A.), Roberts & Co. v. Wayland*, (1909) 26 R. P. C. 249.
3. *Macmillan v. Ehrmann Bros. Ltd.*, (1904) 21 R. P. C. 357.
4. Cf. *Kharwar v. Motiwala*, A.I.R. 1939 Rang. 98; *Hiranand v. Sardar Mehar Singh*, A.I.R. 1938 Sind 38.
5. Cf. *Habeeb & Co. v. Hw Ohaung*, A.I.R. 1937 Rang. 490.
6. *Inderchand v. Bidyadhar*, A. I. R. 1921 Pat. 48.
7. *Sheocharan v. Channulal*, A. I. R. 1931 Nag. 63; cf. *Pandit Someshwar Dutt v. Pandit Tirbhawan Dutt*, (1933-34) 38 C. W. N. 806 (P. C.); *Boyse v. Rossborough*, (1857) 6 H. L. C. 1, 49; cf. *Baudains v. Richardson*, (1906) A. C. 169, 184.
8. *Mariam Bibi v. Cassim Ebrahim*, A.I.R. 1939 Rang. 278 (parent and child).

that the said relations were such that one of the parties was in a position to dominate the will of the other and, (c) that the party who was in a position to dominate the will used that position to obtain an undue advantage over the other.¹ Particulars as to how and when the party in a position to dominate the will of the other used that position must be given.

Where a transaction is on the face of it unconscionable the burden of proving that such contract was not induced by undue influence shall lie on the person in a position to dominate the will of the other.² Before the burden of proving that a contract was not induced by undue influence can accrue under Sec. 16 (3) of the Indian Contract Act, against whom such influence is alleged, the party alleging such influence must prove that the former was in a position to dominate the will of the other party to the contract.³

See heading "Fraud," *supra*.

(78) **Usage** : A custom depends for its validity on its antiquity while a usage depends for its validity on its notoriety.⁴ As a matter of pleading, it is necessary to plead usage thus : "According to the usage of the gunny trade or market in Calcutta,..." As a matter of evidence it should be proved that the usage was so universally acquiesced in that everybody in the trade knew it or could have known it.⁵

(79) **Waiver** : Waiver is a mixed question of law and fact.⁶ Waiver is 'a course of conduct inconsistent with the intention of insisting on a particular objection'.⁷ It is a consent to dispense with or forego something to which a person is entitled. Such consent may be either express or implied.

1. Sec. 16, Ind. Cont. Act; *Sundar Koer v. Sham Krishen*, (1906-07) L. R. 34 I. A. 9; *Raghunath Prasad v. Sarju Prasad*, (1923-24) L. R. 51 I. A. 101; *Bobu Homeshwar Singh v. Kameshwar Singh*, (1934-35) 39 C. W. N. 1130 (P. C.); *Santhappa v. Santhiraja*, A.I.R. 1938 Mad. 426.

2. Sec. 16 (3) Ind. Cont. Act.

3. *Gafur Mohammad v. Mohammad Sharif*, (1931-32) 36 C. W. N. 994 (P. C.).

4. *Gopal v. Collector of Aligarh*, A. I. R. 1927 All. 232; *Eduard Dalgliesh v. Sheikh Gozaffar Hossein*, (1898-99) 3 C. W. N. 21

5. *Jamnadas v. Chetandas*, A. I. R. 1928 Bom. 487.

6. *Ananda Chandra Sen v. Parbati Nath Sen*, (1906) 4 O. L. J. 198; *Kabidnund Thakur v. Pirthi Chand*, (1911) 14 C. L. J. 346.

7. *Karsandas Kalidas v. Chhotalal Motichand*, (1924) I. L. R. 48 Bom. 259.

Delay is not waiver ; inaction is not waiver though it may be evidence of waiver.¹ As a general rule, parties may waive the advantage of provisions made to protect their own interest but not of those made to protect the interest of others or of the public.² There can be no waiver unless the person against whom the waiver is claimed had full knowledge both of his rights and of the facts which would enable him to take effectual action for their enforcement.³ An agreement which seeks to waive an illegality is void.⁴ Irregularity can be waived.⁵

A double duty ordinarily devolves upon the party who alleges that his opponent has waived any of the rights which the law confers upon him. He must allege and he must prove (i) that his opponent knew what his rights were and (ii) that he knowingly discarded them.⁶

Acquiescence, estoppel and waiver are three distinct categories of law, but are generally mixed up. See "Acquiescence" and "Estoppel" under "Special Defences", Chap. XVII.

(80) **Way** : See "Right of way", *supra*.

(81) **Wilful default** : In a suit for compensation for loss or destruction of goods consigned to a carrier, all particulars constituting the wilful neglect or default of the carrier, which occasioned the loss or deterioration as is required by O. VI, r. 4, of the C. P. Code must be set forth.⁷

In a suit for accounts against an agent, executor or trustee on the basis of wilful default, the wilful default must be alleged, otherwise no order can be made on the footing of wilful default either at the hearing or at any subsequent time.⁸ In order to obtain an account on the footing of wilful default one must allege at least one instance of wilful default.⁹

1. *Ram Chunder v. Rawatmull*, (1914-15) 19 C. W. N. 1172.

2. *Seshayya v. Sattiraju*, A. I. R. 1930 Mad. 414.

3. *Nadershaw Sheriarji v. Shirinbai Bapuji*, A. I. R. 1924 Bom. 264 ; *Nripati Nath v. Jatindra Kumar*, A. I. R. 1926 Cal. 577.

4. *Dhanukdhari v. Nathima Sahu*, (1906-07) 11 C. W. N. 848.

5. *Fort Gloster Jute Mfg. Co. v. Ohandra Kumar Das*, (1919-20) 24 C.W.N. 791.

6. *Ladhomal Premchand v. Bulho*, A. I. R. 1933 Sind. 1.

7. *G. I. P. Ry. Co. v. Jitan Ram Nirmal Ram*, A. I. R. 1922 Pat. 17.

8. *Barber v. Mackrell*, (1879) 12 Ch. D. 534.

9. *Raja Peary Mohan Mookerjee v. Manohar Mookerjee*, (1922-23) 27 C. W. N. 989, 994.

- (82) **Witnesses, names of:** If the party applying for particulars is entitled to the information which he seeks, the order will be made, although his opponent will be thereby compelled to disclose the names of his witnesses.¹

CHAPTER XXI

INTERROGATORIES.

Interrogatories, meaning of.—Interrogatories are ‘written questions addressed on behalf of one party to a cause, before the trial thereof, to the other party, who is bound to answer them in writing upon oath.’²

Object of Interrogatories: The object of interrogatories is to enable a party to obtain from the opposite party—

(a) information as to material facts not within his own knowledge, and

(b) admission, which will make it unnecessary for him to enter into evidence as to facts admitted.³

A party may deliver interrogatories in order to ascertain the nature of the opponent's case, or to support his own case in order to narrow the points in issue, or to avoid proving facts which are admitted.⁴ A party is entitled to interrogate on facts directly

1. *Zierenberg v. Labouchere*, (1893) 2 Q. B. 183, 187, 188; cf. *Bishop v. Bishop*, (1901) P. 325; *Wootton v. Sievier*, (1913) 3 K. B. 499 (C. A.).
2. *Wharton's Law Lexicon*, 14th Edn., p. 531; O. XXX, rr. 1 and 8, C. P. Code.
3. *Per Jessel M. R.* in *Att.-Gen. v. Gaskill*, (1882) 20 Ch. D. 519 (In this case, the defendant objected to the interrogatories in as much as they sought an admission or denial on oath by defendant on matters in issue between him and plaintiffs as to which the onus of proof is on the plaintiffs: *Held*—That is no reason at all. It is because there is the obligation of proof on plaintiffs that they ask the question. If defendant were to admit plaintiffs' title, plaintiffs would be relieved of the obligation of proof and would get judgment at once. But if he does not admit the whole, he may admit part of it, and to that extent plaintiffs may relieve themselves of the obligation of proof.; cf. *Mariappan v. Nalla Sevugan*, A. I. R. 1933 Mad. 298.
4. *Shamrao v. Motiram*, A. I. R. 1934 Nag. 181,

in issue on the pleadings. Thus, in a suit for the recovery of an amount on a hundi alleged to have been drawn and accepted by the defendant in consideration of a loan, the defendant is entitled to discovery where he alleges that he had no transaction with the plaintiff of the form of which the loan was alleged to have been made and of the time and place the hundi was drawn and accepted and the time and place and the names and addresses of the persons by whom it was presented.¹

The Court of law allows interrogatories to be administered in order to prevent unnecessary expense. But these are for the purpose of obtaining admissions as to facts. A party cannot be allowed by means of an interrogatory to compel his opponent to state on oath what his conduct of the case at the trial is going to be. Thus, where plaintiffs sued defendants for libel published in defendants' newspapers and the defendants pleaded justification and fair comment and administered to plaintiff the following interrogatories: "Do you intend to set up that defendants in publishing words complained of, were actuated by malice toward plaintiffs? If yes, state generally the facts and circumstances, on which plaintiffs rely as showing actual malice." *Held*.—"The Interrogatory was inadmissible."²

Interrogatories and defective pleadings: Interrogatories are not to be framed to anticipate or supply defects of pleading. Where the pleading of either party is too vague, the Court may call for a further or fuller statement of pleading or may frame and record issues until the case raised by the pleadings is ascertained with sufficient clearness. Thus, a plaintiff may interrogate with a view to obtain information or admission in support of his own case, and this right extends not only to his original case, but also to any answers which he has to make to the defendant's case, subject to the qualification, *inter alia*, that the interrogatories must be directed to a case on which the plaintiff has already determined and to which he has committed himself. He cannot be allowed to put fishing questions in order to try whether he can discover any flaw in the defendant's case or suggest any answer to it.³

1. *Bajjnath v. Raghunath*, (1914) I: L. R. 41 Cal. 6.

2. *Per Fletcher Moulton L. J.*, in *Lever Brothers v. Associated Newspapers*, (1907) 2 K. B. 626.

3. *Ali Kader Syud Hossain v. Gobind Dass*, (1890) I. L. R. 17 Cal. 840.

Interrogatories and Particulars—distinction between: The object of interrogatories is to enable a party to obtain admission from the other party and so relieve himself from the necessity of adducing evidence. The object of particulars is to fill in the picture of the plaintiff's cause of action with information sufficiently detailed to put the defendant on his guard as to the case he has to meet and to enable him to prepare for trial.¹ Although the functions of the two are different, matter in the nature of particulars is often allowed to be ascertained by means of interrogatories.² Where the information sought can be better obtained by particulars the interrogatories may be disallowed.³ Where the interrogatories are the proper method of obtaining the information, it is not the proper subject-matter for particulars.⁴

By and against what persons interrogatories administered: O. XI, r. 1, C. P. Code, provides that "in any suit the plaintiff or defendant, by leave of the Court, may deliver interrogatories in writing for the examination of the opposite parties or any one or more of such parties."

One defendant may administer interrogatories to another defendant, if there is some right to be adjusted in the action between them,⁵ but not where there is no issue between them.⁶ A defendant, who, in his defence, submits completely to the relief sought by plaintiff, neither denying nor admitting the allegations of the plaint, is not a party adverse in point of interest to another defendant who disputes plaintiff's rights, and the latter therefore cannot examine the former for discovery, as the pleadings do not raise any issue between them.⁷

Where in an action by M. against K., K. delivered a defence and counter-claim, to which M. and I. were defendants, and I. applied for leave to exhibit interrogatories for the examination of M., it was held that as I. was not a defendant in the original action, and I. and

1. *Bruce v. Odhams Press Ltd.*, (1936) 1 K. B. 697.

2. *Cf. Saunders v. Jones*, (1877) 7 Ch. D. 435, 448; *Ashley v. Taylor*, (1878) 38 L. T. 44.

3. *O'Meara v. Stone*, (1884) W. N. 72; cf. O. XI, r. 2, C. P. Code.

4. *Young (G. & W.) & Co. Ltd., v. Scottish Union etc. Co.*, (1907) 24 T. L. R. 73 C. A.

5. *Brown v. Watkins*, (1885) 16 Q. B. D. 125.

6. *Marshall v. Langley*, (1889) W. N. 222.

7. *Fonseca v. Jones*, (1909) 19 Man. L. R. 334.

M. were co-defendants in the counter-claim, they were not "opposite parties" and I. had no right to interrogate M.¹

Where persons who had been served by a defendant with a third party notice for the purpose of claiming indemnity obtained an order (a) that the question of indemnity should be tried after the trial of the action ; and (b) that they should be at liberty to appear at the trial and oppose plaintiff's claim so far as they were affected thereby, and for that purpose to put in evidence and cross-examine witness, it was held that third parties had put themselves in the position of "opposite parties" to the plaintiff and the plaintiff had a right to examine them by interrogatories.²

At what stage of proceedings interrogatories administered : Interrogatories will not as a general rule be allowed until after the defence is filed as, until then, it is not known what are the matters in dispute. Thus, where an action was brought against the executors of a deceased trustee seeking to make his estate liable for breaches of trust, and the executors are personally ignorant of all the transactions in respect of which the plaintiff sought relief and applied for leave to interrogate the plaintiff before putting in the statement of defence, alleging that the plaintiff's solicitor who had acted for the trustees during the trusteeship of the testator, could furnish information which would enable them to defend the action successfully, it was held that leave must be refused, and the executors must put in such statement of defence as they could, and then interrogate.³

In the Chancery Division of the Supreme Court of England, a plaintiff has often been allowed to deliver interrogatories before statement of defence filed.⁴

Illustration :

(i) A vendor sued for specific performance of a contract for sale of land, at the price of £ 24,000/-, and it appeared that less than three weeks before the contract the vendor had obtained a conveyance of the land from his two sisters, in which the consideration expressed was £ 5,000/-, and the sisters were old and infirm, and being unmarried lived, and for a great many years lived, with the plaintiff, and were said to be under his influence. The defendant was advised that

1. *Molloy v. Kilby*, (1880) 15 Ch. D. 162.

2. *Eden v. Weardale Coal Co.*, (1887) 34 Ch. D. 223, *fd. in Eden v. Weardale*, (1887) 35 Ch. D. 287.

3. *Disney v. Longbourne*, (1876) 2 Ch. D. 704.

4. *Harbord v. Monk*, (1878) 9 Ch. D. 616.

so great a difference in the price required explanation, and alleged that he had made endeavours to see the sisters but had been refused access to them and the plaintiff had refused to procure them to join in the conveyance to the defendant. Held :—that in these circumstances defendant should be allowed to examine the two sisters for discovery before delivering the defence.¹

(ii) In an action on a bill of exchange the defendant sought to ascertain by interrogatories whether the plaintiff was a mere nominee of the drawer without consideration. Held :—He should be allowed to administer the interrogatories before delivering a statement of defence as, if the plaintiff proved to be a holder for value without notice, no statement of defence would be put in.²

What interrogatories are admissible : “Ever since interrogatories were first invented, it has been recognised that they constitute a process which might become oppressive and be used for improper purposes ; and therefore that the allowance or disallowance of interrogatories is a matter for discretion and they should be allowed or disallowed on the merits of the particular case.”³ As a general rule, interrogatories must relate to matters in question in the suit. Interrogatories, which do not relate to any matters in question in the suit shall be deemed irrelevant, notwithstanding that they might be admissible on the oral cross-examination of a witness.⁴

Interrogatories may be put to a plaintiff to ascertain the true measure of the damages he has sustained, and so guide defendant as to the amount he may fairly pay into Court.⁵

In an action for breach of promise of marriage interrogatories as to defendant's means are pertinent and will be allowed.⁶

In an action for slander plaintiff administered the following interrogatories to defendant : “Did you on or about March 1st, or when, speak the following words of plaintiff, (setting out the words alleged in the plaint to have been spoken by defendant or plaintiff), or words to that effect ?” “Were the said words spoken in the pre-

1. *Brown v. Pears*, (1838) 12 P. R. 396.

2. *Hawley v. Reade*, (1876) W. N. 64 ; *Beal v. Pilling*, (1878) 38 L. T. 486 ; *Tate v. Globe Printing Co.*, (1886) 11 P. R. 253.

3. *Per Vaughan Williams L. J.*, in *Heaton v. Goldney*, (1910) 1 K. B. 754, 758.

4. O. XI, r. 1, C. P. Code ; *Bhagvandas Parashram v. Burjorji*, (1913) I. L. R. 37 Bom. 347.

5. *Wright v. Goodlake*, (1865) 34 L. J. Ex. 82.

6. *Anon.*, (1875) 20 Sol. Jo. 122.

sence of (the persons named in the plaint) and other persons, or any and which of them ?" *Held* :—Those were proper interrogatories and the defendant must answer them.¹

Where a plaintiff seeks to go back to previous matters long before an alleged libel to show malice, defendant is entitled to interrogate him as to the matters he is going to rely upon as showing malice.²

In an action for the infringement of a patent where defendants were ordered to account for profits—*Held* :—Defendants must disclose the names and addresses of their customers³.

Under the general charge as to the fact of payment, plaintiff may interrogate as to all the circumstances, that go to prove or disprove the truth of the fact as, when, where, etc. without particular charges.⁴

Interrogatories may be administered in an action of ejectment, even though it may be brought to enforce a forfeiture⁵.

It is no ground for refusing, in answer to interrogatories, to produce a correspondence which has taken place upon the subject-matter of the action, that the production of such correspondence would disclose the secrets of the trade of the party interrogated.⁶

What interrogatories will be refused : Leave to deliver interrogatories will be refused in the following cases :—

(1) *Where interrogatories are irrelevant to the issue in the action and oppressive :* Thus, where in an action brought by the plaintiffs for a declaration that a piece of land which had been purchased by the defendant and C. in 1873, was purchased by them as co-partners and for accounts of the partnership, etc., and the defendant denied the partnership, and the plaintiff interrogated the defendant as to other purchases of land made by him and C. both before and after 1873, in order to prove that they had been co-partners, it was held that the interrogatories ought not to be allowed⁷.

(2) *Where the interrogatories are unnecessary and vexatious :* Plaintiff in an action for libel against proprietors of a well-known

1. *Dalgleish v. Louther*, (1899) 2 Q. B. 590.

2. *Cooper v. Blackmore*, (1886) 2 T. L. R. 746.

3. *Saccharin Corp'n. v. Chemicals and Drugs Co.*, (1900) 2 Ch. 556.

4. *Faulder v. Stuart* (1805) 11 Ves. 296.

5. *Chester v. Wortley*, (1856) 17 C. B. 410.

6. *The Don Francisco*, (1862) 1 Lush. 468.

7. *Kennedy v. Dodson*, (1895) 1 Ch. 334.

provincial newspaper administered an interrogatory to defendants asking how many copies were printed and circulated of the issue of the newspaper which contained the alleged libel. Defendants answered that a considerable number of copies of that issue was printed and published. *Held*:—The answer was sufficient. A plaintiff is entitled to an approximate statement in round numbers of the circulation of any obscene newspaper, in which a libel has appeared, but in the case of a well-known London or provincial newspaper such an interrogatory would be held unnecessary and vexatious¹.

(3) *Where the object is to compel the adversary to disclose the evidence by which he proposes to prove the facts on which he intends to rely*: The creditors in an insolvency petition alleged that acts of insolvency had been committed and, by administering interrogatories, attempted to extract information from the alleged partners of the insolvent, instead of proving their case by producing evidence. *Held*:—A party is not entitled to administer interrogatories for obtaining discovery of facts which constitute exclusively the evidence of his adversary's case².

(4) *Where the interrogatories are administered obviously for the purpose of fishing out a case and are prolix and scandalous*: Thus, where the plaintiffs sued the defendant for recovery of loss suffered by them, as defendant's *pakka adatias*, in several transactions, and the defendant, setting up the defence of wagering, administered interrogatories asking the plaintiffs to disclose their daily cash balances and daily bank balances for one month, to disclose the whole of their contracts for the sale and purchase of linseed during some specified years with particulars of each contract, the quantity agreed to be sold or purchased in each contract and how each contract was performed, it was held that the mere fact that questions would be admissible in cross-examination of a witness does not make them good as interrogatories. Interrogatories must not be exhibited unreasonably or vexatiously, nor be prolix, oppressive, unnecessary or scandalous. Nor should interrogatories be allowed which are sought to be administered obviously for the purpose of fishing out a case³.

1. *Wittaker v. "Scarborough Post"*, (1896) 2 Q. B. 148.

2. *Dinajpur Trading & Banking Co. Ltd. v. Prohash Chandra*, A. I. R. 1933 Cal. 151.

3. *Bhagwandas Parashram v. Burjorji Rutlonji*, (1913) I. L. R. 37 Bom 347; see O. XI, r. 7, C. P. Code.

(5) *Where the interrogatories relate to questions of law.* In an action by the plaintiff for declaration of her rights under a will, the plaintiff administered interrogatories as to the expression "family" mentioned in the will. *Held*:—To interrogate a party to a suit as to the construction he puts on the meaning of the word "family" is not admissible. The question if replied to would only be of value as the opinion of a party to a suit on what is really a question of law¹.

Answers to interrogatories: O. XI, r. 8 of the C. P. Code provides that "Interrogatories shall be answered by affidavit to be filed within ten days, or within such other time as the Court may allow."²

"(1) Where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, then—

- (a) if it is proved that the summons was duly served, the Court may proceed *ex parte*;
- (b) if it is not proved that the summons was duly served, the Court shall direct a second summons to be issued and served on the defendant;
- (c) if it is proved that the summons was served on the defendant, but not in sufficient time to enable him to appear and answer on the day fixed in the summons, the Court shall postpone the hearing of the suit to a future day to be fixed by the Court, and shall direct notice of such day to be given to the defendant.

(2) Where it is owing to the plaintiff's default that the summons was not duly served or was not served in sufficient time, the Court shall order the plaintiff to pay the costs occasioned by the postponement³."

"Where the Court has adjourned the hearing of the suit *ex parte*, the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, he may upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance⁴."

The party interrogated cannot escape giving an answer by saying that he has no personal knowledge as to matters enquired

1. *Nittomoye v. Soobul*, (1896) I. L. R 23 Cal. 117, 123.

2. See O. S. Rules, Mad. High Court, Order X.

3. O. XI, r. 6, C. P. Code.

4. O. XI, r. 7, C. P. Code.

into. He is bound to answer as to his information obtained from his agents¹.

Original side Rules of the High Courts, relating to Interrogatories :—

Bombay : Bom. High Court O. S. Rules, Chap. IX, Rules 160, 161, 162, 163, 164.

Madras : Mad. High Court O. S. Rules, Order X.

Calcutta : Cal. High Court, O. S. Rules, Chap. XI.

Rangoon : Rang. High Court, O. S. Rules, Rule 133.

CHAPTER XXII.

AMENDMENT OF PLEADINGS.

The subject of this chapter is dealt with under two heads :—

1. Amending your opponent's pleading.
2. Amending your own pleading.

1. Amending your opponent's pleading : Under O. VI, r. 16, C. P. Code, "the Court may at any stage of the proceedings order to be struck out or amended any matter in any pleading which may be unnecessary or scandalous or which may tend to prejudice, embarrass or delay the fair trial of the suit."

The allegation in a pleading are 'embarrassing' when they are "so irrelevant that to allow them to stand would involve useless expense, and would also prejudice the trial of the action by involving the parties in a dispute that is wholly apart from the issues."² A pleading is not 'embarrassing' merely because it contains allegations which are inconsistent or are stated in the alternative.³ Nothing can be 'scandalous' which is relevant.⁴ A statement will

1. *Foakes v. Webb*, (1884) 28 Ch. D. 287.
2. *Per* Pickford, L. J., in *Mayor, etc. of London v. Horner*, (1911) 111 L. T. 512, 514. Cf. *Anderson Kirkwood Tennent v. Walter Mitchel*, (1924-25) 29 C. W. N. 670.
3. *Child v. Stenning*, (1877) 5 Ch. D. 695; *In re: Morgan, Owen v. Morgan*, (1887) 35 Ch. D. 492, fd. in *Motilal Poddar v. Judhistir Das*, (1915-16) 20 C. W. N. 310, and in *Chandrika Prasad v. Hira Lal*, A. I. R. 1924 Pat. 312.
4. *Per* Cotton L. J., in *Fisher v. Owen*, (1878) 8 Ch. D. 645, 653; *Everett v. Prythergh*, (1841) 12 Sim. 363.

not be struck out merely because it is unnecessary so long as it is otherwise harmless.¹ If, however, immaterial matter is set out in such a way that the applicant must plead to it, and so raise irrelevant issues, then the irrelevant matter must be struck out.² A plaint which is unintelligible may be ordered to be struck off or ordered to be amended.³ The same rule applies to general allegations without particulars.⁴

2. Amending your own pleading: Under O. VI, r. 17, C. P. Code "the Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

Object of allowing amendment: Amendment serves to avoid multiplicity of suits⁵ and to shorten litigation.⁶

Conditions of amendment: The Court will allow an amendment subject to *three general conditions*: (a) *Bona fides* on the part of the applicant; (b) possibility of amendment with prejudice to the other party as cannot be compensated by costs (such as prejudice to rights accrued); and (c) that the amendment is not such as to turn a suit of one character into a suit of another character.⁷

The amendments ought not to be limited to accidental errors. It does not matter if the original omission arose from negligence or carelessness. The rule is that "all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties."

If the amendment is permissible under the law then the Court has no discretion in the matter. It is bound to allow the amend-

1. *Per Chitty J.*, in *Rock v. Purssell*, 84 L. T. Jo. 45.
2. *See Annual Practice*, 1938, p. 373.
3. *Bannerjca v. Mauzar Ali*, (1929) 27 All. L. J. 496.
4. *Jagdish Narain v. Hazari Lal*, A. I. R. 1932 All. 467; *Nedungadi Bank Ltd. v. Official Assignee of Madras*, (1930) I. L. R. 53 Mad. 645.
5. *Maung Shwe Myat v. Maung Po Sin*, (1925) I. L. R. 3 Rang. 183; *Hem Chandra Sen v. Srimanta Chattopadhyya*, A. I. R. 1925 Cal. 944.
6. *Shankar v. Murarji*, A. I. R. 1925 Nag. 195.
7. *Per Sanderson, C. J.*, and Woodroffe, J., in *Upendra Narain Roy v. Rai Janoki Nath*, (1917-18) 22 O. W. N. 611; *Bhuwanlal v. Sumranlal*, A. I. R. 1927 Nag. 310; *Raja Jogendra v. Debendra Narain*, (1936-37) 41 C. W. N. 1084.

ment.¹ It is not open to the Court to compel the plaintiff to amend his plaint,² and where the Court does compel the plaintiff to amend his plaint, only the plaintiff can complain; it is not open to the defendant to complain³.

Leave to amend when given ; Subject to the three general conditions enumerated above, the Court will allow amendments of pleadings.

Illustrations :

- (a) *Addition of averments :* Omission to plead notice under Sec. 80, C. P. Code may be cured by amendment.⁴ Omission to plead acknowledgment of liability saving limitation may be cured by amendment.⁵ Omission to plead legal necessity in a suit against members of a joint Hindu family for money lent to the manager of the family may be cured by amendment.⁶
- (b) *Addition of claim :* Claims which are not time-barred can always be added if otherwise permissible. Thus, where the plaintiff brought a suit on the first mortgage executed by a Hindu father, he was allowed to amend his plaint by adding a claim under a second mortgage executed in his favour by the father and his son as members of a Hindu joint family.⁷
- (c) *Addition, striking out, substitution and transposition of parties :* This subject has been dealt with fully in Chapter VIII.
- (d) *Addition of relief :* In a suit for recovery of plaintiff's share transferred by B. in favour of C. at a time when he had been separated from B., he may be allowed to amend his plaint by adding an alternative claim for possession of the entire property in favour of himself or jointly in favour of himself and B. ⁸.

1. *Niemeyer v. E. M. Mamooji*, A. I. R. 1938 Rang. 461.
2. *Mehtab Singh v. Dayal Singh*, A. I. R. 1939 Lah. 172.
3. *Vaidinatha Chettiar v. Thirumalai Reddyar*, A. I. R. 1934 Mad. 220.
4. *Tipan Prasad Singh v. Secy. of State*, A. I. R. 1935 Pat. 86. But see 'Condition-precedent' under "Special Defences", Chap. XVII.
5. *Mulhammal v. Gurusami*, A. I. R. 1935 Mad. 158. Cf. *Kondamma v. Venkatarayadu*, A. I. R. 1939 Mad. 31.
6. *Indubala Dassi v. Lakshmi Narain*, (1933-34) 39 C. W. N. 1146.
7. *Deonandan Prasad Singh v. Piaray Singh*, A. I. R. 1935 Pat. 365.
8. *Achutanand Jha v. Surajnaraian Jha*, (1926) I. L. R. 5 Pat. 746.

In a suit originally brought on a promissory note, the plaintiff may amend his plaint by adding a claim in the alternative on the original liability for which the promissory note was given,¹ even where the suit on the promissory note is barred by limitation provided the cause of action on the original liability is not barred.²

In a suit brought on a contract of sale, the plaintiff should be permitted to amend his plaint by adding an alternative claim for refund of purchase-money should the sale be discovered to be void.³

In a suit by one of the co-promisees to recover his share of the amount due on a bond, the plaintiff may be given leave to amend his plaint by adding a claim for the whole amount due on the bond, provided the other co-promisees are on the record as parties.⁴

In a suit for specific performance, the plaintiff may be allowed to add a relief as to possession.⁵

In a suit on a mortgage, the plaintiff may be allowed to add a claim for personal decree against the mortgagor.⁶

In a suit for rent and possession the plaintiff may be allowed to add a prayer for declaration of title.⁷

In a suit for recovery of unpaid purchase-money as regards a plot of land, the plaintiff may be allowed to add a claim for a charge upon the property in the hands of the buyer

1. *Sarafalli v. Mahasukhbhai*, (1933) I. L. R. 57 Bom. 802 ; *Ramendra Mohon Tagore v. Keshab Chandra*, (1934) I. L. R. 61 Cal. 433, both *fil.* in *Niemeyer v. E. M. Mamooji*, A. I. R. 1938 Rang. 461 ; *Maung Po Chein v. C. R. etc. Chettyar Firm*, A. I. R. 1935 Rang. 282 ; *Tarachand Protapmal v. Tamijuddin Sheikh*, (1934-35) 39 C. W. N. 1241 ; *East Bengal etc. Bank v. Surendra*, (1934-35) 39 C. W. N. 1235 ; *Aijaz Husain v. Ram Sarup*, A. I. R. 1931 Oudh 54 ; *Rurmal Ram Nath v. Kapil Man*, (1935) I. L. R. 57 All. 459.
2. *Official Assignee v. Kuppuswami Naidu*, A. I. R. 1936 Mad. 785 F. B. (where the original debt was payable by instalments).
3. *Hakam Ali v. Hashu*, A. I. R. 1938 Lah. 244.
4. *Raghunath Prasad v. Mt. Prana*, A. I. R. 1937 Oudh 290.
5. *Chockalingam Pillai v. Pichappa Chettiar*, A. I. R. 1926 Mad. 155.
6. *P. M. Chettyar Firm v. Ma Shwe Pon*, A. I. R. 1927 Rang. 154.
7. *Ismail Bibi v. Moideen Abdul Kadir*, A. I. R. 1929 Mad. 273.

for the amount of the purchase money remaining unpaid and for interest on such a amount.¹

In a suit for declaration of title, the plaintiff may be allowed to add a prayer for possession.²

In a suit for a declaration that a decree obtained was collusive, the plaintiff may be allowed to amend his plaint by including a prayer for setting aside the decree.³

In a suit by a partner against his copartners for accounts, the plaintiff may be allowed to amend his plaint by adding a prayer for dissolution of partnership.⁴

In a suit for injunction, a prayer for declaration may be added by way of amendment.⁵

In a suit against defendants alleged to be members of a joint Hindu family, the plaint may be allowed to be amended by the addition of an alternative claim against them as members of a partnership.⁶

- (e) *Correction of mistake* : Amendments of clerical mistakes are allowed at any stage. Mistakes which are a little more than clerical errors may also be amended, where there is no prejudice to the opposite party.

Illustrations :

(i) Misdescription of properties :

A. brought a suit on a mortgage, but by a misdescription in the plaint, he put the share hypothecated as being situated in the village Jagia although it was really situated in the village Udaipur. The plaintiff applied for amendment by substituting the name of the correct village in place of the wrong one. The trial Court dismissed the application. On appeal, the Allahabad High Court held : "The mortgage in suit was filed along with the plaint and showed quite clearly what the property really mortgaged was. Under these circumstances the amendment should have been allowed : *Bhagirathi Shukul v. Chandra Harihar*, A. I. R. 1922 All. 81. See *Narayandin v. Mahesh Singh*, A. I. R. 1926 Nag. 313.

(ii) Misdescription of parties :

(i) A firm brought a suit against another firm described as "Firm S. situate at Patiala State, through C., manager and proprietor of the said firm". An objec-

1. *Daw Mya v. U Po Mya*, A. I. R. 1934 Rang. 266.
2. *Lakshmiah Naidu v. Krishnaswami*, A. I. R. 1935 Mad. 286.
3. *Gurlingappa Shivappa v. Sabu Ramappa*, A. I. R. 1931 Bom. 218.
4. *Moti Ram v. Narain Das*, A. I. R. 1933 Lah. 245.
5. *Megavarnam v. Krishnan*, A. I. R. 1934 Mad. 600.
6. *Bishamberdas v. Brijlal* A. I. R. 1931 Bom. 590.

tion was taken that O. XXXI, r. 1, C. P. Code benefitted firms in British India only and not the firms working in the Indian States, whereupon the plaintiff applied that the plaint should be allowed to be amended by substituting the name of C., the sole proprietor and manager of the firm in place of firm S. *Held* : that in view of the fact that the name of C. was already on the record and that the only defect in the plaint was that the opposite party had been wrongly described, the amendment should be allowed. : *Firm Kishen Singh-Sant Ram v. Firm Salig Ram-Bhagat Ram*, A. I. R. 1938 Lah. 718.

(ii) D., purporting to have attained majority, brought a suit against G. An objection was taken that D. had a guardian appointed under Act VIII of 1890 and that he was still a minor. The plaintiff applied for amendment of the plaint by describing himself as a minor. The application was dismissed. *Held* : "Where the plaintiff had no knowledge of his minority and no intention of deceiving the Court, an opportunity should be given on application made to amend the plaint : *Mt. Durga Devi v. Gur Narain*, A. I. R. 1924 Lah. 157.

(iii) A. instituted a suit for recovery of a loan against two defendants alleging that they were partners in the business carried on under the name of A. T. R. S. and that the debt was incurred by defendant No. 1 in the course of the said business. Later the plaintiff applied for amendment of the plaint on the basis that defendant No. 1 was carrying on the business in pursuance of a direction under a will of the father of defendant No. 2. *Held* : "Where all the necessary facts and circumstances under which a debt was incurred were clearly set out in the plaint, the amendment sought, being in consonance with the true view of the fact, should be allowed. In the interests of justice even where a question of limitation may arise a Court can allow the amendment." : *Perumal Ayyar v. Ramasubramanian Chettiar*, A. I. R. 1933 Mad. 265.

Amendment allowed under special circumstances : Though the power of the Court granting leave to amend should not as a rule be exercised where its effect is to take away from a defendant a legal right which has accrued to him by lapse of time, yet there are cases where such considerations are outweighed by the special circumstances of the case¹. In other words, in the absence of special circumstances, leave to amend ought not to be given where the effect of the amendment is to deprive the opposing party of an acquired right².

Illustrations .

(a) A. sued for a declaration that he was entitled to certain rights of pre-emption against the defendants who were vendees of certain shares and interests in the properties in suit. The plaintiff did not ask for possession or any other

1. *Charan Das v Amir Khan*, (1921) I. L. R. 48 Cal. 110, 116 (P. C.). *Id.* in *Jessaram Bhagwandas v. Ratanchand Fatehchand*, A. I. R. 1925 Sind 173 ; *Md. Ismail Khan v. Said-ul-Din Khan*, A. I. R. 1927 Lah. 819.
2. *Per Beaumont C. J.*, in *Karsondas Dhunjibhoy v. Surajbhan Ramrijpal*, (1934) I. L. R. 58 Bom. 200, 204.

consequential relief. The defendants objected to the frame of the suit and contended that the plaintiff was not entitled to a mere declaratory decree. The plaintiff applied for leave to amend the plaint by adding a claim for possession after pre-emption. The trial Court refused to permit the amendment on the ground that the suit to enforce a right of pre-emption was barred by lapse of time. The Court of the Judicial Commissioner allowed the amendment to be made. On appeal, the Judicial Committee held: "In a case such as the present where the right sought is one involving the dispossession of a perfectly lawful purchaser of property, it is not quite accurate to say that a plea that such a suit has not been brought within the proper period of time limited by the Act is a technical plea, if by a technical plea is meant a plea which asserts rights which have no merits for their support." : *Charan Das v. Amir Khan*, (1921) I. L. R. 48 Cal. 110, 115, 116 (P. C.)

(b) S. purchased certain property from P., the latter however remaining in possession of the property. S. then sold the property to Y. who sued P. for possession and mesne profits joining S. as *proforma* plaintiff. In the plaint, it was claimed that the decree should be passed in favour of Y. alone. An amendment of the plaint for relief in favour of S. was applied for by the plaintiff after his claim had become time-barred. Patkar J. allowed the amendment and observed, "There is no ground for suspecting that the plaintiffs had not acted in good faith, and amendment can be allowed where through some blundering or inexpertness of pleading plaintiffs did not assert the rights to which they were entitled in the proper form in the plaint." : *Bhogilal v. Jethalal*, A I. R. 1929 Bom. 51.

(c) A. sued on a promissory note under-stamped. The defence was a total denial of the loan. The plaintiff applied for amendment so as to introduce a claim on the loan at a time when the said claim was already time-barred. The trial Court refused to grant leave to amend and dismissed the suit. On appeal, held: "In this case, the claim on the loan itself was not raised through some blundering on the lawyer's part, and thereby the plaintiff's clear rights were jeopardised. The defendants will not be and never were prejudiced in their defence (which was a total denial of the whole transaction). Having regard to all the circumstances of the case, the amendment originally asked for should be allowed." : *East Bengal Commercial Bank v. Surendra Narayan Saha*, (1934-35) 39 C. W. N. 1235.

Leave to amend when refused : Leave to amend will be refused in any of the following cases :

(1) *Where the amendment if allowed would convert the case set up into another of a different and inconsistent character.* Thus—

(a) Claim for specific performance of an alleged agreement or damages for breach thereof cannot be converted into one for damages for breach of another agreement¹.

1. *Ma Shwe Mya v. Maung Mo Hnauy*, (1920-21) L. R. 48 I. A. 214, 217.

(b) Claim under gift cannot be changed into one under inheritance.¹

(c) Claim for rent cannot be converted into one for use and occupation.²

(d) Claim for damages for use and occupation cannot be converted into one for rent.³

(e) Claim for possession cannot be converted into one for redemption.⁴

(f) Claim founded on a krittima adoption cannot be converted into one based on an appathitta adoption.⁵

(g) Fraud of one kind cannot be converted into one of another kind.⁶

(h) Claim based on relationship between two principals cannot be converted into one based on relationship between principal and agent.⁷

(i) Claim for a declaration that the properties in dispute are trust properties cannot be converted into a claim that the plaintiff has a life interest in the said properties.⁸

NOTE: As in the case of a plaint, so in the case of a written statement, the Court will refuse amendment where it will involve a complete change of front in the defence.⁹

(2) *Where the effect of the proposed amendment is to take away from the defendant a legal right which has accrued to him by lapse of time :* The Court will not as a rule permit a party by amendment to take away from his opponent some legal right that that opponent has or acquired. By far the most frequent illustration of that principle arises in connexion with limitation. It may be that, before the time comes at which a plaintiff asks to amend his plaint, the defendant has acquired a complete legal answer to the amended

1. *Dalpheroo Mian v. Bangali Mali*, A. I. R. 1923 Pat. 481 ; see *Ghulam Muhammad v. Mehta Chandras Dat*, A. I. R. 1927 Lah. 771.
2. *Veerabhadra v. Vithinathaswamy Koil*, A. I. R. 1927 Mad. 182 ; *Surendra Narain v. Bhai Lal*, (1895) I. L. R. 22 Cal. 752.
3. *Jhari Singh v. Pirthi Nath*, (1917) 2 Pat. L. J. 69 ; *Narayan Ganesh v. Hari Ganesh*, (1889) I. L. R. 13 Bom. 664.
4. *Laxmishankar v. Hamjabhai*, (1920) I. L. R. 44 Bom. 515.
5. *Maung Ba Thein v. Ma Than Myint*, (1925) I. L. R. 3 Rang. 483.
6. *Abdool Hoossein v. Turner*, (1886 87) L. R. 14 I. A. 111.
7. *Kokamal v. Gulabsingh*, A. I. R. 1925 Bom. 248.
8. *Nazir Ahmed v. Taj Mahal Begum*, A. I. R. 1940 Lah. 63.
9. *G. McKenzie & Co. v. Tatanlal Surajmal*, A. I. R. 1935 Pat. 463 ; *Fazal Nur v. Bibi Rani*, A. I. R. 1930 Lah. 278 (2).

claim under the Statute of limitation. The general principle is that, unless in very exceptional circumstances, the Court will not allow a defendant to be dispossessed of that legal statutory defence by the expedient of the plaintiff making an amendment and then ante-dating that amendment to the date of the delivery of the original plaint. Thus, where a plaintiff sued on a promissory note insufficiently stamped and then applied for amendment of the plaint by alleging some obligation either anterior or collateral to the promissory note itself, it was held that there were no special circumstances to deprive the defendant of the legal defence of limitation.¹

Where a person who was a necessary party to a suit was not impleaded and a step is taken to implead him after the suit is barred against him, the amendment will be refused.²

Where in a mortgage suit the mortgagor makes no claim to money decree, allows time to go by and makes no application for leave to amend till his claim is time-barred by limitation but subsequently applies for leave to amend, although there is still a discretion in the Court to allow amendment, the discretion will as a general rule be more wisely exercised by refusing it.³

Where a suit is instituted by an unregistered firm and, on subsequent registration, an application is made to amend the plaint and to treat the suit as instituted on the date of application, the amendment will be refused, as the suit originally instituted was incompetent and any subsequent amendment after getting the firm registered cannot relate back to the date of institution.⁴

(3) *Where the amendment is asked for at such a late stage that it will cause injustice or injury to the opposite party* : An amendment may be allowed at any stage of the case. Thus, amendments may be allowed after the case had been closed for argument,⁵ or in appeal,⁶ or in revision.⁷ A Court of Appeal may remand a case *ex debito justitiæ* directing the lower Court to grant leave for

1. *Mary Niemeyer v. Ebrahim Moosaji*, A. I. R. 1937 Rang. 413.
2. *Tipan Prasad v. Secy. of State*, A. I. R. 1935 Pat. 86 ; *Maung Tun Thein v. Maung Sin*, A. I. R. 1937 Rang. 124.
3. *Ramkaran Thakur v. Baldeo Thakur*, (1938) I. L. R. 17 Pat. 168.
4. *Subramania Mudaliar (Firm) v. East Asiatic Co.*, A. I. R. 1936 Mad. 991.
5. *Anwar Khan v. Yakub Khan*, A. I. R. 1925 Nag. 62.
6. *Hargobind Ray v. Keshwa Prasad*, A. I. R. 1925 Pat. 168 ; *Ramachandracharyulu v. Rangacharyulu*, A. I. R. 1926 Mad. 1117, 1120 (second appeal) ; *Shankar Narayan v. Patlu Bhatta*, A. I. R. 1932 Bom. 175.
7. *Maddu Mal v. Baggu*, (1913) 20 I. C. 831 (Lah.).

amendment of the plaint and proceed with the trial of the suit.¹ But where the application for amendment is made at such a late stage that it will cause injustice or injury to the opposite party if the leave to amend is granted, the application will be refused.²

(4) Where the amendment if allowed will necessitate a trial *de novo* or the letting in fresh evidence.³

Amendment after leave to sue : Where a suit was instituted by six plaintiffs as partners of a firm after obtaining leave under Cl. 12 of the Letters Patent of the Bombay High Court (same as Cl. 12 of the Letters Patent of the Calcutta and Madras High Courts, and Cl. 10 of the Letters Patent of the Rangoon High Court), but subsequently the plaint was amended so as to make it a suit by one only of the original plaintiffs, the Bombay High Court held that the suit could not proceed without fresh leave of the Court, because Cl. 12 of the Letters Patent is confined to the cause of action set forward in the plaint at the time the leave is granted ; hence the plaint cannot be amended so as to alter the cause of action.⁴

CHAPTER XXIII.

VERIFICATION OF PLEADINGS.

Object of verification of pleadings : The object of verification of a pleading is to fix upon the party verifying, or on whose behalf verification is made, the responsibility for the statements which it contains and to afford a guarantee of his good faith and thus to prevent as far as possible disputes as to whether the suit was instituted or defended with the knowledge or authority of the party who has signed the verification or on whose behalf it has been

1. *Habib Bakhsh v. Baldeo*, (1901) I. L. R. 23 All. 167, 173.
2. *Gopaldas v. Lokamat*, A. I. R. 1939 Sind 173.
3. *Shri Chandra Chatterjee v. Golap Moni Dasi*, (1920-21) 25 O. W. N. 552 ; *Punjab National Bank v. Uma Datt-Hans Raj*, (1928) I. L. R. 9 Lah. 291 ; *Thakardwara Amritsar v. Ishar Das*, (1928) I. L. R. 9 Lah. 588 ; *Kahn and Kahn v. Premsookh*, A. I. R. 1931 Lah. 260 ; *Badridas Lalchand v. Raja Pratappir*, A. I. R. 1940 Nag. 8.
4. *Moti Lal v. Shankar Lal*, A. I. R. 1939 Bom. 345.

signed.¹ Further, a verification has been described by a Full Bench of the Calcutta High Court as possessing the security of being made under the sanction of a declaration for which the person making it would be liable to the penalties attaching to the crime of giving false evidence, if the declaration were false to his knowledge.² A verification accordingly is a matter of great importance,³ and is intended to afford some guarantee that a false or totally trivial claim should not be put before the Court.⁴ But the requirement of the rule that every plaint must be verified has been characterised by Lord Williams, J. of the Calcutta High Court, "to be useless, irritating and to add unnecessarily to the costs of litigation". "I have never yet been able to discover", his Lordship observed, "how, when a litigant has occasion to include in his pleading two wholly inconsistent allegations of fact which the rules of pleading permit, he manages conscientiously to affirm that both are true and how he evades a consequent prosecution for perjury."⁵

Rules of verification under the Civil Procedure Code :

"(1) Save as otherwise provided by any law for the time being in force, every pleading shall be verified at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case."

"(2) The person verifying shall specify, by reference to the numbered paragraphs of the pleading, what he verifies of his own knowledge and what he verifies upon information received and believed to be true."

"(3) The verification shall be signed by the person making it and shall state the date on which and the place at which it was signed."⁶

"Every pleading shall be signed by the party and his pleader

1. See *Basdeo v. John Smidt*, (1900) I. L. R. 22 All. 55, 60, 61 (case of verification by plaintiff).
2. *Rammohun Mookerjee v. Rajah Narsing Deb*, (1862) Suth. W. R. 54 (F. B.) applied in, *An Attorney, In re.*, (1914) I. L. R. 41 Cal. 113, 125.
3. *Girdhari v. Kanhaiya Lal*, (1892) I. L. R. 15 All. 59, *fd. in*, *An Attorney, In re.*, *supra*.
4. *Per Sanderson C. J.*, in *Ross & Co. v. Scriven*, (1916) I. L. R. 43 Cal. 1001, 1011.
5. *Ramprasad v. Hazarimull*, (1931) I. L. R. 58 Cal. 418.
6. O. VI, r. 15, C. P. Code. See r. 14 of the same Order for requirements of the signature.

(if any) : Provided that where a party pleading is, by reason of absence or for other good cause, unable to sign the pleading, it may be signed by any person duly authorized by him to sign the same or to sue or defend on his behalf."¹

Who can verify pleadings : Ordinarily the party or one of the parties pleading should sign the verification. But some other person may sign the verification, if

(a) a party pleading is, by reason of absence or for other good cause, unable to sign the pleading and if such person is duly authorised by him to sign the same, and

(b) if it is proved to the satisfaction of the Court that such other person is acquainted with the facts of this case.

Thus, where during the plaintiff's absence, a servant of the plaintiff signed a plaint and presented it to Court and it was not proved that the plaintiff's servant was his recognised agent trading on his behalf while he was away from the jurisdiction, it was held that the plaint was not duly presented and not duly signed.²

Where the party should himself verify : Where the written statement contained allegations of fraud and collusion and statements of a scandalous nature and also statements of facts which, if true, must be within the personal knowledge of the defendant, it was held that the trial Court ought not to have permitted this written statement to be filed by the defendant under the verification of the mukhtear.³

Where the plaintiff alleged that the defendants were either parties or privies to a gross fraud and where the case depended mainly upon the personal knowledge of the plaintiffs but the plaint was verified by a person who called himself "an agent of the plaintiffs", and who acted apparently without any mukhtearnama, Garth C. J., held that the plaintiffs or one of them should have been required to verify the plaint.⁴ In such cases the defendant may require the plaintiff to subscribe and verify the plaint himself.⁵

It is not necessary that all the persons named in the plaint as co-plaintiffs should sign and verify the plaint, there being no rule

1. O. VI, r. 14, C. P. Code.

2. *Uttamram Vithaldas v. Thakordas Parshottamdas*, (1922) I. L. R. 46 Bom. 150.

3. *Brajeshware v. Budhanuddi*, (1881) I. L. R. 6 Cal. 263, 270.

4. *Protap Chunder v. Krishto Kishore*, (1882) I. L. R. 8 Cal. 895, 887.

5. *Rajah of Tomkuhi v. Braidwood*, (1887) I. L. R. 9 All. 505.

that a person named as a co-plaintiff is not to be treated as a plaintiff unless he signs and verifies the plaint.¹ The object of the signature to the plaint is to prevent as far as possible disputes as to whether the suit was instituted without the plaintiff's knowledge and authority. Such authority may be established by other means besides the signature. O. VI, r. 15, C. P. Code, which requires a pleading to be signed by a party is merely a matter of procedure and it is the business of the Court to see that this provision is carried out.²

Verification in special cases under the Code :—

- (a) *Crown*³ : In any suit by or against (the crown⁴), the plaint or written statement shall be signed by such person as (the Crown⁵) may, by general or special order, appoint in this behalf, and shall be verified by any person whom (the Crown⁶) may so appoint and who is acquainted with the facts of the case.⁶
- (b) *Corporation* : In suits by or against a corporation, any pleading may be signed and verified on behalf of the corporation by the secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case.⁷

If a principal officer of the corporation verifies a pleading, it is not necessary that permission for that purpose should be obtained. But it should be shown that the person purporting to verify on behalf of a corporation or company is a principal officer of the corporation, and is able to depose to the facts of the case. If the body of the plaint or written statement contains a statement to that effect, verification in the usual form will be sufficient. But if there is no

1. *Mohini Mohun v. Bungshi Buddan*, (1890) I. L. R. 17 Cal. 580, 582 (P. C.).
2. *Motharam Doulattram v. Pahlajrai Gopaldas*, A. I. R. 1925 Sind 159, fd. in *Emil Adolph Zippel v. Kapur & Co.*, A. I. R. 1932 Sind 9.
3. For definition of 'Crown', see O. XXVII, r. 8 (b), inserted by the Ad. Or., to C. P. Code.
4. Substituted by the Ad. Or. for "the Secretary of State for India in Council", in O. XXVII, r. 1, C. P. Code.
5. Substituted by the Ad. Or. for "the Government", in O. XXVII, r. 1, C. P. Code.
6. O. XXVII, r. 1, C. P. Code.
7. O. XXIX, r. 1, C. P. Code.

such statement in the body of the plaint or written statement, such evidence should be supplied by affidavit.¹ A *defacto* secretary for a corporation who verifies a plaint in the absence of the secretary is a principal officer.²

- (c) *Firm* : Where the persons sue or are sued as partners in the name of their firm under sub-rule (1), it shall, in the case of any pleading or other document required by or under the Code to be signed, verified or certified by the plaintiff or the defendant, suffice if such pleading or other document is signed, verified or certified by any one of such persons.³

High Court, Original Side Rules relating to verification.

Calcutta High Court : Where any person, other than a party pleading verifies a pleading under O. VI, r. 15 of the Code, his fitness to so verify shall be proved by his affidavit, at the time the pleading is presented.⁴ In a pleading on behalf of a company, the fitness of the person purporting to verify it, even though that person be a secretary or a director or other principal officer, must be proved by affidavit.⁵

Where in a suit by a Company registered under the Indian Companies Act, the plaint was signed and verified by the secretary, and the plaint stated that he was authorised by the Articles of Association of the Company to do all acts in connection with suits, and it appeared that the Articles of Association empowered the secretary to verify pleadings, it was held that the requirements of the O. XXIX, r. 1 of the C. P. Code were satisfied and no affidavit testifying to the fitness of the secretary to verify was required.⁶

Bombay High Court : All plaints and written statements shall be verified before one of the Assistant Masters or Associates of the

1. *Sreenath Banerjee v. East Indian Railway Co.*, (1895) I. L. R. 22 Cal. 268, fd. in *Gopalganj Laxmi Bhandar v. Purna Chandra*, (1935-36) 40 C. W. N. 930.
2. *Bundi Portland Cement, Ltd. v. Abdul Hussein*, A. I. R. 1936 Bom. 418.
3. O. XXX, r. 1 (2), C. P. Code.
4. Cal. High Court, O. S. Rules, Chap. VII, Rule 12.
5. *International Continental Caoutchouc v. Mehta & Co.*, (1926-27) 31 C. W. N. 1030 (applying Chap. VII, Rule 12 of the Rules of the Court).
6. *Gopalganj Laxmi Bhandar v. Purna Chandra*, *supra*, fg. *Sreenath Banerjee v. East Indian Rly. Co.*, *supra*, and distd. in *International Continental Caoutchouc v. Mehta & Co.*, *supra*.

Court appointed in that behalf and elsewhere in India before the officer indicated in the Code of Civil Procedure, Sec. 139. The verification shall be in Form No. 1.¹

Madras High Court: The plaint of a corporation, or incorporated company, or of a company authorised to sue and be sued in the name of an officer or trustee, may be subscribed and verified on behalf of the corporation or company by a director, secretary or other principal officer of the corporation or company, who states in the verification of the plaint that he is acquainted with the facts of the case.

The plaint of a firm may be subscribed and verified by any of the partners who states in the verification of the plaint that he is acquainted with the facts of the case.

The next friend of a minor plaintiff or other plaintiff under disability, may subscribe and verify the plaint on behalf of a minor subject to his presenting together with the plaint an affidavit stating the age of the minor and that the next friend has no interest directly or indirectly adverse to that of the minor, and is otherwise a fit and proper person to act as a next friend.²

Except as provided by O. II, r. 5, if a plaint is subscribed and verified by a person other than the party on whose behalf it is presented it shall not be admitted or filed, unless it is made to appear, upon affidavit that such person by a recognised agent of the party as defined by O. III, r. 2 (b) of the Code and is duly authorised and competent so to do. Rules 5 and 6 of O. II shall apply to written statements.³

Rangoon High Court: When an application is made for the Court's permission to a plaint or application being verified by some person other than a plaintiff or person on whose behalf the application is made, the application must be accompanied by an affidavit by the person proposing to verify, showing clearly his connection with the facts alleged in the plaint or application.⁴

Federal Court Rules relating to verification: No pleading of the Federal Court is required to be verified. But every pleading shall be signed by, or by an Advocate on behalf of, the Advocate-

1. Bom. High Court O. S. Rules, Chap. VI, Rule 95 and Chap. VII, Rule 123.
2. Mad. High Court O. S. Rules, O. II, R. 5, read with O. VII, R. 2.
3. Mad. High Court O. S. Rules, O. II, rr. 6 and 7.
4. Rang. High Court. O. S. Rules, Part II, Rule 24.

General of India or by an Advocate on behalf of, the Advocate-General for the Province, as the case may be.¹

Matters to be verified : The facts contained in a pleading must be verified. Points of law raised in a pleading need not be included in the verification in any form. It is not necessary to state in the verification that in the opinion of the verifier the point of law raised in the pleading is applicable to the case. Nor it is necessary to state that a paragraph containing a conclusion of law is a submission to the Court.²

Mode of verification : The Rule requires that the person verifying shall specify by reference to the numbered paragraphs of the pleading, what he verifies on his own knowledge and what he verifies upon information received and believed to be true. Where the plaintiff in her verification stated that some of the statements were true to her knowledge and the others true to her information and belief and an objection was taken that the plaintiff in that verification had not, in support of the statements which, she stated, were true according to her information and belief, disclosed the sources of her information, it was held by a Division Bench of the Calcutta High Court³ that the verification was made in strict accordance with the Rule, but that the omission to disclose the sources of her information might affect the weight that was to be attached to that verification. It is submitted that the last conclusion is erroneous. If the Rule does not require the source of information to be given, omission to state the source of information cannot affect the weight to be attached to the verification.

Defective verification : The correct form of verification is that the person verifying shall specify, by reference to the numbered paragraphs of the pleading, what he verifies of his own knowledge and what he verifies upon information received and believed to be true.⁴ It may so happen that a single paragraph may contain matters which are partly true to the verifier's knowledge and partly based upon the verifier's information believed to be true. In such cases the verification should state by reference to the said paragraph that the paragraph beginning with the words.....and ending with the words.....are true to his knowledge and the rest of

1. O. XXI, r. 6, Federal Court Rules.

2. *Praphull Dev v. Sham Lal*, A. I. R. 1932 Lah. 328.

3. *Rivers Steam Navigation Co. v. Khanto Kumari*, (1934) 59 C. L. J. 391.

4. O. VI, r. 15 (2), C. P. Code.

the paragraph are based upon information received and believed to be true.

A verification in the form—"To the limit of my knowledge the purport of this is true" is not a verification that complies with the rule;¹ but a verification in the form—"The contents of the plaint are true to the best of my knowledge and belief," substantially, though not strictly, complies with the rule.²

A defect in verification is only an irregularity and may be cured by amendment at any stage of the suit.³ Thus, when an application for leave to sue as a pauper was rejected for defective verification, the High Court remanded the application for correction.⁴ A verification can be amended even after the period of limitation.⁵

Omission to verify—effect of : The omission to verify a plaint has been held to be a mere irregularity and can be cured at a later stage by amendment.⁶ Similarly the absence of signature of the plaint, where it appears that the suit was in fact filed with the knowledge and the authority of the plaintiff named therein, may be waived by the defendant, or, if necessary, cured by amendment at any stage of the suit.⁷

Verification and limitation : Where a plaint was presented without any verification and was subsequently verified, it is to be deemed as presented on the date of actual presentation and not on the date of its verification.⁸

Where a defective verification of plaint is amended, the plaint must be taken to have been presented on the date when it was actually presented and not when the verification was amended.⁹

Defective verification and waiver : Objection to verification should be taken at the earliest possible opportunity and, if not so taken, will be deemed to have been waived.¹⁰

1. *Girdhari v. Kanhaiya Lal*, (1893) I. L. R. 15 All. 59, 60.
2. *Rajit Ram v. Katesar Nath*, (1896) I. L. R. 18 All. 396 F. B.
3. *Ram Labhaya Mal v. Firm Chanchal Sing*, A. I. R. 1932 Lah. 28.
4. *Piare Lal v. Bhagwan Das*, (1933) I. L. R. 55 All. 216; *Maharaja of Rewah v. Swami Saran*, (1903) I. L. R. 25 All. 635; *Rajit Ram v. Katesar Nath*, *supra*.
5. *Ramgopal v. Dharendra*, (1927) I. L. R. 54 Cal. 330.
6. *Shib Deo Misra v. Ram Prasad*, (1924) I. L. R. 46 All. 637.
7. *Basdeo v. John Smidt*, (1900) I. L. R. 22 All. 55.
8. *Shib Deo Misra v. Ram Prasad*, *supra*.
9. *Ram Gopal v. Dharendra*, *supra*.
10. *Shama Soonduree v. Rchimooddeen* (1875) 24 Suth. W. R. 71.

CHAPTER XXIV.

STRIKING OUT PLEADINGS.

The Court may at any stage of the proceedings order to be struck out or amended any matter in any pleading which may be unnecessary or scandalous or which may tend to prejudice, embarrass or delay the fair trial of a suit.¹

The language of the above rule is wide, but its operation has been limited to some extent by judicial decisions. Thus, although the rule states that the order may be made "at any stage of the proceedings", the Court may decline to exercise its jurisdiction unless objection is taken at the earliest opportunity.² Sometimes, the whole pleading may be struck out, sometimes only a part. Leave to amend will generally be given if the defect can be cured by amendment.

Unnecessary pleadings : According to the English practice, the mere fact that an opponent's pleading contains unnecessary matters, is not sufficient ground for striking out those matters. A statement will not be struck out merely because it is unnecessary if it is otherwise harmless.³ But if wholly immaterial matter is set out so that the defendant must plead to it, and so raise irrelevant issues, then the irrelevant matter will be struck off as it will tend to prejudice the fair trial of the action.⁴

Scandalous pleadings : "Nothing can be scandalous which is relevant."⁵ Thus, allegations of dishonesty and outrageous conduct, if relevant to the issue, are not scandalous.⁶ But if degrading char-

1. O. VI, r. 16, C. P. Code (O. XIX, r. 27, R. S. C.); *Knowles v. Roberts*, (1888) 38 Ch. D. 263, 270, 271.

2. *Cross v. Howe*, (1893) 62 L. J. Ch. 342.

3. *Per Chitty, J.*, in *Rock v. Purssell*, 84 L. T. Jo. 45.

4. *Rassam v. Budge*, (1893) 1 Q. B. 571 (In an action for slander the statement in the defence that the defendant did not say the words alleged in the plaint, but that he said something else and that the something else which he said was true, was ordered to be struck out as unnecessary and embarrassing.); *Davy v. Garrett*, (1878) 7 Ch. D. 473 (A mass of evidence pleaded unnecessarily may be struck off.); *Knowles v. Roberts*, *supra* (where in an action to compromise in a former action, the allegations regarding the original disputes between the parties were struck out as unnecessary and embarrassing.).

5. *Per Cotton, L.J.*, in *Fisher v. Owen*, (1878) 8 Ch. D. 645, 653.

6. *Everett v. Prythergh*, (1841) 12 Sim. 363.

ges are made which are irrelevant, or if, though the charge be relevant, unnecessary details are given, the pleading becomes scandalous.¹

Pleadings which tend to prejudice, embarrass or delay the fair trial of the suit : "The rule that the Court is not to dictate to parties how they should frame their case is one that ought always to be preserved sacred. But that rule is, of course, subject to this modification and limitation that the parties must not offend against the rules of pleading which have been laid down by the law ; and if a party introduces a pleading which is unnecessary, and it tends to prejudice, embarrass, and delay the trial of the action, it then becomes a pleading which is beyond his right."²

"The defendant may claim *ex debito justitiæ* to have the plaintiff's case presented in an intelligible form so that he may not be embarrassed in meeting it." Thus where a plaint was verbose, extremely long and involved and impossible to understand, the High Court of Allahabad held that the whole document ought to have been struck out or an order made for its amendment so that an intelligible case could have been presented to the Court.⁴ If the defendant does not clearly state how much of the plaint he admits and how much he denies, his pleading is embarrassing.⁵ A plea of justification is embarrassing if the plaintiff is left in doubt as to what the defendant has justified and what he has not.⁶

A claim for alternative relief is not embarrassing.⁷ A pleading is not embarrassing because the law stated or reasons alleged may be bad.⁸ Where particulars are ordered and not given the party in default runs the risk of his pleading struck off.⁹

1. *Blake v. Albion Life Assurance Society*, (1878) 45 L. J. O. P. 663.
2. *Knowles v. Roberts*, (1878) 38 Ch. D. 263, 270.
3. *Per James L. J.*, in *Davy v. Garrett*, (1878) 7 Ch. D. 473, 486.
4. *K. Bannerjee v. Mawxar Ali*, (1929) A. L. J. 496.
5. *British and Colonial Land Association v. Foster*, 4 Times Rep. 574.
6. *Fleming v. Dollar*, (1899) 23 Q. B. D. 388.
7. *Bagot v. Easton*, (1877) 7 Ch. D. 1 ; In *re Morgan*, *Owen v. Morgan* (1887) 35 Ch. D. 492 (case of inconsistent defences), *fd.* in *Chandrika Prasad v. Hiralal*, A. I. R. 1924 Pat. 280.
8. *London Corp'n. v. Horner*, (1914) 111 L. T. 512.
9. *Nedungadi Bank Ltd. v. Official Assignee of Madras*, (1930) I. L. R. 53 Mad. 615.

CHAPTER XXV.

APPEALS.

This chapter deals with —

- (1) Appeals up to the High Court,
- (2) Appeals to the King in Council, and
- (3) Appeals to the Federal Court.

1. Appeals up to the High Court :

(a) **Forms of Appeal :** The following are among the relevant rules relating to Forms of Appeal :

- (i) *Under the C. P. Code*¹ : Every appeal shall be preferred in the form of a memorandum signed by the appellant or his pleader and presented to the Court or to such officer as it appoints in this behalf. The memorandum shall be accompanied by a copy of the decree appealed from and (unless the Appellate Court dispenses therewith) of the judgment on which it is founded.
- (ii) *Under Cal. High Court O. S. Rules*² : O. XLI, r. 1 (1) of the Code shall apply except that the memorandum of appeal need only be accompanied by a copy of the decree and be presented to the Registrar.
- (iii) *Under Mad. High Court O. S. Rules* : "A memorandum of appeal shall be headed with a cause-title setting out the name of the Court, the serial number of the appeal, the names of the parties, separately numbered, and described as appellants and respondents, and also the full cause-title of the original suit or matter as in Form No. 2"³.

The full names, residence, and description, of each party, and if such is the case, the fact that any party sues or is sued in a representative character, shall be set out.⁴

A memorandum of appeal shall be headed as in Form No. 2 and shall be accompanied by a certificate copy of the decree and judgment, or order amounting to a judgment appealed from and a notice to the respondent in Form No. 45 and

1. O. XLI, r. 1 (1).
2. Chap. XXXI, r. 2.
3. O. II, r. 2.
4. O. II, r. 3.

and also a copy thereof signed by the appellant or his pleader.¹

- (iv). *Under Bom. High Court O. S. rules* : A memorandum of appeal shall be in Form No. 131, and rule 93 as to plaints shall *mutatis mutandis*, and as far as applicable, apply to memoranda of appeal.²

The memorandum need not be accompanied by a copy of the decree or order appealed from nor of the judgment, but such decree or order must be filed before the day fixed for the hearing,³

- (b) **Contents of memorandum** : The memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative ; and such grounds shall be numbered consecutively.⁴

- (c) **Appeal lies, when and in respect of what matters** : Before drafting the grounds of appeal or grounds of objection the following rules ought to be borne in mind :

“(1) Save where otherwise expressly provided in the body of the Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorised to hear appeals from the decisions of such Court.

(2) An appeal may lie from an original decree passed *ex parte*.

(3) No appeal shall lie from a decree passed by the Court with the consent of parties.⁵”

(4) “No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any misjoinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court.⁶”

1. O. XXVII, r. 1.

2. Chap. XXXIV, r. 786.

3. Chap. XXXIV, r. 787.

4. O. XLI, r. 1(2), C. P. Code.

5. Sec. 96, C. P. Code.

6. Sec. 99, C. P. Code.

“(5) Save where otherwise expressly provided in the body of the Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to a High Court, on any of the following grounds, namely :—

(a) the decision being contrary to law or to some usage having the force of law ;

(b) the decision having failed to determine some material issue of law or usage having the force of law ;

(c) a substantial error or defect in the procedure provided by this Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.

(6) An appeal may lie under this section from an appellate decree passed *ex parte*.”¹

(7) “No second appeal shall lie except on the grounds mentioned in section 100.”²

(8) “No second appeal shall lie in any suit of the nature cognizable by Courts of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed five hundred rupees.”³

(9) “In any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue of fact necessary for the disposal of the appeal, (which has not been determined by the lower appellate court or which has been wrongly determined by such court by reason of any illegality, omission, error or defect such as is referred to in sub-section (1) of section 100).”⁴

“The appellant shall not, except by leave of the Court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal ; but the Appellate Court, in deciding the appeal, shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the Court under this rule :

Provided that the Court shall not rest its decision on any other

1. Sec. 100, C. P. Code.

2. Sec. 101, C. P. Code.

3. Sec. 102, C. P. Code.

4. Sec. 103, C. P. Code.

ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground.”¹

The grounds of objection must be such as arise from the pleadings and evidence². The appellant cannot be allowed in appeal to make out a new case³, or a case inconsistent with the case set up by him in the lower Court⁴. But grounds of objection may be taken for the first time in appeal in the following cases :

(a) Where the lower Court had no inherent jurisdiction to try or entertain the suit.⁵

(b) Where a point of law arises out of admitted facts and does not take the opponent by surprise.⁶

(c) Where a defect fatal to the suit is apparent on the face of the proceedings⁷.

FORMS OF HIGH COURT APPEALS.

(a) Form No. 1. App. G., C. P. Code.

(Title)

The	above-named appeals to the
	Court at from
the decree of	in Suit No. of
19....., dated the day of	19....., and sets
forth the following grounds of objection to the decree	
appealed from, namely :—	

1. O. XLI, r. 2.

2. *Nuzur Ally v. Ojoodhyaram*, (1866) 10 M. I. A. 540, 558.

3. *Indur Chunder v. Radhakishore*, (1891-92) L. R. 19 I. A. 90.

4. *Gajapati v. Vasudeva*, (1892) I. L. R. 15 Mad. 503.

5. *Ramayya v. Subbarayudu*, (1890) I. L. R. 13 Mad. 25.

6. *Kesar Singh v. Indar Singh*, A. I. R. 1924 Lah. 543 ; *Secretary of State v. Upendra*, (1922) 36 Cal. L. J. 336.

7. Cf. *Ahsanulla v. Hurri Charan*, (1891-92) L. R. 19 I. A. 191.

(b) **Form No. 1, App. L., Cal. High Court O. S. Rules :**
IN THE HIGH COURT OF JUDICATURE AT
FORT WILLIAM IN BENGAL.

IN APPEAL FROM ITS ORIGINAL CIVIL JURISDICTION

Appeal No.

SUIT No. of 19.....

Appellant and
(Plaintiff or Defendant).

versus

Respondent and
 (Defendant or Plaintiff)

(Insert name) the appellant abovenamed appeals against
 the (decree or) order of the Honorable Mr. Justice
 in the above suit passed on the day of 19 ,
 for the following amongst other reasons :—

1st.—That (here state grounds of appeal).

(By way of endorsement.)

Appeal No.

SUIT No. of 19 .

Appellant,

versus

Respondent

(c) **Form No. 2, App. II, Mad. High Court, O. S. Rules :**

(Cause Title of an Appeal)

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Appellate Jurisdiction.

Appeal No. of 19 .

Between

1. A. B. and
2. C. D..... Appellants

AND

1. E. F. and
2. G. H..... Respondents.

On appeal from the judgment of the Honourable Mr. Justice
 dated the day of in the Ordinary

Original Civil (or Matrimonial, or Testamentary, or Admiralty) jurisdiction of this Court.

Suit No. of 19 .
(or Original Petition No. of 19 .).

Between

1. A. B. and
2. C. D. Plaintiffs.
- AND
1. E. F. and
2. G. H. Defendants.

(d) Form No. 131, Bom. High Court, O. S. Rules :
IN THE HIGH COURT OF JUDICATURE AT BOMBAY.

In Appeal from its Original Civil Jurisdiction

Appeal No. of 19 .
Suit No. of 19 .

Appellant and
(Plaintiff or Defendant).

Versus

Respondent and
(Defendant or Plaintiff).

(Insert name) the appellant abovenamed appeals against the
(decree or order) of the Honourable Mr. Justice
in the above suit passed on the day of 19 ,
for the following amongst other reasons :—

1st.—That (here state grounds of appeal).

By way of endorsement.

Appeal No. of 19.....
Suit No. of 19.....

Appellant.

versus

Respondent.

2. **Appeals to the King in Council:** "Subject to such rules as may, from time to time, be made by His Majesty in Council regarding appeals from the Courts of British India, and to the provisions hereinafter contained, an appeal shall lie to His Majesty in Council,—

(a) from any decree or final order passed on appeal by a High Court or by any other Court of final appellate jurisdiction ;

(b) from any decree or final order passed by a High Court in the exercise of original civil jurisdiction ; and

(c) from any decree or order, when the case, as hereinafter provided, is certified to be a fit one for appeal to His Majesty in Council."¹

"In each of the cases mentioned in clauses (a) and (b) of section 109, the amount or value of the subject-matter of the suit in the Court of first instance must be ten thousand rupees or upwards, and the amount or value of the subject-matter in dispute on appeal to His Majesty in Council must be the same sum or upwards, or the decree or final order must involve, directly or indirectly, some claim or question to or respecting property of like amount or value, and where the decree or final order appealed from affirms the decision of the Court immediately below the Court passing such decree or final order, the appeal must involve some substantial question of law."²

"Notwithstanding anything contained in Section 109, no appeal shall lie to His Majesty in Council,—

(a) from the decree or order of one Judge of a High Court (constituted by His Majesty by Letters Patent), or of one Judge of a Division Court, or of two or more Judges of such High Court, or of a Division Court constituted by two or more Judges of such High Court, where such Judges are equally divided in opinion and do not amount in number to a majority of the whole of the Judges of the High Court at the time being ; or

(b) from any decree from which under section 102 no second appeal lies."³

1. Sec. 109, C. P. Code.

2. Sec. 110, C. P. Code.

3. Sec. 111, C. P. Code. The words "constituted by His Majesty by Letters

3. Appeals to the Federal Court: "Where a certificate has been given under section 205 (1) of the Government of India Act, 1935, the provisions of Order XLV, C. P. Code shall apply in relation to appeals to the Federal Court as they apply in relation to appeals to His Majesty in Council and references in this Order to His Majesty in Council or to any Order of His Majesty in Council shall be construed as references to the Federal Court and the rules of the Federal Court ;

Provided that—

(a) rule 3 of this Order shall have effect as if at the end of sub-rule (1) thereof there were inserted the words "apart from any question of law as to the interpretation of the Government of India Act, 1935, or any Order in Council made thereunder";

"(b) where the only ground of appeal stated in the petition is that any question of law as to the interpretation of the Government of India Act, 1935, or any Order in Council made thereunder has been wrongly decided, the petition need not pray for such a certificate as is mentioned in rule 3, and the like proceedings shall be had thereon as if such a certificate had been given except that no security shall be required for the costs of the respondent,"¹

"Where a certificate has been given under section 205 (1) of the Government of India Act, 1935, sections 109, 110 and 111 of the C. P. Code shall apply in relation to appeals to the Federal Court as they apply in relation to appeals to His Majesty in Council, and accordingly references to His Majesty shall be construed as references to the Federal Court :

Provided that—

(a) so much of the said sections as delimits the cases in which an appeal will lie shall be construed as delimiting the cases in which an appeal will lie without the leave of the Federal Court otherwise than on the ground that a substantial question of law as to the interpretation of the said Act, or any Order in Council made thereunder, has been wrongly decided ;

Patent" have been substituted by the Ad. Or. for "established under the Indian High Courts Act, 1861, or the Govt. of Ind. Act, 1915."

1. O. XLV., r. 17, C. P. Code.

(b) in determining under clause (c) of section 109 whether the case is a fit one for appeal, and, under section 110, whether the appeal involves a substantial question of law, any question of law as to the interpretation of the said Act, or any Order in Council made thereunder, shall be left out of account,"¹

PETITION OF APPEAL TO THE FEDERAL COURT.

In the Federal Court.
(Appellate Jurisdiction).
Appeal No. . of

In the matter of an appeal under Section 205 (1)
of the Government of India Act, 1935,
And

In the matter of

A. B. *Appellant*
vs.

C. D. *Respondent.*

Appeal from the High Court of

To

The Honourable Chief Justice of
India and his Companion Justices of the said Honourable
Court.

The humble petition of
appeal on behalf of the
appellant above-named

Sheweth :—

1. ... That on the day of 19 , the appellant
instituted a suit against the respondent in the Court of the
Subordinate Judge of (T. S. No. of)
claiming on the basis of..... .

2. ... That the respondent defended the suit on the grounds

3. ... That on the learned Subordinate Judge made a
decree in favour of the appellant.

4. ... That on the Respondent appealed to the High
Court of against the said decree, and the said appeal

1. Sec. 111 A, C. P. Code.

was heard by their Lordships the Honourable Mr. Justice and the Honourable Mr. Justice , who by their judgment dated , were pleased to allow the said appeal.

5. ... That the appellant being dissatisfied by the said judgment and the decree of the said High Court applied for and obtained a certificate under Section 205(1) of the Government of India Act, 1935, from the said High Court to the effect that the case involves a substantial question of law as to the interpretation of Sections and of the said Act (or any Order in Council made thereunder, as the case may be).¹

6. ... That the appellant begs to appeal from the said judgment and decree of the said High Court dated on amongst others the following

Grounds :

(Here state the grounds of appeal.)

(i)

(ii)

(iii)

7. ... That in support of his case, the appellant proposes to rely upon the following arguments and authorities at the time of hearing :—

(Here set out briefly the arguments and authorities)

(i)

(ii)

(iii)

The appellant therefore humbly prays that your Lordships may be pleased to hear this appeal and set aside the said judgment and decree of the said High Court and restore the judgment and decree of the learned Subordinate Judge and pass such further and other orders as to your Lordships may appear fit and proper,

And for this act of kindness the appellant shall ever pray.

-
1. *Contents of the petition of appeal* : The petition of appeal shall contain a concise statement of the facts of the case, of the grounds of appeal and of the arguments and authorities on which the appellant proposes to rely at the hearing : Part II, O. X. r. 3, F. C. R. Where any person wishes to appeal to the Federal Court on the ground which in the circumstances of the case requires the leave of the Court under Sec-

CHAPTER XXVI.

AFFIDAVITS.

Affidavit—meaning of : An affidavit, (fr. *affidare*, M. Lat., to pledge one's faith, fr. *fides*, Lat.) is a written statement sworn before a person having authority to administer an oath.¹

Affidavits as evidence : By the rules and/or practice of the Courts any particular fact or facts may be proved by affidavit.² But affidavits cannot properly be acted upon unless both parties agree to have them treated as evidence.³ Any person who has made an affidavit is liable to be cross-examined thereon.⁴

Affidavits—contents of : Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except upon interlocutory applications, on which statements of his belief may be admitted : provided that the grounds thereof are stated.⁵

A general averment in an affidavit that the statements are to the best of the deponent's knowledge, information and belief, is insufficient.

tion 205(2) of the Act, he shall include a prayer for special leave to appeal in his petition of appeal : Part II, O. XIV, rr. 1. and 2, F. C. R.

Certificate : A certificate is the key which unlocks the door into Federal Court : *Subhanand Chowdhury v. Apurba Krishna Mitra*, A. I. R. 1940 F. C. 7. Application under O. XLV, r. 17, C. P. Code irregular if no certificate was in existence when the application was made : *Raja Prithwi Chand Lall Chowdhury v. Sukhraj Rai*, A. I. R. 1940 F. C. 25 ; cf. *Lachmeswar Prasad Shukul v. Girdhari Lal Choudhuri*, A. I. R. 1940 F. C. 26.

1. Wharton's Law Lexicon, 14th Edn., p. 38.
2. O. XIX, r. 1, C. P. Code.
3. *Narayana v. Lakshmayya*, A. I. R. 1939 Mad. 927. Cf. Proviso to O. XIX, r. 1, C. P. Code.
4. O. XIX, r. 2, C. P. Code. For application of this rule to divorce proceedings, see *Stones v. Stones*, (1935) I. L. B. 62 Cal. 541 : The Court may at any time, for sufficient reason, allow a petitioner and her witness, in divorce proceedings, to give evidence on affidavit provided, always, that they will have to be present for cross-examination if and when so required.
5. O. XIX, r. 3, C. P. Code.

Every affidavit should clearly express how much is a statement of the deponent's knowledge and how much is a statement of his belief, and the grounds of belief must be stated with sufficient particularity to enable the Court to judge whether it would be safe to act on the deponent's belief.¹

Where in an affidavit on an interlocutory application the declarant makes a statement of his belief on information, he must disclose the source of his information.² Rule 9 of the Rules of the Allahabad High Court provides that in interlocutory proceedings, when the particular fact is not within the declarant's own knowledge, but is stated from information obtained from others, the declarant shall use the expression "I am informed" and, if such be the case, "and verily believe it to be true," and shall state the name and address of, and sufficiently describe for the purposes of identification, the person or persons from whom he received such information. When the application or the opposition thereto rests on facts disclosed in documents or copies of documents produced from any Court of Justice or other source, the declarant shall state what is the source from which they were produced, and his information and belief as to the truth of the facts disclosed in such documents.

Particulars in affidavits : The Court has inherent jurisdiction to interfere and direct particulars if it considers that a litigant is substantially embarrassed owing to lack of precision in a petition or affidavit. Any relevant statement which could have been incorporated in the petition or furnished by way of particulars will be treated as new matter, which cannot be imported in an affidavit in reply.³

Affidavits—how to be drawn and sworn : The Civil Procedure Code does not say how affidavits are to be drawn and sworn. The Allahabad and Rangoon High Courts, however, have framed rules therefor by way of local amendment to O. XIX, C. P. Code. And there are provisions as to how affidavits are to be drawn and sworn in the rules of the Federal Court and in the rules of the original sides of the High Courts. Such rules are set out here-under :

1. *Per Jenkins C. J. and Woodroffe J., in Padmabati Dasi v. Rasik Lal Dhar*, (1910) I. L. R. 37 Cal. 259 ; applied in *Durga Das v. Nalin Chandra*, (1934) I. L. R. 61 Cal. 814.
2. Cf Pat. High Court Rules, Part II, Chap. III, Rules 8 and 12 ;
Keshab Prasad v. Harihar Prasad, A. I. R. 1926 Pat. 54.
3. *Sitaram Poddar v. Hariram Poddar*, (1935-36) 40 O. W. N. 913.

1. Appellate Side Rules of the Allahabad High Court :—

R. 4. Affidavits shall be entitled in the Court of at (naming such Court). If the affidavit be in support of, or in opposition to, an application respecting any case in the Court, it shall also be entitled in such case. If there be no such case it shall be entitled : *In the matter of the petition of* .

R. 5. Affidavits shall be divided into paragraphs, and every paragraph shall be numbered consecutively and, as nearly as may be, shall be confined to a distinct portion of the subject.

R. 6. Every person making any affidavit shall be described therein in such manner as shall serve to identify him clearly ; and where necessary for this purpose, it shall contain the full name, the name of his father, of his caste or religious persuasion, his rank or degree in life, his profession, calling, occupation or trade, and the true place of his residence.

R. 7. Unless it be otherwise provided, an affidavit may be made by any person having cognizance of the facts deposed to. Two or more persons may join in an affidavit ; each shall be deposed separately to those facts which are within his knowledge and such facts shall be stated in separate paragraphs.

R. 8. When the declarant in any affidavit speaks to any fact within his own knowledge, he must do so directly and positively, using the words "I affirm" or "I make oath and say."

R. 10. When any place is referred to in an affidavit, it shall be correctly described. When in an affidavit any person is referred to, such person, the correct name and address of such person, and such further description as may be sufficient for the purpose of the identification of such person, shall be given in the affidavit.

R. 11. Every person making an affidavit for use in a Civil Court, shall, if not personally known to the person before whom the affidavit is made, be identified to that person by some one known to him, and the person before whom the affidavit is made shall state at the foot of the affidavit the name, address and description of him by whom the identification was made as well as the time and place of such identification.

R. 11A. Such identification may be made by a person

- (a) personally acquainted with the person to be identified, or,
- (b) satisfied from papers in that person's possession or otherwise, of his identity :

Provided that in case (b) the person so identifying shall sign on the petition or affidavit a declaration in the following form, after there has been affixed to such declaration in his presence the thumb impression of the person so identified :—

I (name, address and description) declare that the person verifying this petition (or making this affidavit) and alleging himself to be A. B., has satisfied me (here state by what means, e. g., from papers in his possession or otherwise) that he is A. B.

R. 12. No verification of a petition and no affidavit purporting to have been made by a *pardanashin* woman who has not appeared unveiled before the person before whom the verification or affidavit was made, shall be used unless she has been identified in manner already specified and unless such petition or affidavit be accompanied by an affidavit of identification of such woman made at the time by the person who identified her.

R. 13. The person before whom any affidavit is about to be made shall, before the same is made, ask the person proposing to make such affidavit if he has read the affidavit and understands the contents thereof, and if the person proposing to make such affidavit states that he has not read the affidavit or appears not to understand the contents thereof, or appears to be illiterate, the person before whom the affidavit is about to be made shall read and explain, or cause some other competent person to read and explain in his presence, the affidavit to the person proposing to make the same, and when the person before whom the affidavit is about to be made is thus satisfied that the person proposing to make such affidavit understands the contents thereof, the affidavit may be made.

R. 14. The person before whom an affidavit is made, shall certify at the foot of the affidavit the fact of the making of the affidavit before him and the time and place when and where it was made, and shall for the purpose of identification mark and initial any exhibits referred to in the affidavit.

R. 15. If it be found necessary to correct any clerical error in any affidavit such correction may be made in the presence of the person before whom the affidavit is about to be made and before, but not after, the affidavit is made. Every correction so made shall be initialled by the person before whom the affidavit is made and shall be made in such manner as not to render it impossible or difficult to read the original word or words, figure or figures, in respect of which the correction may have been made.

2. Appellate Side Rules of the Bombay High Court :—

R. 4. The officer administering the oath to the declaration of an affidavit should first make the declarant take the oath or affirmation. Then he should make the declarant repeat the whole of the statement written in the affidavit as coming from him. Then the declarant should sign the affidavit, and lastly the officer administering the oath should sign and date it.

R. 5. Every affidavit to be used in a Court of Justice should be entitled "In the Court of at " naming the Court. If there is a case in Court, the affidavit in support of or in opposition to an application respecting it, must also be entitled "In the case of ."

If there is no case in Court, the affidavit should be entitled "In the matter of the petition of".

R. 6. Every affidavit containing any statement of facts shall be divided into paragraphs, and every paragraph shall be numbered consecutively and, as nearly as may be, shall be confined to a distinct portion of the subject.

R. 7. Every person, other than a plaintiff or defendant in a suit in which the application is made, making an affidavit shall be described in such a manner as will serve to identify him clearly, that is to say, by the statement of his full name, the name of his father, his profession or trade ; and the place of his residence.

R. 8. When the declarant in any affidavit speaks to any fact within his knowledge, he must do so directly and positively using the words "I affirm" (or make oath) "and say".

R. 10. Every person making an affidavit, if not personally known to the Commissioner, shall be identified to the Commissioner by some person known to him, and the Commissioner shall specify at the foot of the petition, or of the affidavit (as the case may be), the name and description of him, by whom the identification is made, as well as the time and place of the identification and of the making of the affidavit.

R. 11. If any person making an affidavit is ignorant of the language in which it is written, or appears to the Commissioner to be illiterate or not fully to understand the contents of the affidavit, the Commissioner shall cause the affidavit to be read and explained to him in a language which he understands. If it is necessary to employ an interpreter for this purpose, the interpreter shall be sworn to interpret truly. When an affidavit is read and explained

as herein provided, the Commissioner shall certify in writing at the foot of the affidavit that it has been so read and explained and that the declarant seemed perfectly to understand the same at the time of making the affidavit. When an interpreter is employed the Commissioner shall state in his certificate the name of the interpreter, and the fact that he has sworn to interpret truly.

R. 12. In administering oaths and affirmations to declarants the Commissioner shall be guided by the provisions of the Indian Oaths Act, 1873.

3. Rules of the Federal Court : O. III, F. C. R. provides—

R. 1. Every affidavit shall be instituted in the cause, matter or appeal in which it is sworn.

R. 2. Every affidavit shall be drawn up in the first person, and shall be divided into paragraphs to be numbered consecutively, and shall state the description, occupation, if any, and the true place of abode of the deponent.

R. 4. An affidavit requiring interpretation to the deponent shall be interpreted by an interpreter nominated or approved by the Court, if made within the Province of Delhi, and if made elsewhere, shall be interpreted by a competent person who shall himself make an affidavit that he is a competent person and that he has correctly interpreted the affidavit to the deponent.

R. 5. Affidavits for the purposes of any cause, matter or appeal before the Court may be sworn before any Court or officer mentioned in Section 139 of the Code, before a Commissioner generally or specially authorised in that behalf by the Chief Justice.

R. 6. Where the deponent is a pardanashin lady she shall be identified by a person to whom she is known and that person shall prove the identification by a separate affidavit.

R. 7. Every exhibit annexed to an affidavit shall be marked with the title and number of the cause, matter or appeal and shall be initialled and dated by the commissioner, court or officer before whom it is sworn.

R. 10. Where a special time is limited for filing affidavits, no affidavit filed after that time shall be used except by leave of the Court.

R. 11. In this Order "affidavit" includes a petition or other document required to be sworn and "sworn" shall include "affirmed".

4. **Rules of the Calcutta High Court (O. S.)** :—Chapter XV of Calcutta High Court O. S. Rules provides as follows —

R. 1. Every affidavit shall be intitled in the suit or matter in which it is sworn but in every case in which there are more than one plaintiff or defendant, it shall be sufficient to state the full name of the first plaintiff or defendant, respectively, and that there are other plaintiffs or defendants as the case may be, and the costs occasioned by any unnecessary prolixity in any such title shall be disallowed by the Taxing Officer ; provided, however, that all affidavits proving the service of any process or notice shall set forth the full title of the suit or matter.

R. 2. Every affidavit shall be drawn up in the first person, and shall be divided into paragraphs, and every paragraph shall be numbered consecutively and as nearly as may be, shall be confined, to a distinct portion of the subject. Every affidavit shall be written or printed book-wise. No costs shall be allowed for any affidavit or part of an affidavit substantially departing from this rule.

R. 3. Every affidavit shall state the description and true place of abode of the deponent.

Where the deponent has an occupation (*i. e.*, profession, trade, business or calling) that occupation should be disclosed ; and if he has none, the words “of no occupation” should be added after his address.

R. 4. All affidavits to be made in Calcutta or within 5 miles thereof, which require to be interpreted and explained to the deponent, shall be interpreted and explained by one of the sworn interpreters or translators, of the Court, prior to being sworn. In the event of the deponent not knowing any of the languages known to the Interpreters or Translators, or in the event of the affidavit being sworn outside the limits above-mentioned, the affidavit may be interpreted and explained to the deponent by some competent person, who shall make an affidavit that he is thoroughly conversant with English and with the language spoken by the deponent, and that he truly and accurately interpreted and explained the affidavit.

R. 5. Affidavits for use in any of the jurisdictions of the Court may be taken in Calcutta or within 5 miles thereof before a Commissioner generally or specially authorised by the Chief Justice for the purpose,

Every such Commissioner shall express in the jurat the place where he has taken any affidavit, in the event of the same being taken elsewhere than in the Court House.

R. 6. In every affidavit made by two or more deponents, the names of the several persons making the affidavit shall be inserted in the jurat.

R. 7. Where the deponent is a *purdanashin* woman, she shall be identified by a person to whom she is known and before whom she appears, and such person shall at foot of the affidavit certify that the deponent was identified by him and sign his name thereto, and shall prove such identification by a separate affidavit.

R. 8. Every exhibit annexed to any affidavit shall be marked with the short title and the number (if any) of the cause or matter and shall be dated and initialled by the officer before whom the affidavit is sworn.

R. 9. No affidavit shall be filed in the several offices of the Court, unless properly endorsed with the number and title of the suit or matter, the name or names of the deponents, the date on which it is sworn, and by whom or on whose behalf it is filed.

5. Rules of the Madras High Court (O. S.) :—The Madras High Court O. S. Rules provide as follows. —

O. II, R. 1-A. All pleadings, affidavits, interlocutory applications, and other proceedings presented to the Court, shall be written, typewritten, or printed fairly and legibly, on substantial white foolscap folio paper, with an outer margin about two inches wide and an inner margin about one inch wide, and separate sheets shall be stitched together bookwise. The writing or printing shall be on both sides of the paper, and numbers shall be expressed in figures.

All pleadings, except petitions for probate or letters of administration, which contain more than ten folios, shall be either printed or typewritten.

O. III, R. 1. An application for leave to institute a suit in the Court shall be made by Judge's summons entitled in the matter of the intended suit, and shall be supported by an affidavit stating the residence and occupation of the defendant, and the reason for instituting the suit in the Court. The application shall be accompanied by the plaint in the intended suit, or a copy thereof.

The Court may direct notice of the application to be given to the defendant.

If leave to sue is granted, the summons to the defendant shall contain the notice set out in Form No. 9.

O. III, R. 2. An application under Order 1, Rule 8 of the Code, shall be made by Master's summons, and shall be supported by an affidavit stating the number or approximate number of the parties, and the places where they respectively reside; that they have all the same interest in the subject-matter of the suit, and the nature of the said interest; and the best means of giving notice of the institution of the suit to the said parties, and the probable cost thereof. If the application is made before suit, it shall be entitled as in Rule I of this order mentioned, and shall be accompanied by the plaint, or a copy thereof.

O. XIV, R. 3. Every affidavit shall be drawn up in the first person and divided into paragraphs numbered consecutively, and each paragraph, as nearly as may be, shall be confined to a distinct portion of the subject.

O. XIV, R. 5. Every affidavit shall state the full name, description, and place of abode of the deponent, and shall be signed or marked by him.

O. XIV, R. 9. Every affidavit shall bear an endorsement stating on whose behalf it is filed.

6. Rules of the Bombay High Court (O. S.) :—Chapter XI of the Bombay High Court O. S. Rules provides as follows—

R. 181. Every affidavit shall be instituted in the suit or matter in which it is sworn or declared; but in every case in which there are more than one plaintiff or defendant, it shall be sufficient to state the full name of the first plaintiff or defendant, respectively, and that there are other plaintiffs or defendants as the case may be; and the costs occasioned by any unnecessary prolixity in any such title shall be disallowed by the Taxing Master.

R. 185. The occupation and nationality and (if a native of India, the community to which he belongs) and the true place of abode of every person making any affidavit, shall be inserted therein.

R. 186. In every affidavit made by two or more deponents, the names of the several persons making the affidavit shall be inserted in the jurat, except that, if the affidavit of all the deponents is taken at one time by the same officer it shall be sufficient to state that it was sworn by both (or all) of the "above-named" deponents.

R. 187. No affidavit shall be filed in the several offices of the Court unless properly endorsed, giving the names of the deponents,

the date on which it is sworn, and stating by whom, or on whose behalf, it is filed.

R. 188. The Court or a Judge may order to be struck out from any affidavit any matter which is scandalous, and may order the cost of any application to strike out such matter to be paid as between attorney and client.

Interlineations, alterations or erasures in affidavits :

(a) According to the rules of the Federal Court (O. III)—

R. 8. No affidavit having any interlineation, alteration or erasure shall be filed in Court unless the interlineation or alteration is initialled, or unless in the case of an erasure the words or figures written on the erasure are rewritten in the margin and initialled, by the commissioner or officer before whom the affidavit is sworn.

R. 9. The registrar may refuse to receive an affidavit where in his opinion the interlineations, alterations or erasures are so numerous as to make it expedient that the affidavit should be new written.

(b) According to the Calcutta High Court, O. S. Rules, Chap. XV—

R. 11. No affidavit having in the jurat or body thereof any interlineation, alteration or erasure, shall, without the leave of the Court or a judge, or in any matter depending before an officer without the leave of such officer, be read, or made use of, unless the interlineation or alteration (other than by erasure) is authenticated by the initials of the officer taking the affidavit, nor, in the case of an erasure, unless the words or figures, appearing at the time of taking the affidavit to be written on the erasure, are re-written and initialled in the margin of the affidavit where, in his opinion, the interlineations, alterations, or erasure are so numerous as to render it necessary that the affidavit should be re-written.

(c) According to Madras High Court O. S. Rules, O. XIV—

R. 6. Alterations and interlineations shall, before an affidavit is sworn or affirmed, be authenticated by the initials of the officer before whom the affidavit is taken, and no affidavit having therein any alteration or interlineation not so authenticated, or any erasure, shall, except with the leave of the Court, be filed or made use of in any matter.

(d) *According to Bombay High Court O. S. Rules, Ch. XI.—*

R. 189. No affidavit having in the jurat or body thereof any interlineation, alteration or erasure, shall, without leave of the Court or a Judge, be read, or made use of, in any matter depending in Court, unless the interlineation or alteration (other than by erasure) is authenticated by the initials of the officer taking the affidavit, nor, in the case of any erasure, unless the words or figures appearing at the time of taking the affidavit to be written on the erasure, are re-written and initialled in the margin of the affidavit by the officer taking it.

(e) *According to Rangoon High Court O. S. Rules, Part II, Chap. I.*

R. 50. No affidavit having in the jurat or body thereof any interlineation, alteration, or erasure, shall, without leave of the Court or a Judge, be read, or made use of, in any matter depending in Court, unless the interlineation or alteration (other than by erasure) is authenticated by the initials of the officer taking the affidavit, nor, in the case of any erasure, unless the words or figures appearing at the time of taking the affidavit to be written on the erasure, are re-written and signed or initialled in the margin of the affidavit by the officer taking it. An officer may refuse to take an affidavit, where, in his opinion, the interlineations, alterations or erasures are so numerous as to render it necessary that the affidavit should be re-written.

PART III. FORMS OF PETITIONS.

1.

AMENDMENT OF PLEADINGS.

PETITION for Amendment of one's own pleading. (1).

(Title)

The humble petition of.....
the plaintiff above-named

S h e w e t h :—

1. That on.....the petitioner instituted the above suit for recovery of Rs.....due on a promissory note dated....., executed by the opposite party in favour of the petitioner.

2. That the opposite party wrote a letter dated.....to the petitioner, unconditionally acknowledging his liability for the amount then due on the said promissory note.

3. That through mistake or inadvertance the said acknowledgement in writing has not been pleaded in the plaint herein.

4. That without an averment of the said acknowledgement the plaint is liable to be rejected as being barred on the very face of it.

5. That it is necessary in the interest of justice that the petitioner should be allowed to amend his plaint by adding the following paragraph as paragraph 3 to the body of the plaint :—

“By letter dated....., the defendant unconditionally acknowledged in writing his liability to pay the sum then due on the said promissory note.”

Your petitioner therefore humbly prays
that he may be given leave to amend his plaint
by adding the above-mentioned paragraph to the
body of his plaint upon such terms as to costs as
the Court should think just,

And for this act of kindness your peti-
tioner as in duty bound shall ever pray. •

(1) *Muthammal v. Gurusami*, A. I. R. 1935 Mad. 158 ; *Kondama v. Venkatarayadu*, A. I. R. 1939 Mad. 34. See “Leave to amend—when given”, under “Amendment of Pleadings”, Chap. XXII.

2.

AMENDMENT OF PLEADINGS.

PETITION for Amendment of the Opponent's pleading. (2).

(Title)

The humble petition of.....
the defendants abovenamed

S h e w e t h :—

1. That the above suit was instituted by the minor sons of one A.B. for setting aside the decree dated..... obtained by the petitioners in Suit No..... of 19... of this Court against the said A. B. upon a mortgage bond dated..... executed by the said A. B. as the Karta of the joint Hindu family consisting of himself and his said minor sons, on amongst others, the alleged ground that the debt so incurred was an immoral debt.

2. That paragraph... of the plaint runs as follows:—

“A. B., the father of the plaintiffs, was at all material times extravagant and dissolute.”

3. That in the plaint the exact nature of the immorality has not been specified and it has not been alleged how it came about at the time of the said loan, that the particular money was needed and used for the particular immorality charged.

4. That the said general allegation of immorality is embarrassing.

Under the circumstances your petitioner humbly prays that the said paragraph... of the plaint be struck out and the plaint be amended accordingly, and that the opposite parties be ordered to pay the costs of and incidental to this application, and that such further and other orders be made as the Court thinks just,

And for this act of kindness your petitioner as in duty bound shall ever pray.

(2) *Jagdish Narain v. Hazari Lal*, A.I.R. 1932 All. 467 : *Per Mears C. J.*—

“The exact nature of the immorality, be it gambling, drinking, women or anything else must be specified. Further, the pleading must show with precision exactly how it came about at the particular time that the particular money was needed and used for the particular immorality charged. No Judge should allow a general paragraph of this nature to remain upon the record, and the proper order to make is to have the whole paragraph struck out.”

3.**AMENDMENT OF PLEADINGS.****PETITION for Amendment of the Opponent's pleading. (3).**

(ANOTHER FORM).

(Title)

The humble petition of.....,
the defendant abovenamed

S h e w e t h :—

1. That the above suit was instituted for recovery of the sum of Rs. in respect of certain alleged dealings in shares between the parties.

2. That paragraph...of the plaint contains the following averment :

“The defendant is a drunkard and is of dissolute character.”

3. The said allegation is scandalous, irrelevant, and will raise unnecessary issues of facts.

Your petitioner therefore humbly prays that the said paragraph...of the plaint be struck out and the plaint be amended accordingly, and that the plaintiffs be ordered to pay the costs of and incidental to this application and that such further and other orders be made as the Court thinks just,

And for this act of kindness your petitioner as in duty bound shall ever pray.

-
- (3) Under O. VI, r. 16, C.P. Code, the Court may at any stage of the proceedings order to be struck out any matter in any pleading which may be unnecessary or scandalous or which may tend to prejudice, embarrass or delay the fair trial of a suit. See *Knowles v. Roberts*, (1888) 38 Ch. D. 263, 270, 271. Nothing can be scandalous which is relevant : • *Fisher v. Owen*, (1878) 8 Ch. D. 645, 653. But if degrading charges are made which are irrelevant or if, though the charges be relevant, unnecessary details are given, the pleading becomes scandalous : *Blake v. Albion Life Assurance Society*, (1878) 45 L. J. C. P. 663.

4.

COMPANIES.**PETITION by Unpaid Creditor for Winding up.**

(Form No. 12, App. 7, R. 51, Cal. High Court, O. S. Rules)

**IN THE HIGH COURT OF JUDICATURE AT FORT
WILLIAM IN BENGAL.**

Ordinary Original Civil Jurisdiction.

In the matter of the Indian Companies
Act, VII of 1913,

And

In the matter of

Coy., Ltd.

To

The Honourable Chief Justice and his
Companion Justices of the said Honourable Court.

The humble petition of.....(a)

S h e w e t h :—

1. The Limited (hereinafter called the company), is a company duly incorporated under the Indian Companies Act.

2. The registered office of the company is at (b)

3. The nominal capital of the company is Rs. divided into shares of Rs. each. The amount of the capital paid up or credited as paid up is Rs.....

4. The objects of the company are as follows (c) :— and other objects set forth in the Memorandum of Association thereof.

5. The company is indebted to your petitioner in the sum of Rs. for (d)

6. On the day of 19 your petitioner served (or, caused to be served by A. B. of) on the company by leaving the same at its registered office a demand under his hand in the words and figures following :—

(Set out demand in full)

-
- (a) Insert full name, address, description, etc. of petitioner.
 (b) State the full address of the registered office.
 (c) State principal objects according to Memorandum of Association.
 (d) State consideration for the debt, with particulars so as to establish that the debt is due.

7. The company has neglected to pay the said sum of Rs..... or to secure or compound for it to the reasonable satisfaction of your petitioner.

8. The company is (insolvent and) unable to pay its debts.

9. In the circumstances it is just and equitable that the company should be wound up.

Your petitioner therefore humbly prays as follows :—

(1) That _____, Limited—may be wound up by the Court (e) under the provisions of the Indian Companies Act, 1913.

(2) or that such other order may be made in the premises as shall be just.

5.

COMPANIES.

PETITION for Reduction of Capital.

(Form No. 1, R. 16, App. 7, Cal. High Court, O. S. Rules)

IN THE HIGH COURT OF JUDICATURE AT FORT

WILLIAM IN BENGAL,

Ordinary Original Civil Jurisdiction.

In the matter of the Indian Companies Act,
VII of 1913,

And

In the matter of

Ltd.

To

The Honourable _____ Chief Justice and his
Companion Justices of the said Honourable Court.

The humble petition of (a)

Limited and Reduced,

S h e w e t h :

1. Your Petitioner the abovenamed company (hereinafter called “the company”) was incorporated on the day of 19 _____, under the provisions of the Indian Companies Act as a company limited by shares.

(e) Or under the supervision of the Court.

(a) Insert full name of Company.

2. The registered office of the company is situated at (b)

3. The objects of the company are as follows (c):—

and other the objects set forth in the Memorandum of Association thereof.

4. The nominal capital of the company is Rs. divided into of which have been issued and are fully paid up or credited as fully paid up.

5. Shortly after its incorporation the company commenced to carry on and it has since been and still is carrying on business.

6. By article (5) of the Articles of Association of the company it is provided that the company may (set out Article or Articles of Association authorising a reduction of capital).

7. (Set out the reasons for reduction stating all material facts and circumstances.)

8. Under the provisions of section 55 of the Indian Companies Act, 1913, and in pursuance of the powers in that behalf contained in the said Articles of Association the company by a Special Resolution of its share-holders duly passed and confirmed at Extra-ordinary General Meetings duly convened and held on the day of 19 , and the day of 19 , respectively resolved :—

(Set out the special resolution for reduction of capital)

9. (d) The reduction of capital does not involve either the diminution of liability in respect of unpaid capital or the payment to any shareholder of any paid up capital and in consequence no creditor is entitled to object to the reduction under the provisions of section 58 of the said Act.

10. (If the petition asks that the use of the words “and reduced” be dispensed with, here state reasons.)

11. The form of minute proposed to be registered under the provisions of section 61 of the said Act is as follows :—

(Set out proposed Minute of Reduction).

Your petitioner therefore humbly prays (e)—

(1) That the reduction of capital to be effected by the Special Resolution set out in paragraph 8 hereof be confirmed and that the

(b) State full address of the registered office.

(c) State principal objects according to Memorandum of Association.

(d) Omit if creditors are entitled to object to the reduction.

(e) Omit or alter paragraphs (2) and (3) according to circumstances.

minute set forth in paragraph 11 hereof be approved by the Court.

(2) That the addition of the words "and Reduced" to the Company's name be dispensed with.

(3) That the obtaining of the certificate provided for by rule 29 of the Rules of this Honourable Court may be dispensed with and that in accordance with rule 18 of the said Rules a day may be fixed for the hearing of this petition and directions given as to the advertisements to be published.

(4) That such other order may be made in the premises as to the Court shall seem fit.

Petitioner's Attorneys.

I, _____, of _____, make oath (or solemnly affirm) and say as follows :

1. That I am a (director) of the petitioner company and as such I am fully acquainted with the affairs of the said company.

2. That the facts stated in foregoing petition are true to my knowledge.

Sworn (or, solemnly affirmed), etc.

6.

DIVORCE.

DISSOLUTION OF MARRIAGE.

HUSBAND'S PETITION for Dissolution of Marriage under the Indian Divorce Act. (4)

IN THE HIGH COURT OF JUDICATURE AT FORT
WILLIAM IN BENGAL.

(O. S.) Matrimonial Jurisdiction.

In Re : The Indian Divorce Act (Act IV of 1869)

Between

A. B., residing at _____

Petitioner,

-
- (4) **Place of marriage :** The petitioner has to allege and prove that the marriage was solemnised in India : *Manohar Bapuji v. Chandrawati*, A. I. R. 1936 Nag. 26.

C. B., residing at

Respondent.

&

X. Y., residing at

Co-respondent.

-
- (4) **Domicile** : The parties to the marriage must be domiciled in India when the petition is presented : Sec. 2, Ind. Div. Act ; *Manohar Bapuji v. Chandrawati*, A. I. R. 1936 Nag. 26. Since the wife's domicile follow that of the husband, the husband's domicile only is generally pleaded. But according to English practice the domicile of both the husband and the wife must be stated in the petition: see Latey's Divorce, 12th Edn., p. 503. By the Ind. Div. (Amendment) Act, 1926, domicile in India was made a condition precedent to the granting of a dissolution of marriage : *Waller v. Waller*, (1928) I. L. R. 10 Lah. 64. The Court must carefully enquire into the question of domicile : *Cresswell, v. Cresswell*, (1933) I. L. R. 60 Cal. 601. The Indian and Colonial Divorce Jurisdiction Act, 1926, was passed to enable persons domiciled in England and Scotland (not Ireland) but residing in India to obtain a dissolution of their marriage, exactly as if the suit had been instituted in England or Scotland : *Barnard v. Barnard*, (1929) I. L. R. 56 Cal. 89.
- (4) **Religion** : The petitioner or the respondent must be Christian : Sec. 2(a), Ind. Div. Act ; *Nima Dalal v. N. D.*, (1930) 32 Bom. L. R. 1046 (F. B.) ; *Rooke v. Rooke*, A. I. R. 1934 Bom. 230 ; *Manohar Bapuji v. Chandrawati*, *supra*.
- (4) **Place of co-habitation** : Last place of co-habitation in India gives jurisdiction to Courts in India to hear divorce petition : *Grant v. Grant*, A. I. R. 1937 Pat. 82.
- (4) **Residence** : The petitioner must allege and prove that the husband and the wife reside or last resided together within the local limits of the ordinary jurisdiction of the Court to which the petition is presented : *Manohar Bapuji v. Chandrawati*, *supra*.
- (4) **Adulterer co-respondent** : Sec. 11, Ind. Div. Act ; *Garao Sangma v. Rangji Mechik*, (1929) I. L. R. 56 Cal. 29 ; *Joseph v. Ramamma*, A. I. R. 1923 Mad. 9 (F. B.). The nationality or domicile of a co-respondent is immaterial. Therefore a husband can in his petition for divorce add a foreigner as co-respondent : *Hill v. Hill*, (1923) I. L. R. 47 Bom. 657. If adultery is committed on dates subsequent to the petition filed, a supplementary petition supported by an affidavit may be filed with the leave of the Court : *Duncan v. Duncan*, A. I. R. 1939 Rang. 352.
- (4) **Absence of Collusion** : Secs. 12, 13, 14 and 47, Ind. Div. Act.
- (4) **Previous proceedings** : If there have been no previous proceedings, it should be stated. If there have been previous proceedings these must be stated together with the decree or order, if any, and whether there has been any presumption of cohabitation since the making of such decree or order.
- (4) **Damages** : Sec. 34, Ind. Div. Act.
- (4) **Misconduct of petitioner, effect of**—*Doutre v. Doutre*, I.L.R. (1939) All. 573.

To

The Honourable

Chief Justice and his

Companion Justices of the said Honourable Court.

The humble petition of A. B.,
abovenamed

S h e w e t h :—

1. That on the 5th day of December 19 ... your petitioner was lawfully married to C. B., then C. D., spinster (hereinafter called the respondent) at.....A copy of the marriage certificate is hereto annexed and marked 'A'.

2. That the petitioner and the respondent are domiciled in India.

3. That the parties to the said marriage profess the Christian religion.

4. That after the said marriage your petitioner and the respondent lived and cohabited at _____ and at _____ and lastly at _____ in _____

within the jurisdiction of the Court, and there is issue of the said marriage now living (one child, namely, E. D., born on the 5th July 19...).

6. That your petitioner is an Insurance agent and is now living at _____

7. That the respondent is now living at _____

8. That from the 5th day of June 19..., until the 15th day of November 19 .., at No. _____ Street, in _____ the respondent lived and cohabited and habitually committed adultery with the said X. Y.

9. That there have been no previous proceedings in this Honourable Court with reference to your petitioner's said marriage either by or on behalf of your petitioner or the respondent (or set out any previous proceedings and the result of them, with a statement that "Save and except as is aforesaid, there have been no previous proceedings", etc.).

10. That no collusion or connivance exists between the petitioner and the respondent for the purpose of obtaining a dissolution of marriage or for any other purpose.

Your petitioner therefore prays—

1. That the said marriage be dissolved.

2. That the co-respondent do pay Rs..... as damages in respect of the said adultery by him committed.

3. That the co-respondent and the respondent, out of her separate estate, do pay the costs of these proceedings.

4. That such further and other reliefs be given to your petitioner as may be just.

And for this act of kindness your petitioner as in duty bound shall ever pray.

7.

DIVORCE.

DISSOLUTION OF MARRIAGE.

WIFE'S PETITION for Dissolution of Marriage under the Indian Divorce Act, IV of 1869. (5)

1. That the petitioner A. B., then A. D., spinster (or, as the case may be) was on the day of 19 , lawfully married to C.D., (hereinafter called the respondent) at . A copy of the marriage certificate is hereto annexed and marked 'A'.

2. That the petitioner and the respondent are domiciled in India.

3. That the petitioner (or respondent) professes the Christian religion.

- (5) **Status of wife :** The status of the wife, that is, whether 'spinster', 'widow' or "the divorced wife of A. B., formerly C. D., spinster" or "formerly the wife of A. B. from whom she obtained a divorce, formerly C. D., spinster" should be stated.
- (5) **Alimony :** Secs. 36, 37, Ind. Divorce Act.
- (5) **Custody of children :** Sec. 41, Ind. Divorce Act; *Duncan v. Duncan*, A. I. R. 1939 Rang. 352.
- (5) **Women adulterer :** For the glaring injustice which still exists as between the position of a woman charged with adultery where the suit is brought under the Ind. and Col. Divorce Jurisdiction Act and that of a woman charged with adultery in a suit brought under the provisions of the Ind. Div. Act of 1869, see *Sadler v. Sadler*, (1935) I. L. R. 62 Cal. 82. A party who is named in a divorce plaint as being a person with whom the respondent is alleged to have committed adultery should be allowed to intervene but it is doubtful if a person so named has the right to claim to be added as a party to the divorce proceedings: *Stuart v. Stuart*, (1936) I. L. R. 57 All. 884.
- (5) **Damages :** No damages may be asked for against the woman adulterer : *Latey's Divorce*, 12th Edn., p. 506.
- (5) **Costs :** The prayer should specifically ask for costs : *Latey's Divorce*, 12th Edn., p. 506.
- (5) **Other matters :** See notes under "Husband's petition for Dissolution of marriage", p. 569.

4. That after the said marriage the petitioner lived and cohabited with the said respondent at _____ and at _____ and lastly at _____, and that there are issues of the said marriage, now living, _____ children, to wit : (here state the names and dates of birth of children).

5. That the petitioner resides at _____

6. That the respondent resides at _____

7. That no previous proceedings with reference to the said marriage have taken place by or on behalf of either party to the said marriage.

8. That on the _____ day of _____ 19____, at _____ the said respondent committed adultery with G. N. (or with a woman unknown).

9. That no collusion or connivance exists between the petitioner and the respondent for the purpose of obtaining a dissolution of marriage or for any other purpose.

10. (Where alimony pending suit is claimed) That the said respondent is employed as a _____ and is in receipt of a monthly salary of Rs. _____

The petitioner therefore prays that the Court will decree—

(1) That the marriage of the petitioner with the said respondent be dissolved.

(2) That she may have the custody of the children.

(3) That the said respondent (and when the woman named is a co-respondent) and the co-respondent do pay the costs of these proceedings.

(4) (When alimony pending suit is claimed) That the said respondent do pay the petitioner such sums of money by way of alimony pending suit as may seem just.

(5) That the petitioner may have such further and other reliefs as may be just.

8.

DIVORCE.

NULLITY OF MARRIAGE.

WIFE'S PETITION for Nullity of Marriage under the Indian Divorce Act.

1. That on the _____ day of _____ 19____, the petitioner

A.B., then A.D., spinster, and C.B., (hereinafter called the respondent) went through a ceremony of marriage at

2 That after the said ceremony of marriage the petitioner lived with the said respondent as husband and wife at and at and that the said marriage has never been consummated and there is (no issue) of the said cohabitation.

3. That the petitioner resides at and is domiciled in India.

4. That the said respondent resides at and is domiciled in India.

5. That the said respondent is a (state occupation).

6. That no previous proceedings etc. (same as paragraph 7 in Form No. 7).

7. That the said respondent was at the time of the said marriage and has ever since been incapable of consummating the same.

The petitioner therefore prays that the Court will decree—

(1) That the marriage in fact celebrated between the petitioner and the said respondent be declared null and void.

(2) That the said respondent do pay the petitioner the costs of the proceedings.

(3) That the petitioner may have such further and other reliefs as may be just.

DIVORCE.

NULLITY OF MARRIAGE.

HUSBAND'S PETITION for Nullity of Marriage Under the Indian Divorce Act.

Charge : Bigamy. (6)

1. That on the day of 19 , the petitioner went through a form of ceremony of marriage with C. B. (other-

(6) **Who can apply for nullity of marriage :** Only the husband or the wife can apply for nullity of marriage: Sec. 18, Ind. Div. Act. But when the husband or wife is a lunatic or idiot, any suit under the Ind. Div. Act (other than a suit for restitution of conjugal rights) may be brought on his or her behalf by the Committee or other person entitled to his or her custody: Sec. 48, Ind. Div. Act. Where the petitioner is a

wise M.) in the marriage certificate described as a spinster, at.....

2. That after the said ceremony of marriage the petitioner lived and cohabited as man and wife with the said respondent at
and at and that there are issues of the said cohabitation, now living,.....children, to wit :

3. That the petitioner resides at and is a.....
(state occupation) and is domiciled in . The said respondent resides at and is domiciled in.....

4. That no previous proceedings etc. (as in Form No. 7).

5. That on the day of 19 , the said respondent, then C. D., spinster (or give other status) was lawfully married at.....to L. K., and that the said marriage has never been dissolved or annulled, but is still valid and subsisting.

6. That at the date when the petitioner went through the said form of marriage with the said respondent, the said L. K. was (and still is—if this is the case) alive.

The petitioner therefore prays that the Court will decree :—

(1) That the marriage celebrated between the petitioner and the said respondent be declared null and void.

(2) That he may have the custody of his said children (where applicable).

(3) That the petitioner may have such further and other reliefs as may be just.

10.

DIVORCE.

JUDICIAL SEPARATION.

WIFE'S PETITION for Judicial Separation (on the Ground of Cruelty and Adultery) under the Indian Divorce Act.

1. That on the day of 19 , your petitioner, then C. D., spinster, (or give other status) lawfully was married to C. B. (hereinafter called the respondent) at

2. That after her said marriage the petitioner lived and cohabited as man and wife with the said respondent, and that there are issues of the said cohabitation, now living,.....children, to wit :
minor, he or she shall sue by his or her next friend to be approved by the Court; Sec. 49, of the said Act.

(6) **Custody of children :** Secs. 43 and 44, Ind. Div. Act.

(6) **Defences in a suit for nullity :** The sole question in a suit for nullity is that of marriage. The respondent cannot therefore raise the plea of adultery, cruelty, desertion or any other misconduct. See Manchanda's Divorce, p. 549.

bited with the said respondent at _____ and at _____
 and lastly at _____ and have issues living
 of their said marriage, to wit,—

3. That the petitioner resides at.....and is domiciled in India.

4. That the said respondent resides at _____ and is domiciled in India.

5. That no previous proceedings etc. (as in Form No. 7)

6. That in and during the years 19... and 19..., at _____ the said respondent used violent and abusive language to the petitioner.

7. That on the _____ day of _____ 19..., at _____ the said respondent brutally assaulted the petitioner with a stick causing injury (give details).

8. That since the celebration of the said marriage the said respondent committed adultery with some woman unknown, and thereby contracted syphilis, and that on or about the _____ day of _____ 19 _____, the said respondent (wilfully and recklessly) communicated such venereal disease to the petitioner.

9. (When alimony pending suit is claimed) That the said respondent is employed as a _____ and is in receipt of a salary of Rs. _____ per month.

10. That the said respondent owns house property in..... (here specify) from which he derives an income of Rs. _____ per month.

11. That no collusion or connivance exists between your petitioner and the said respondent with respect to the subject of the present suit.

The petitioner therefore humbly prays that the Court will decree:—

(1) That she may be judicially separated from the respondent.

(2) That she may have the custody of her said children.

(3) That the respondent do pay the costs of these proceedings.

.. (4) (Where necessary) That the Court will order that the said respondent do pay to the petitioner such sums of money by way of alimony pending suit as may be just.

(5) That such further and other reliefs may be granted to your petitioner as may be just.

11.

DIVORCE.

RESTITUTION OF CONJUGAL RIGHTS.

WIFE'S PETITION for Restitution under the Indian Divorce Act. (7)

1. That the petitioner A. B., then C. D., spinster, was on theday of 19....., lawfully married C. B. (hereinafter called the respondent) at

2. That after her said marriage the petitioner lived and cohabited with the said respondent at

3. That the petitioner resides at , and is domiciled in India.

4. That the respondent resides at and is domiciled in India.

5. That no previous proceedings etc. (same as paragraph 9, Form No. 7).

6. That on the day of 19 , the said respondent without reasonable excuse withdrew from cohabitation with the petitioner and has refused and still refuses to render her conjugal rights (Set out circumstances of such refusal fully).

7. That the petitioner sincerely desires a restitution of conjugal rights and is willing to render such rights to the respondent (Here set out any proof of such sincerity, e. g., any letter written, etc.).

The petitioner therefore prays that the Court will decree :—

(1) That the respondent do return to her and render to her conjugal rights.

Or

That the respondent do take the petitioner home and receive her as his wife and render her conjugal rights.

(7) **Jurisdiction** : The Court shall have jurisdiction where one of the parties is a Christian : Amendment of Sec. 2, Ind. Div. Act by Act XXX of 1927 ; *Dalal v. Dalal*, A. I. R. 1930 Bom. 385 (F. B.), which was a suit by a Christian lady against her Parsi husband. The cause of action in a suit for restitution of conjugal rights accrues where the desertion has taken place : *Weldon v. Weldon*, (1883) 9 P. D. 52. The Bombay High Court has held that the Court shall have no jurisdiction to grant a decree if the respondent is not residing within its jurisdiction : *Wadia v. Wadia*, (1914) I. L. R. 33 Bom. 125.

(7) **Sincerity of petitioner** : *Russel v. Russel*, (1924) A. C. 687.

(7) **Refusal to obey decree—how enforced** : See O. XXI, rr. 32 and 33, C. P. Code.

(7) **Answer to a petition for restitution** : Sec. 33, Ind. Div. Act.

- (2) That she may have the custody of her said children.
- (3) That the respondent do pay the costs of these proceedings.
- (4) That such further and other reliefs may be granted to your petitioner as may be just.

12.

ELECTIONS.

**PETITION to have the Election of a Councillor of Corporation
declared void. Charge : Corrupt practice. (7)**

**IN THE HIGH COURT OF JUDICATURE AT FORT WILLIAM
IN BENGAL**

Ordinary Original Civil Jurisdiction.

In the matter of Sections 46 and 47 of the
Calcutta Municipal Act (Bengal Act
III of 1923) as amended by the Calcutta
Municipal Amendment Act (Bengal
Act II of 1939)

And

In the matter of the Sixth General Election
of Councillors to the Corporation of
Calcutta from the non-Mahomedan Con-
stituency (Ward No.....)

And

In the matter of A. B., residing at

.....

—Petitioner

—: versus :—

C. D., residing at.....

.....

— Respondent.

To

The Honourable

Chief Justice and

his Companion Justices of the said Honourable Court.

The humble petition of.....

.....the petitioner abovenamed

Sheweth :—

1. That the sixth general election of Councillors to the Corpora-
tion of Calcutta took place on the.....19..., pursuant to a Noti-

(7) **Grounds for declaring election void : Section 47 of the Calcutta Municipal
Act (Act III of 1923) and Part I of Schedule II to the said Act.**

fication of the Provincial Government published in the Calcutta Gazette dated..... ..

- (7) **Corrupt Practices :** Allegations of corrupt practices are not in the nature of criminal charges and therefore not governed by the principles applicable to a criminal case : Per McNair J., in *Nasiruddin Ahmed v. Haji Mahammad Yusuf*, (1936) I. L. R. 63 Cal. 825. Where a person is elected by corrupt practices, his election is liable to be set aside, and the fact that such practices have been used by the rival candidates also does not help him because such practices on both sides do not have the effect of cancelling out each other : *Ramanna v. Inspector, Local Boards, Madras*, A. I. R. 1937 Mad. 557 (In this case a candidate who was elected as a member of the District Board had supplied petrol to 2 private cars which were used for the purposes of his election and had hired a bus for the conveying of the voters to the poll. The election was declared void.). As to what constitutes a threat to any candidate or any voter, see *Bijli Sahib v. Mahomed Asin*, A. I. R. 1934 Mad. 27. For invalidity of a nomination paper for want of candidate's signature, see *Ratansi Damji v. Ratansi Virji*, A. I. R. 1939 Bom. 335.
- (7) **Time for filing election petition :** *Nasiruddin Ahmed v. Haji Mahammad*, (1936) I. L. R. 63 Cal. 825. (The proviso in sec. 46 of the Calcutta Municipal Act, giving eight days' time within which to file the election petition is intended to provide the person elected with an opportunity of meeting the charges at once and thus to enable the matter to be speedily determined, and if substantiated to enable a fresh election to be held without delay.).
- (7) **Agent of a candidate, who is :** *Nasiruddin Ahmed v. Haji Mahammad*, (1936) I. L. R. 63 Cal. 825. (Without doubting that a candidate is always responsible for all the misdeeds of his agent committed within the scope of his authority, it is always a sound principle to remember that a man may become the agent of another either by actual employment or by recognition and acceptance, and to establish agency it is not necessary to show that the candidate himself knew of an accepted voluntary service. Knowledge and acceptance by other persons in control is sufficient. Although in order to make a person chargeable as an agent one has to make out some sort of an entrustment by the candidate with some material part of the business in connection with his election still such entrustment may be by implication ; but that implication ordinarily must arise from the knowledge which it appears that the candidate has of the part which the person is taking in the election.).
- (7) **Election to the Central or Provincial Legislature :** In case of election to the Central Legislature, the election petition must be addressed to the Governor-General ; in case of election to a Provincial Legislature, the election petition should be addressed to the Governor of the Province under Part III Sec. 3 of the Government of India (Provincial elections) (Corrupt practices and election petitions) Order, 1936.

2. That the petitioner's and the respondent's names as elector, were registered on the electoral roll for the said general election in the said constituency.

3. That the petitioner and the respondent filed their respective nomination papers and were duly nominated as candidates for election as Councillor from the said constituency.

4. That at the said election, the respondent procured 400 votes and the petitioner 395 votes and accordingly the respondent was declared elected.

5. That the election of the respondent was procured or induced, by corrupt practices committed by or on behalf of the respondent.

Particulars :

(a) That on or about.....the respondent paid, or caused to be paid through A.B., his agent, a bribe of Rs.....to C. D., an elector in the said constituency, at the latter's place of residence at.....with the object of inducing the said C. D. to refrain from voting at the said election (or to vote for the respondent).

(b) That on or about the respondent gave a bribe of Rs.....to G. H., an elector in the said constituency, at... with the object of inducing the said G. H. not to stand as a candidate for the said election.

(c) That the respondent and/or his agents (give names) interfered with the free exercise of the franchise of several electors...

(i) by restraining 5 voters (give names) who happened to be at.....from proceeding to the polling booth to record their votes ;

(ii) by telling the voters near about the polling booth between and P.M. that prayers were being offered by a Sadhu at the Kalighat Temple against those who would vote for the petitioner, thereby threatening the voters that if they voted for the petitioner they would become or be rendered an object of divine displeasure or spiritual censure ; consequently E. F., G. H., I. J., and others (whose names are at present unknown to the petitioner) who otherwise would have voted for the petitioner refrained from so voting.

(d) That A. B., the respondent's said agent procured, and attempted to procure, votes for the respondent by false

personations. One K. S. personated his brother D. S., S. S. personated B.S., and C. S. personated R. S. All those persons were identified at the polling station as voters by the respondent's said agent, who knew or ought to have known that they were not voters.

(e) That the respondent published or caused to be published in a leaflet, immediately before and during the said election, a false statement that the petitioner had withdrawn his candidature, which false statement was reasonably calculated to prejudice and did prejudice the petitioner's election. J. H., and K. H. refrained from voting for the petitioner believing such statement to be true.

(f) That the respondent hired a bus and two taxi cabs bearing regtd. nos.....to convey his voters to the poll and supplied petrol to the private cars which were used for the purposes of his election.

6. That the result of the election was materially affected by the aforesaid corrupt practices.

Your petitioner therefore humbly prays that the said election of the Respondent as Councillor be declared void and that he be directed to pay the costs of the petitioner and that such further and other orders be made as the Court thinks fit.

And for this act of kindness your petitioner shall as in duty bound ever pray.

13.

GUARDIANSHIP.

PETITION for the Appointment of a Guardian of a Minor. (8)

(Form of cause-title under the Cal. High Court, O. S. Rules)

IN THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

Ordinary Original Civil Jurisdiction.

In the matter of Guardians and
Wards Act VIII of 1890,

And

In the matter of A. B., son of K.
of in the town of
Calcutta, an infant.

(8) **Contents of application :** The application shall, in addition to the

To

The Honourable

Chief Justice and His Companion

Justices of the said Honourable Court.

The humble petition of B. C. of...
in the town of Calcutta

Sheweth:—

1. (Follow next Form)

14.

GUARDIANSHIP.**PETITION for Appointment of a Guardian of a Minor.**

(Form No. 100, App. II, Mad. High Court, O. S. Rules)

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Original Petition No. of 19 .*In the matter of T. V. N., a minor.*

- | | | |
|--|---|--------------|
| <ol style="list-style-type: none"> 1. T. M. N., <li style="text-align: center;">AND 2. T. R. N. | } | Petitioners. |
|--|---|--------------|

Petition under the Guardian and Wards Act, 1890.

The abovenamed petitioners state as follows:—

particulars required by section 10 of the Act, state whether the minor is entitled to any property absolutely, or subject to the rights or interests of any other person, and whether any property is subject to any, and what, incumbrance; and shall specify all persons of the same degree of relationship as, or of nearer degree than, the proposed guardian, and where a female is proposed as guardian, the nearest male relation of the minor: Rule 3, Chap. XXX, Cal. High Court, O. S. Rules, Ormond's Edn. p. 505.

- (8) **Where father of minor is living:** Where the father of the minor is living, and is not proposed as guardian, the application shall also state any facts relied on as showing that he is unfit to act as guardian of the minor, or that he consents to the application: Rule 4, Chap. XXX, Cal. High Court, O. S. Rules.
- (8) **Where property of minor is proposed to be dealt with:** Where it is proposed to deal with any property of the minor in manner mentioned in Section 29 of the Act, the grounds of the application, and the relief prayed, shall be stated shortly in the original petition, and it shall not be necessary to present a separate petition or application: Rule 5, Chap. XXX, Cal. High Court, O. S. Rules.
- (8) **Jurisdiction:** Clause 17 of the Letters Patent, 1865.

1. T. M. N., the 1st petitioner, is a *land-owner*, and resides at _____ and is the *elder brother* of the abovenamed minor. T. R. N., the 2nd petitioner, is a *dealer in grain* and resides at _____, and is the *paternal uncle* of the said minor. The address for service of the petitioners is _____ (*Insert names descriptions and residences of the respondents, if any, and also their relationship to the minor*).

2. The abovenamed T. V. N. is a minor of the age of _____ and upwards, having been born on or about the _____ day of _____ and is a *male*, by religion a *Hindu*, of the *Saivite* sect, and ordinarily resides at _____ and is in the custody of _____

3. (*Where the minor is a female*). The said minor was married on the _____ day of _____ to T. K. N., a *land-owner*, who is now of the age of _____ and upwards, and resides at _____ or _____ (the said minor is *unmarried*).

4. The minor is absolutely entitled under the will of his maternal uncle A. B., deceased (*or, as sole surviving son of his father C. D., deceased or as the case may be*), to the movable and immovable properties set out in the schedule hereto, which are approximately of the values set out in column 3 to the said schedule, and are in the possession of *1st petitioner* (*or, are respectively in the possession of the several persons whose names and residences are set out opposite to the several items in column 4 of the said schedule*). (*Or where the minor is not absolutely entitled.*) The minor is entitled, as one of the two surviving sons of his father C. D., deceased, jointly with the 1st petitioner, and subject to the right of his mother Thoyeammal to maintenance and residence (*proceed as above and state the interest or share of the minor, as thus :—The minor is entitled to an equal undivided moiety of the said properties*). The approximate total value of the said properties (*or, of the minor's interest in the said properties*) is Rs. _____; and after deducting the amount of the said incumbrances, the approximate net value is Rs. _____.

5. The only relations of the minor now living are :—(1) the first petitioner, his *elder brother*, (2) the 2nd petitioner, his *paternal uncle*, (3) Thoyeammal, his *mother*, residing at _____

and (4) E. F., his *sister*, the wife of G. H., residing at _____

6. L. M., the father of the minor, died on or about the day of _____ (*or is a person of unsound mind, and incapable of managing his own affairs, or as the case may be*).

7. No guardian of the person or of the property of the minor has been appointed by any person, and no application has at any time been made to this or to any other Court with respect to the guardianship of the person or property of the minor. (*Or* P. Q., late of (*residence and description*) was, by the will of the said L. M., appointed guardian of the person and property of the minor and died on or about the day of , an application was on the day of made to the High Court by original petition No. of for the appointment of a guardian of the person and property of the said minor; and by an order, dated the day of R. S., late of (*residence and description*) was appointed accordingly. The said R. S. died on or about the day of . No other application has been made to this or to any other Court with respect to the guardianship of the person or property of the said minor.

(*Or*, R. S., brother of the minor, who died on or about the day of by his will dated the day of purported to appoint T. V. of (*residence and description*) guardian of the person and property of the minor, but by the law to which the minor is subject, such appointment is invalid and of no effect).

8. X. Y., the person proposed as guardian, is a land-owner. He is the nearest male relation of the minor, is married, and has 3 children, and resides with his family at . He is in good circumstances, having an income of about Rs. a year and of good character and reputation, and of good business habits, and is a fit and proper person to be appointed guardian of the person and property of the said minor. (*Or, where a person is to be declared to be the guardian.*—X. Y. is under the law, to which the minor is subject, the guardian of the person and property of the minor. He is (*state the relationship to the minor, and the qualifications of the proposed guardian, as above*).

9. Items Nos. 2 and 4 of the schedule hereto are in a bad state of repair, and unless they are at once repaired, will seriously deteriorate in value, and it is to the interest of the minor that the sum of Rs. should be at once, expended for this purpose. It is proposed to raise this sum by a mortgage of items 2, 3, 4 and 5 of the said schedule on interest at the rate of Rs. per cent. per annum.

(*Or*, the mortgagees of items Nos. 2 and 3 of the schedule hereto

threaten to take proceedings to realize their security ; and in such case it is apprehended that the property will not realize its full value. It is proposed to concur with the mortgagees in selling the property and to invest any balance after paying off the mortgage moneys in Government securities. Or, the income of the said property which amounts to the sum of Rs. per annum

or thereabout, is not sufficient to provide for the maintenance of the said minor, and his education at the Presidency College, Madras ; and it is proposed to sell items Nos. 2 and 3 of the said schedule for this purpose *(or state any other grounds on which the application is made)*.

10. Your petitioners therefore pray—

(a) That the said X.Y., or some other fit and proper person may be appointed (or declared to be) the guardian of the abovenamed infant T. V. N.

(b) That the security to be given by the said guardian may be fixed at the sum of Rs. _____ and that P. Q. and R. S. may be accepted as his sureties.

(c) That the sum of Rs. _____ a month may be fixed for the maintenance and education of the minor (where any person is entitled to maintenance out of the property of the minor, and the sum of Rs. _____ a month may be fixed for the maintenance of the said Thoyeammal.)

(d) That the sum of Rs. _____ a month may be allowed to the said guardian as his remuneration, in respect of the collection of the rents of the immovable property of the minor.

(e) That the said guardian may be at liberty out of the income of the said minor to expend the sum of Rs. *in his thread wearing ceremony.*

(f) That the said guardian may be at liberty to invest any balance of the net income of the minor, after payment of the said sums and the costs of this application in

(g) That the guardian may be at liberty to raise the said sum of Rs. _____ by a mortgage of items Nos. 2 and 3 of the schedule hereto, upon interest at the rate of Rs. _____ per cent. per annum, and to apply the said sum for the purposes mentioned in paragraph 10 hereof.

(h) That the costs of your petitioners of this application may be paid by the said guardian (or if the petitioners are to be appointed guardians, retained by them) out of the income of the property of the said minor.

(i) For such other relief as to this Court may deem fit.

11. We declare that the facts above stated are true to our knowledge except as to matters stated to be on information and belief and as to those matters we believe them to be true.

Dated the

day of

15.

GURDIANSHIP.

PETITION for the Appointment of a Guardian of the Person and Property of a Minor (9).

IN THE COURT OF THE DISTRICT JUDGE OF.

Petition for appointment of a guardian of the person and property of....., a minor.

The humble petition of
of

Sheweth:—

1. That the abovenamed A. B. is a minor of the age of having been born on or about day of and is a male, by religion a Hindu, and ordinarily resides at .

2. That the said minor is absolutely entitled to the movable and immovable properties, set out in the Schedule hereto, which are approximately of the value of Rs.

3. That the said properties are at present in the possession of.....

4. That the the said A. B. is at present in the custody of

5. That the only relations of the minor, now living, are:—

(1) This petitioner, his paternal uncle, residing at ,

(2) C. D., his mother, residing at , and

(9) Persons entitled to apply for order: Sec. 8, Guard. & Wards Act, 1890.

(9) Contents of petition: Sec. 10, Guard. & Wards Act, 1890.

(9) Jurisdiction: Sec. 9, Guard. & Wards Act, 1890. For power of the High Court to confer jurisdiction on Subordinate Judicial Officers, compare Sec. 4A of the Act. Residence is a matter of fact and not a matter of presumption: *Lakshman v. Gangaram*, A. I. R. 1932 Bom. 592.

(9) Matters to be considered in appointing guardian: Sec. 17, Guard. & Wards Act, 1890.

(3) E. F., his sister, and wife of G. H.. residing at .

6. That no guardian of the person and/or of the property of the minor has been appointed by any person, and no application has at any time been made to this or to any other Court with respect to the guardianship of the person and/or property of the minor, (or G. H., late of.....was appointed guardian of the person and property of the minor and died on or about the day of . No other application has been made to this or to any other Court with respect to the guardianship of the person and/or property of the said minor).

7. That this application is for the appointment of the guardian of the person and property of the said minor.

8. That L. M., the father of the minor died intestate on or about the day of (or, is a person of unsound mind or incapable of managing his own affairs, *or as the case may be*).

9. That your petitioner is the paternal uncle of the minor and the said minor is under his care and protection. The petitioner is married and has four children and resides with his family at . He is in good circumstances, having an income of Rs. a year. He is of good business habits and is a fit and proper person to be appointed guardian of the person and property of the said minor. C. D., the mother of the said minor, has requested the petitioner to get himself appointed as such guardian.

10. That suitable provision ought to be made for the education and maintenance of the said minor and for the management of his properties. Item Nos. 2, 3 and 4 of Schedule hereto are in a bad state of repair, and unless they are at once repaired, will seriously deteriorate in value.

Your petitioner, therefore, humbly prays for an order that your petitioner may be appointed guardian of the person and property of the said minor upon such terms as may be deemed just,

And for this act of kindness your petitioner as in duty bound shall ever pray.

GUARDIAN AD LITEM.

Ordinary Original Civil Jurisdiction.

Petitioner

Your petitioner therefore prays that the said
or some other fit and proper person be appointed guardian for the
suit of the said minor defendant.

17.

LEAVE TO APPEAL.

PETITION for leave to appeal to His Majesty in Council (10)

(Form No. 2, App. L., Cal. High Court, O. S. Rules)

**IN THE HIGH COURT OF JUDICATURE AT FORT
WILLIAM IN BENGAL.**

IN APPEAL FROM ITS ORIGINAL CIVIL JURISDICTION.

Appeal No.

SUIT No. of 19

Appellant to England.

versus

Respondent to England.

To the Honourable Sir
Justices of the said Court. and his Companion

The Petition of

S h o w e t h—

1. That this suit was filed by the plaintiff
in the Court of First Instance who prayed (*here set out concise state-
ment and give amount or value of subject matter*).

2. That the said suit came on for hearing before the Honourable
Mr. Justice on the day of and
his Lordship on the day of passed the decree (or
order) filed of record in this suit on the day of 19 .

3. That (*here insert name of appellant in High Court*) feeling
himself aggrieved by the said decree (or order) filed a memorandum
of appeal against the same on the day of .

4. That the said appeal came on for argument before the Court
of Appeal consisting of the Honourable and the
Honourable on the day of .
and their Lordships on the day of passed the
decree (or order) filed of record in this suit on the day
of .

5. That your petitioner feeling himself aggrieved by the said
decree (or order) is desirous of appealing to His Majesty in Council
from the same on the grounds following (*here state the grounds
and number them consecutively i, ii, iii, et seq.*)

(10) Cal. High Court O. S. Rules, Ormond's Edn., p. 727; O. XLV, rr. 2 & 3,
C. P. Code; Cf. Form No. 134, Bom. High Court, O. S. Rules.

To the Honourable Sir, _____ and his
Companion Justices of the said Court.

The petition of _____

Sheweth:

1. That this suit was filed by _____, the
plaintiff in the Court of First Instance who prayed (*here set out
consise statement and give amount of value of subject matter*).

2. That the said suit came on for hearing before the Honourable
Mr. Justice _____ and on the _____ day of
_____ 19 _____, the decree (or order) was made which was
filed of record in this suit on the _____ day of _____ 19 _____.

3. That (*here insert name of appellant in High Court*) feeling
himself aggrieved by the said decree (or order) filed a memorandum
of appeal against the same on the _____ day of _____ 19 _____.

4. That the said appeal came on for hearing before the Court
of Appeal consisting of the Hon'ble _____ and the
Hon'ble _____ and on the _____ day of _____ 19 _____,
the decree (or order) was made which was filed of record in this
suit on the _____ day of _____ 19 _____.

5. That on the _____ day of _____ 19 _____ the Court
certified that the case involved a substantial question of law as to
the interpretation of the Government of India Act, 1935, and/or any
Order in Council made thereunder.

6. That your petitioner feeling himself aggrieved by the said
decree (or order) is desirous of appealing to the Federal Court
from the same on the grounds following (*here state the grounds
and number them consecutively i, ii, iii, et seq.*)

7. That the amount of value of the subject-matter of the suit
in the Court of First Instance and of the matter in dispute on
appeal to the Federal Court is Rs. 10,000 and upwards [or "that the
decree (or order) from which an appeal is sought to the Federal
Court involves a claim or question respecting property of the amount
or value of Rs. 10, 000 and upwards"] and that the appeal herein
involves a substantial question of law.

8. That your petitioner is ready and willing to comply with
the rules and orders as to giving security for costs and otherwise
regulating appeals to the Federal Court.

Your petitioner therefore prays that your Lordships will be
pleased—

(a) to grant him a certificate that (*here state nature of
certificate required as set out in paragraph 7*) and

- (b) to admit his petition and to transmit to the Federal Court under the seal of this Court a correct copy of the record so far as is material to the questions in dispute herein.

I, _____ the petitioner abovenamed make solemn affirmation (or oath) and say that what is stated in the foregoing petition is true to my knowledge, information and belief.

Solemnly affirmed

(or sworn)

by

at

this

day of

19 .

Before me.

Commissioner for Oaths.

19.

LETTERS OF ADMINISTRATION.

PETITION for Grant of Letters of Administration.

(Form No. 88 Part II, Bom. High Court O. S. Rules)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY.

Testamentary and Intestate Jurisdiction.

Petition for letters of administration of the property and credits of _____

Deceased*

.....Petitioner.

Sheweth,

That the abovenamed †

died at

on or about the

day of

2. That the said deceased at the time of his death left (a) property within the Town and Island of Bombay and within the Presidency.

3. That the said deceased died intestate and that due and diligent search has been made for a will but none has been found.

4. That the said deceased left him surviving as his only next-of-kin according to _____ (b) law residing at

5. That the petitioner as

** of the deceased

* Insert name in full and profession. If deceased was a bachelor or spinster that should be stated.

† Insert name of the deceased.

(a) Or had fixed place of abode at.

(b) Here state what law.

** State the relationship to the deceased.

claims to be entitled to a
estate.

share of the

6. The petitioner has truly set forth in Schedule No. I hereto all the property and credits which the deceased died possessed of or entitled to at the time of his death which have or are likely to come to the petitioner's hands.

7. That the petitioner has also truly set forth in Schedule No. II (c) all the items that by law he is allowed to deduct.

8. That the said assets exclusive of what the deceased may have been possessed of or entitled to as a trustee for another and not beneficially or with power to confer a beneficial interest and also exclusive of the items mentioned in the said Schedule No. II but inclusive of all rents, interests and dividends and increased value since the date of his death are under the value of Rs.

9. That no application has been made to any District Court or Delegate or to any* High Court for Probate of any will of the said deceased or letters of administration with or without the will annexed to his property and credits.

The petitioner therefore prays that letters of administration may be granted to him having effect throughout (d) the Bombay Presidency.

I the petitioner abovenamed do solemnly declare that what is stated in paragraphs is true to my own knowledge and that what is stated in the remaining paragraphs is true to the best of my information and belief and I believe the same to be true.

Solemnly declared at
aforesaid this day of

Before me,
Associate.

(c) Full particulars of debts due by the estate, including names of creditors, amounts of claims and the dates when they became due, must be given in the Schedule.

* Or if made state to what Court, by what person and what proceedings have been had.

(d) Or throughout British India.

20**LETTERS OF ADMINISTRATION.****PETITION for Grant of Letters of Administration with the Will annexed.**

(Form No. 90, Part II, Bom. High Court, O. S. Rules)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY.**Testamentary and Intestate Jurisdiction.**

Petition for letters of administration with the will
annexed of the property and credits of*
deceased.

.....Petitioner.

S h e w e t h,

1. That the abovenamed (a) died at
on or about the day of
2. That the said deceased at the time of death
left (b) property within the Town and Island of Bombay and in
the Presidency.
3. That the writing hereto annexed and marked
in his last will and testament.
4. That the said will was duly executed at (c)
on the day of
5. That by the said will the deceased appointed **
sole executor thereof, but he has since died, to wit on the day of
without having proved the said will, and that the
petitioner is the of the deceased.
6. That the petitioner has truly set forth in Schedule No. I
hereto all the property and credits which the deceased died
possessed of or entitled to at the time of death which
have or are likely to come to his hands.
7. That the petitioner has also truly set forth in Schedule
No. II (d) all the items that by law he is allowed to deduct.

* Insert name in full and profession. If deceased was a bachelor or spinster that should be stated.

(a) Insert name of the deceased.

(b) Or had a fixed place of abode at

(c) State where.

** Or no executor as the case may be.

(d) Full particulars of debts due by the estate including names of creditors,

8. That the said assets exclusive of what the deceased may have been possessed of or entitled to as a trustee for another or others and not beneficially or with power to confer a beneficial interest and also exclusive of the items mentioned in the said Schedule No. II but inclusive of all rents, interests and dividends and increased value since the date of death are under the value of Rs.

9. That the said deceased left surviving
as his only next-of-kin according to * residing at

10. That no ** application has been made to any District Court or Delegate or to any other High Court for probate of any will of the said deceased or letters of administration with or without the will annexed to his property and credits.

The petitioner prays that letters of administration with the said will annexed may be granted to him as the of the said deceased having effect throughout the Bombay Presidency.

I the petitioner abovenamed
do declare that what is stated in paragraphs is true to my own knowledge, and that what is stated in the remaining paragraphs is true to the best of my information and belief and I believe the same to be true.

Declared at
aforesaid this day of

Before me,
Associate.

amounts of claims and the dates when they became due must be given in the Schedule.

* State what law.

** Or state if prior application made.

† Or throughout British India.

21**LETTERS OF ADMINISTRATION.****PETITION for Judge's order to apply for Letters of Administration**

(Form No. 94, Part II, Bom. High Court, O. S. Rules)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY.**Testamentary and Intestate Jurisdiction.**

Petition for letters of administration
of the property and credits of
deceased.

.....Petitioner.

S h e w e t h ,

1. That the deceased abovenamed died
at on or about the day of

2. That the said deceased left property in
and within the

3. That the said deceased died intestate as this petitioner believes and that although due and diligent search has been made for a will of the deceased none has been found.

4. That the said deceased at the time of death left him surviving

5. That the petitioner is the of the said minor who lives with and under the care and protection of your petitioner.

6. That in order to protect the property left by the deceased and in the interest of the said minor your petitioner is desirous of applying to this Court for letters of administration and with that view to make a proper petition to this Court.

7. That your petitioner has no interest in the estate of the deceased directly or indirectly adverse to that of the said minor except so far as her maintenance is concerned.

8. Your petitioner prays that she as the of said deceased and the mother of the said minor may be appointed for the purpose of applying for the letters of administration to the property and credits of the said deceased for the use and benefit of the said minor and limited to the period of his minority.

6. That the petition has truly set forth in Schedule No. 1 here-to all the property and credits which the deceased died possessed of or entitled to at the time of his death which have or are likely to come to his hands.

7. That the petitioner has also truly set forth in schedule No. II (f) all the items that by law he is allowed to deduct.

8. That the said assets exclusive of what the deceased may have been possessed of or entitled to as a trustee for another and not beneficially or with power to confer a beneficial interest and also exclusive of the items mentioned in the said Schedule No. II, but inclusive of all rents, interests and dividends and increased value since the date of his death are under the value of Rupees

9. That the said deceased left him surviving as his only next-of-kin according to (g) law.

10. That no application has been made to any District Court (h) or Delegate or to any other High Court for probate of any will of the said deceased or letters of administration with or without the will annexed to his property and credits,

The petitioner prays that probate may be
granted to him having effect through-
out (i) the Bombay Presidency.

I, _____ the petitioner
abovenamed do solemnly declare that what is stated in paragraphs
is true to my own knowledge and that what is stated in the
remaining paragraphs is true to the best of my information and
belief and I believe the same to be true.

Solemnly declared at
aforesaid this _____ day of

before me,
Associate.

(f) Full particulars of debts due by the estate, including names of creditors, amounts of claims, and the dates when they became due must be given in the Schedule.

(g) Here insert what law.

(h) Or if made state to what Court, by what person and what proceedings have been had.

(i) Or throughout British India.

23.

PROBATE.

1. PETITION for Grant of Probate.

(Form No. 108, App. II, Mad. High Court, O. S. Rules)
IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Testamentary and Intestate Jurisdiction.

(Original Petition No. of 19 .)

In the matter of the will of A. B., of (description) deceased.

1. C. D. and
2. E. F. } Petitioners

OR

Between :—

1. C. D. and
2. E. F. } Petitioners

AND

1. G. H. and	}	Respondents.
2. J. K.		

The abovenamed petitioner states as follows :—

1. C. D., the petitioner, is a land-owner and resides at _____ . The address of the petitioner for service of all notices and process is _____

2. E. F., the respondent, is

3. The abovenamed A. B. died on the _____ day of _____
at _____ where he was then residing possessed of pro-
perty within the Presidency of Madras (and also within the Presi-
dency of _____).

4. The writing hereunto annexed, now shown to the petitioner and marked with letter A., is the last will and testament of the said A. B., and was duly executed by him at _____ on the _____ day of _____ in the presence of the witnesses whose names appear on the foot thereof.

5. That the petitioner is the executor (or one of the executors) named in (according to the tenor thereof) the said will.

6. The amount of the assets which are likely to come into the petitioner's hands does not exceed in the aggregate the sum of Rs..... and the net amount of the said assets, after deducting all

items which the petitioner is by law allowed to deduct is of the value of Rs.

7. That no application has been made to any District Court or Delegate or to any other High Court for the probate of any will of the said deceased or letters of administration with or without the will annexed of his property and credits.

8. That the petitioner hereby undertakes to duly administer the property and credits of the said A. B. deceased and in any way concerning his will by paying first his debts and then the legacies therein bequeathed so far as the assets will extend and to make a full and true inventory thereof and exhibit the same in this Court within six months from the date of grant of probate to the petitioner, and also to render to this Court a true account of the said property and credits within one year from the said date.

9. Your petitioner, therefore, prays :

(a) that he may be allowed to prove the will in common form, and that probate thereof, to have effect throughout the whole of British India (or limited to the Presidency of Madras), may be granted to him.

I, C. D., the petitioner abovenamed, do solemnly declare that what is stated in paragraph is true to my own knowledge, and that what is stated in the remaining paragraphs is true to the best of my information and belief, and I believe the same to be true.

Solemnly declared at
by the aforesaid this day of

I, J. K., of (residence and description) one of the witnesses of the said will and testament of A. B., the testator mentioned in the petition, declare that I was present together with
at the house of and we did then and there see the said deceased set and subscribe his name at the foot of the said will now shown to me and marked A and declare and publish the same as and for his last will and testament, and that thereupon, I and the said did at the request of the said deceased and in the presence of each other, all being present at the same time, set and subscribe our respective names and signatures at the foot of the said will as witness thereof.

Before me
Commissioner.

24. PROBATE

PETITION for Grant of Probate. (11)

(District Court Form).

IN THE COURT OF THE DISTRICT JUDGE OF.....

Petition for Probate.

The humble petition of..... of

S h e w e t h :—

1. That one A. B., who in his life time was a Hindu governed by the Dayabhaga School of Hindu Law, died at..... on the day of

2. That the deceased at the time of his death had a fixed place of abode at within the jurisdiction of the Court (or had some property within the jurisdiction of the Court).

3. That the writing hereunto annexed is his last will and testament, written in the language, an English translation whereof by one of the translators of the Court is hereunto annexed and marked with the letter 'A'.

4. That the same was duly executed at ... on day of

5. That the petitioner, the eldest son of the testator, is the executor named in the said will.

6. That the amount of assets which are likely to come to your petitioner's hands is of the value of Rs.... as fully set forth in your petitioner's affidavit hereto annexed and marked 'B'.

7. That to the best of your petitioner's belief no application has been made to any other Court for probate of the said will or for letters of administration of the property and credits of the deceased.

Your petitioner therefore humbly prays that
probate of the said will be granted to your petitioner
as the sole executor named therein, and for this

- (11) Sec. 276 (2) (a), Ind. Suc. Act, 1925. Where the application is to the District Judge and any portion of the assets likely to come to the petitioner's hands is situate in another province, the petition shall further state the amount of such assets in each province and the District Judges within whose jurisdiction such assets are situate :
Sec. 276 (3), Ind. Suc. Act, 1925. See Secs. 280, 281, Ind. Suc. Act.

act of kindness your petitioner as in duty bound shall ever pray.

I, _____ petitioner do declare that what is stated in the petition is true to the best of my information and belief.

(Signature of the petitioner).

I (C. D.), one of the witnesses to the last will and testament of the testator mentioned in the above petition, declare that I was present and saw the said testator affix his signature (or mark, thereto (or that the said testator acknowledged the writing annexed to the above petition to be his last will and testament in my presence).

25.

RECEIVER.

APPLICATION for Appointment of a Receiver in an Administration Suit against Executor. (12)

The humble petition of the plaintiff abovenamed

Sheweth :—

1. That your petitioner has filed the above suit for construction of the will of A. B. deceased, for ascertainment of the rights of the parties thereto, for administration, for discovery and appointment of a receiver.

- (12) **Reference :** *Haines v. Carpenter*, 1 Woods 262 (Amer.), cited in High, pp. 664, 665 (*Per Woods J.*, A strong case must be made out to induce the Court to dispossess a trustee or executor who is willing to act; *fd. in Surendra Kumar Roy Chowdhury v. Sushil Kumar*, (1928) I. L. R. 55 Cal. 249, 259; *Pandurang v. Dwarkadas*, (1933) 35 Bom. L. R. 700 (The Court does not as a rule appoint a receiver as against executors who have obtained probate, unless there is gross misconduct or mismanagement and waste on their part. The Court has, apart from the Succession Act, general jurisdiction to appoint a receiver in any case in which it may appear just and convenient to do so. Such appointment cannot be claimed as of right merely because the proceedings are contested; but whenever there is a *bona fide* dispute and a case of necessity has been made out, the Court in its discretion generally makes the grant.); *Srimati Prosonomoyi Devi v. Beni Madhab*, (1883) I. L. R. 5 All. 556 (The mere fact that a plaintiff in his plaint makes violent and wholesale charges of waste and malversation against a defendant in possession of

2. That A. B., the father of the petitioner, died February, 5th, 19....., having made his will dated January 6th, 19....., and appointed the opposite party his executor, who proved his will May 10th, 19.....

3. That by his will the said testator made provision for paying of certain debts and gave directions as to certain bequests and monthly legacies and ultimately left the properties movable and immovable, particulars whereof are set out in Schedule "A" hereto annexed, to the petitioner.

4. That after the grant of probate the opposite party has been administering the estate of the deceased as executor.

5. That the opposite party has been guilty of gross misconduct, mismanagement and breach of duty in the administration of the said estate.

Particulars :

(a) He colluded with C. D. and E. D., debtors to the estate, and allowed the claims against them amounting to Rs. to be barred.

(b) He has been mixing up the funds of the estate with his own funds and has put all the moneys of the estate into his personal account with Bank.

(c) He has not filed any inventory or accounts.

(d) He has not made any investments of the surplus moneys of the estate in his hands.

(e) He has not been paying the legacies regularly although he has sufficient funds in his hands.

(f)

(g)

property as executor under a will or as a tenant for life, and upon this basis applies for a receiver to be appointed, it is not a necessary consequence that such appointment should be made); followed in *Muhammad Askari v. Nisar Husain*, (1921) I. L. R. 43 All. 311, 313; *Emanjan v. Emanjan*, A. I. R. 1927 Rang. 135 (where a receiver was appointed on the ground that an executor failed to file the inventory of the property and the accounts within the time prescribed by law and did not account for 4 years' income from the estate); *Ma Khatoon v. Ma Mya*, A. I. R. 1934 Rang. 153 (Where no charge of maladministration and waste had been alleged, a mere claim to property made by an alleged daughter of the deceased was held to be no ground for the appointment of the receiver);

6. That the opposite party is saddled with debts and his properties are heavily mortgaged (state amount of debts and value of his properties).

7. That the opposite party has in his hands over..... rupees belonging to the estate, which sum is considerably more than the amount of his security bond, and your petitioner is apprehensive that the opposite party will utilise the funds of the estate for payment of his own debts or otherwise misappropriate the same.

8. That the estate is liable to imminent danger of waste.

9. That the opposite party is an unfit and incompetent person to act as executor.

10. That in the premises it is just and convenient that a receiver should forthwith be appointed of the estate until the disposal of the suit or further order.

Your petitioner therefore humbly prays for an order that a receiver be forthwith appointed of the said estate until the disposal of the suit or further order and that such further and other orders be made as the Court thinks just and proper.

And for this act of kindness your petitioner as in duty bound shall ever pray.

26.

RECEIVER.

APPLICATION for Appointment of a Receiver in a Suit based on a Simple Mortgage. (13)

1. That on.....the opposite party executed a deed of simple mortgage for Rs.....in favour of the petitioner in respect of premises No.....fully described in schedule "A" hereto annexed.

-
- (13) **Jurisdiction of Court to appoint Receiver in a Suit based on a simple mortgage:** According to a Full Bench case of the Allahabad High Court, in the case of a simple mortgage where the mortgagor is in possession, the Court has no power to appoint a Receiver : *Ram Swarup v. Anandi Lal*, (1936) I.L.R. 58 All. 949 (F.B.). In a recent case, a different view has been taken by the Bombay High Court, namely, that in a suit on a simple mortgage the Court has jurisdiction to appoint a Receiver even after the making of a preliminary decree for sale : *Damodar Moreshwar v. Radhabai Damodar*, I. L. R. (1939) Bom. 82, following *Paramasivan Pillai v. Ramasami Chettiar*, (1936) I.L.R. 56 Mad. 915 (F. B.); *S. C. Venkenna*

2. That the said mortgage contained an obligation on the part of the mortgagor to repay the mortgage money with interest at 6 per cent. per annum on.....and a provision that if the money was not paid on or before that date, the mortgagee should be at liberty to bring the mortgaged property to sale.

3. That the mortgagor, opposite party, made default in payment and accordingly on.....the petitioner filed the above suit to enforce his mortgage.

4. That the preliminary decree in the said suit was made on.....The said decree provided that in default of payment of the amount to be found within.....the plaintiff might apply for sale of the mortgaged property.

5. That.....months have elapsed since the preliminary decree was made.

6. That interest amounting Rs..... is in arrears.

7. That rates and taxes amounting to Rs.....are also in arrears.

8. That the mortgaged property has been allowed to fall into disrepair (give particulars).

9. That the value of the property, which will not exceed Rs.—, will be insufficient to meet the arrears of rates and taxes and the plaintiff's claim in full and consequently the security is in jeopardy.

10. That the mortgaged property yields an income of Rs..... per month.

11. That it is necessary that the income of the property should be applied for payment of rates and taxes in arrears and for repairs and next in payment of the petitioner's dues.

v. Mangammal, (1936) I.L.R. 14 Rang. 308 (F.B.); *Gobind Singh v. Punjab National Bank*, A. I. R. 1935 Lah. 17.

- (13) **Ground for appointment of a Receiver** : Mere fact that interest is in arrears does not entitle the plaintiff to have a Receiver appointed. It must be shown that the mortgagee, having originally been secure, finds that the security is likely to be insufficient, either by reason of considerable accumulation of interest or by reason of depreciation of the value of the property itself : *S. K. R. M. Chettyar v. E. A. Chettyar*, A. I. R. 1935 Rang. 525 ; cf. *S. C. Venkenna v. M. O. Mangammal*, (1936) I. L. R. 14 Rang. 308 ; cf. also *Ma Joo Ten v. Collector of Rangoon*, (1934) I. L. R. 12 Rang. 437.

12. That in the circumstances it is just and convenient that a Receiver should forthwith be appointed of the mortgaged property.

Your petitioner therefore humbly prays for an order—

(a) That a Receiver be appointed of the mortgaged property pending the sale ;

(b) That the Receiver so to be appointed be directed to take immediate possession of the mortgaged property and, out of the rents issues and profits thereof, to pay the rates and taxes in the first instance, and next to execute the urgent and necessary repairs, and lastly to pay the net balance to the petitioner towards his claim under the decree ;

(c) That such further and other orders be made including the costs of this application as the Court thinks fit and proper.

And for this act of kindness your petitioner as in duty bound shall ever pray.

27.

RECEIVER.

APPLICATION for Appointment of interim Receiver in a Partition Suit. (14)

The humble petition of the plaintiff
above-named

Sheweth :—

1. That one A. B., late of....., died intestate on or about.....leaving him surviving the petitioner and the opposite party, his sons and heirs under the Dayabhaga School of Hindu Law, and leaving movable and immovable properties of considerable value and extent. Particulars of the said properties, as far as the petitioner has been able to ascertain, are set out in Schedule "A" hereto annexed. .

(14) *Jurisdiction of Court* : The Court has jurisdiction to place *the whole of a joint estate* out of which a plaintiff seeks to have his share partitioned * in the hands of a receiver : *Poreshnath Mookerjee v. Omerto Nauth Mitter*, (1890) I. L. R. 17 Cal. 614 ; *Suprasanna Roy v. Upendra*, (1913-14) 18 C. W. N. 533, 536 ; cf. *Mai Bu v. Mai Oh Gyi*, (1927) I. L. R. 5 Rang. 70 (where, upon the facts of the case, the Court refused to appoint a Receiver of the whole property).

2. That at the time of the death of his father the petitioner was a minor, aged 12, and the opposite party was aged 28.

3. That after the death of A. B. the opposite party managed the said joint family properties as Karta.

4. That the average net income of the said properties was and is about Rs. 15,000/- annually.

5. That the petitioner attained majority on.....

6. That in January, 19..., the petitioner verbally requested the opposite party, (a) to disclose to him what the joint family properties consisted of at the time of the death of their father and what they consisted of then, (b) to explain to him the accounts relating to the said properties, and (c) to allow him to participate in the management of the said properties, but the opposite party put off giving the petitioner any information as regards the said properties, and positively refused to show him any accounts or to allow him to take any part in the management of the said properties.

7. That by reason of the unreasonable attitude of the opposite party towards the petitioner, considerable ill-feeling was created between them, and consequently sometime in,.....19..., the petitioner removed, as he was compelled to do, ~~from~~ the joint family dwelling house at.....to a rented house at.....

8. That since then, the opposite party is in exclusive possession and enjoyment of the joint family properties and has completely withheld payment of any sum to the petitioner out of his undivided one-half share of profits in the joint estate.

9. That on.....the petitioner instituted the above suit against the opposite party for partition, discovery and accounts.

(14) Grounds for appointment of Receiver :

- (i) **Exclusion of plaintiff, although no case of waste made out :** *Ramji Ram v. Saligram*, (1909-10) 14 C. W. N. 248 ; *Basant Ram v. Dasondhi Mal*, A. I. R. 1929 Lah. 497 ; *Swaminathan v. Somasundaram*, A. I. R. 1938 Mad. 730 (where plaintiff was not able to get his fair share of income) ; cf. *Suprasanna Roy v. Upendra Narain Roy*, (1913-14) 18 C. W. N. 534, 536.
- (ii) **Mismanagement and waste :** *Krishnan v. Nani Maruvalamma* A. I. R. 1935 Mad. 402 ; *Hanumayya v. Venkatasubbayya*, (1895) I. L. R. 18 Mad. 23.
- (iii) **Likelihood of debts being realised and settlement of these debts arrived at without the plaintiff's knowledge and in a manner prejudicial to plaintiff :** *Manohar Lal v. Kishan Lal*, A. I. R. 1938 Lah. 10.

10. That the petitioner is paying Rs. 60/- per month as rent of the house he is occupying, and requires at least Rs. 150/- per month for his personal expenses and also other sums of money for expenses in connection with the prosecution of this suit.

11. That the petitioner has no independent source of income apart from the properties now in the exclusive possession and enjoyment of the opposite party as aforesaid.

12. That in the circumstances it is just and convenient that a Receiver should be appointed of the said joint family properties.

Your petitioner therefore humbly prays for an order—

(a) that the Official Receiver of the Court or such other person as the Court may select, be appointed Receiver of the said joint family properties pending the disposal of the suit or until further order.

(b) that the opposite party be directed to forthwith make over to the said Receiver the joint family properties specified in annexure "A" hereto and such other properties, not included in the said annexure but forming part of the joint estate in his possession, and all documents, books of accounts and papers relating to the said joint estate ;

(c) that the said Receiver be directed to pay to the petitioner every month Rs.....or such other sum of money to be fixed by the Court until the disposal of the suit or further order.

(d) that such further and other orders be made as the Court thinks fit,

And for this act of kindness your petitioner as in duty bound shall ever pray.

(14) **Appointment of a party as Receiver** :—The Court will not appoint a party to the action as a receiver unless by consent or unless there are special circumstances justifying such appointment : *Jan Mahomad v. Ghulam Rasul Khan*, A. I. R. 1926 Sind 37 ; *Bhagwan Das v. Sheonandan Prasad Sahu*, (1925) I. L. R. 3 Pat. 964.

(14) **Temporary Injunction and appointment of Receiver—distinction between** :—The distinction between a case in which a temporary injunction may be granted, and a case in which a receiver may be appointed is that, while in either case, it must be shown that the property should be preserved from waste or alienation ; in the former case, it would be sufficient if it be shown that the plaintiff in the suit has a fair question to raise as to the existence of the right alleged ; while in the latter case, a good *prima facie* title has to be made out : *Chandidat Jha v. Padmanand Sing Bahadur*, (1895) I. L. R. 22 Cal. 459.

28.

RECEIVER.

APPLICATION for Appointment of a Receiver of a Partnership Business. (15)

The humble petition of the plaintiff above-named

Sheweth:—

1. That on or about.....19..... the petitioner instituted the above suit for dissolution of the partnership business of....., of which the parties hereto are partners, for appointment of a receiver and for other reliefs.

2. That on19..... the petitioner entered into partnership articles with the opposite parties (defendants Nos. 1 and 2) for carrying on business in leather goods under the firm of.....

3. That by the said partnership articles it was inter alia agreed—

(a) that the petitioner would do the canvassing in connection with the said business and that the opposite parties would otherwise manage the said business and remain in charge of the partnership assets and of the books of account relating to the business;

(b) that no partner during the continuance of the partnership should carry on a separate trade on his own account;

(c) that the partners should contribute to the capital, and would be entitled to the profits, and be liable for the losses, of the business, in equal shares.

4. That accordingly the partnership business was started on.....
.....and has been carried on since.

(15) **Grounds for appointment of a receiver in a partnership action:—**The following are among the grounds for appointment of a receiver of a partnership business:

(i) Where, by agreement, the partners have divested themselves of their right to wind up the affairs of the concern: *Davis v. Amer*, (1851) 3 Drew 64.

(ii) Where business has been brought to a complete deadlock: *Re Yenidje Tobacco Co., Ltd.*, (1916) 2 Ch. 426.

(iii) Where there has been gross mis-management: *Smith v. Jeyes*, (1841) 4 Beav. 495.

(iv) Where one partner excludes another partner from the management of the partnership: *Const v. Harris*, (1824) 37 E. R. 1191.

5. That in September, 19....., the petitioner came to know—

(a) that the opposite parties, in breach of the partnership agreement, were carrying on a separate trade in leather goods on their own account with partnership property under the name of ;

(b) that the opposite parties had already made away with (give particulars of assets) ; and

(c) that they colluded with A. B. and C. D., debtors of the firm, to the extent of Rs.....and Rs.....respectively, and allowed them to delay paying their debts.

6. That the opposite parties have refused to render any account of their dealings with the partnership assets to the petitioner and/or to allow him to take any part in the management of the business.

7. That the opposite parties are so conducting the business that the partnership funds are in danger of being lost.

8. That there have been considerable quarrels and disagreements between the petitioner on the one hand and the opposite parties on the other occasioning a complete deadlock in carrying on the business.

9. That in the premises it is just and convenient that a receiver should forthwith be appointed of the partnership business.

Your petitioner therefore humbly prays—

(a) that a receiver be forthwith appointed of the stock-in-trade and the effects of the said partnership and of all securities, books of accounts and papers in the hands of the opposite parties relating to the said effects and the said partnership ;

(b) that the said receiver be authorised to sell the said business and the stock-in-trade and the goodwill thereof as a going concern either by private sale or by public auction ;

(v) Where there has been wilful denial of the complaining partner's rights : *Wilson v. Greenwood*, (1818) 1 Swanst. 481.

(vi) Where a partner has so mis-conducted himself as to show that he is no longer to be trusted : *Estwick v. Conningsby*, (1632) 1 Vern. 118 ; *Harding v. Glover*, (1810) 18 Ves. 281.

(vii) Where it is necessary to protect the divergent interest of the partners when they fall out : *Dover E. F. v. Dover E.S.*, 29 (1915) I. C. 684.

See Kerr on Receivers, 10th Edn., pp. 84 to 96 ; Lindley on Partnership, 10th Edn., pp. 629—642 ; Pollock and Mulla's Ind. Part. Act., pp. 128, 129, 130.

(c) that the said receiver be directed to pay the debts due from the said business ; and

(d) that such further and other orders be made as the Court thinks just and proper.

And for this act of kindness your petitioner as in duty bound shall ever pray.

29.

RECEIVER AND MANAGER.

Application for Appointment of a Receiver and Manager of a Partnership Business. (16)

The humble petition of the plaintiff
abovenamed

Sheweth :—

1. That by the terms of a partnership deed dated.....19....., the petitioner and the opposite party agreed to carry on business in co-partnership as mechanical engineers, iron-founders, boiler-makers and contractors at.....under the firm of..... from the.....19....., until the.....19.....

2. That the said deed of partnership *inter alia* provides—

(a) that a partner may determine the partnership if he so desires by giving not less than twelve months' or more than eighteen months' written notice of his desire ;

(b) that within six calender months after the expiration or determination of the partnership, otherwise than by the death or bankruptcy of either partner, a full and general account in writing should be taken by the partners of all the moneys, stock-in-trade, debts and effects then belonging to or due to the partnership, and after payment of all moneys and debts then due by the partnership, the stock-in-trade, debts and effects then belonging or due to the partnership should be divided between the partners in equal shares.

3. That on the.....19..... the partnership was determined pursuant to a written notice given by the opposite party on the.....19.....

(16) **Reference :** *Taylor v. Neate*, (1883) 39 Ch. D. 538 (where upon the facts the Court came to the conclusion that there must be a receiver and a manager). Cf. *Radhakanta Pal v. Benode Behari Pal*, A. I. R. 1934

4. That although six months have expired since the determination of the partnership, no accounts of the partnership have been taken.

5. That the stock-in-trade of the partnership include tools, machinery and plants.

6. That there are existing contracts between the partners *inter se* and contracts with third parties which must be performed.

7. That there are disagreements between the parties as to the mode of executing works which they are bound to execute according to the existing contracts.

8. That on the.....19..... the petitioner filed the above suit *inter alia* for an account of the partnership dealings between the parties, for sale of the partnership business as a going concern, and pending the sale, for the appointment of a receiver and manager of the said business.

10. That in the circumstances it is just and convenient that a Receiver and Manager be appointed for the purposes aforesaid.

Your petitioner therefore prays that a receiver and manager of the partnership business be appointed, upon such terms as the Court thinks fit, to collect and get in the outstanding debts and assets, and out of the first moneys to be received, to pay the debts due from the partnership, and to manage the business until the sale thereof or further order, and that such further and other orders be made as the Court thinks fit.

And for this act of kindness your petitioner as in duty bound shall ever pray.

Cal. 441 (In all cases of partnership, a receiver is appointed only for realizing the assets of the partnership with a view of its winding up and to carry on business only in so far as it is incidental to its winding up. An order appointing a receiver to carry on the proper management of the business is wrong. A party to the suit should not be appointed except with the consent of the other party. If there is some ground for the plaintiff-partner suspecting the honesty of the defendant partner, Court should not appoint the defendant partner as receiver of the firm). See Lindley on Partnership, 10th Edn, pp. 622, 629; Pollock and Mulla's Ind. Part. Act, pp. 128-130.

30.

SUCCESSION CERTIFICATE.

PETITION for Succession Certificate.

(Form No. 96, Part II, Bom. High Court, O. S. Rules)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY.

Testamentary and Intestate Jurisdiction.

Petition for Succession Certificate in respect

of certain securities
debts

belonging to Deceased.

Petitioner.

Sheweth :—

1. That the abovenamed* died at
on or about the day of

2. That the said Deceased ordinarily resided (left property)
within the Town and Island of Bombay.

3. That the said Deceased died intestate and that due and
diligent search has been made for a will but none has been found
or

The said Deceased died leaving a will dated and executed
at a copy of which is hereto annexed and
marked "A."

4. That the said Deceased at the time of his death left him
surviving as his only next-of-kin according to (a) law
residing at

5. That the Petitioner as (b) of the Deceased
claims to be entitled to a share of the estate.

6. That there is no impediment under section 370 of the Indian
Succession Act, 1925, or under any other provision of this Act or
any other enactment to the grant of the certificate or the validity
thereof if it were granted.

7. That the Petitioner has truly set forth in Schedule No. 1
hereto the securities in respect of which the certificate is applied
for. The Succession Certificate is required for the purpose of

* Insert name of the Deceased.

(a) State law.

(b) State relationship to the Deceased.

(c) The said assets in respect of which the Succession Certificate is required are under the value of Rs.

8. That no application has been made to any District Court or Delegate or to any High Court for Probate of any will of the said Deceased or for Letters of Administration with or without the will annexed to his property and credits.

9. That no application for Succession Certificate in respect of any debt or security belonging to the estate of the Deceased has been (d) made to any District Court or Delegate or to any High Court.

Your Petitioner therefore prays that a Succession Certificate may be granted to the Petitioner in respect of the debts and securities set forth in Schedule I hereto with power to

I, the Petitioner abovenamed do solemnly declare that what is stated in paragraphs is true to my own knowledge and that what is stated in the remaining paragraphs is true to the best of my information and belief and I believe the same to be true.

Solemnly declared at
aforesaid this day of

Before me,
Associate.

(c) Mention the purpose for which the certificate is required.

(d) or if made state to what Court by what person and what proceedings have been taken.

PART IV.

FORMS OF PLEADINGS.

PLAINT.

1.

ACCOUNT.

CLAIM by Principal against Agent for Account. (a)

1. On the.....19....., the plaintiff (orally or in writing, as the case may be) employed the defendant as his agent to collect the rents of the plaintiff's various house properties from the tenants, to discharge thereout the taxes and rates relating thereto and duly to account to the plaintiff therefor. Particulars of the said properties are set out in Schedule 'A' hereto annexed.

(a) **Cause of action :** The plaintiff must plead facts showing, (i) that he employed the defendant as his agent either in writing or orally, or placed him in a situation in which, according to the ordinary rules of law, or perhaps it would be more correct to say, according to the ordinary usages of mankind, he is understood to represent or act for the plaintiff who has so placed him : *Pole v. Leask*, (1863) 33 L. J. Ch. 155; (ii) the terms of employment; (iii) if necessary, the place where the employment was made and the place of performance (Such places have a bearing on the place of suing); (iv) that the defendant has not rendered any accounts or any proper accounts or that he has rendered only partial accounts; (v) that there was demand and refusal during the continuance of the agency or that the agency has terminated (which has a bearing on the starting point of limitation); and lastly (vi) that consequently, the plaintiff is left in ignorance as to what exact sum is due from the defendant on the accounts. If the plaintiff knows the particulars of some items (as where accounts have been partially rendered), he may join his claim for debt on those items with a claim for account on the other items about which he does know. In the alternative, he may ask for the taking of general accounts.

(a) **Reliefs :** For reliefs to be asked for, see *Soshi Bhooshun v. Guru Charn*, (1881) I. L.R. 7 Cal. 89.

(a) **Interest by way of damages** may be claimed on the sum to be found due on the account : *Pearse v. Green*, (1831) 1 Jac. & W. 135, 140, 144 (If agents and trustees neglect to account properly, if they violate their duty, the Court for the sake of compelling them to perform it says that they ought

2. The defendant acted as such agent for six months, namely from.....19... to.....19... inclusive and during that time collected, but has not accounted for any of, the said rents, nor has paid over any moneys in his hands to the plaintiff, although requested in writing dated..... so to do within a fortnight from the date of such request.

to be charged with interest, on what they have retained), *fd. in Harsant v. Blaine Macdonald & Co.*, (1887) 56 L. J. Q. B. 511. *Cf. Bengal Nagpur Ry. Co., Ltd. v. Ruttanji Ranji*, (1937-38) L. R. 65 I. A. 66, *fd. in Sm. Nirupama Devi. v. Surabala*, (1937-38) 42 C. W. N. 1004. If however no demand is made upon the agent, it is a simple case of an agent retaining money which he ought to pay over, but which he has not been required to pay. In such a case the agent cannot be made to pay interest: *Subba Pillai v. Ramasami*, (1904) I. L. R. 27 Mad. 512. An agent is liable to pay interest where he is found to be guilty of fraud: *Tota Ram v. Zalim Singh*, 1939 A. L. J. 1065.

- (a) **Limitation** : Art. 89 Ind. Lim. Act: The period in Art. 89 runs either from the termination of agency or from an earlier date when accounts were demanded and refused: *Ganeshdas v. Gangaram*, A. I. R. 1930 Sind 142.
- (a) **Demand must be express, the refusal may be either express or implied** : *Madhusudan v. Rakhal*, (1916) I. L. R. 43 Cal. 248, 258; *Bhabatarini v. Sheikh Bahadur*, (1919) 30 C. L. J. 90; *Abdul Latif v. Gopeswar*, (1932) 56 C. L. J. 172; *Syed Hasan Imam v. Debi Prasad*, (1924) I. L. R. 3 Pat. 546.
- (a) **Where there has been termination of agency**, the agent is bound to render account for the entire period of agency: *Syed Hasan Imam v. Debi Prasad*, *supra*. As to what constitutes termination of agency, see Sec. 201, Ind. Cont. Act, 1872; *Somasundaram v. Nachal Achi*, A. I. R. 1935 Mad. 707; *Hingu Lal v. Sarju Prasad*, 1937 A. L. J. 264.
- (a) **Jurisdiction** :
 - (i) **Place of suing with reference to cause of action** : The cause of action in a suit for account against an agent arises at the place where the contract of agency was made or where it was to be performed or where the refusal to account took place: *Ramdas v. Dhanpat*, (1925) I. L. R. 6 Lah. 153. If no place is appointed for the performance of the promise, the doctrine of 'debtor must find out the creditor', when the creditor is within the realm, may be applied; *cf. Soniram v. R. D. Tata & Co.*, (1927) L. R. 54 I. A. 265; *cf. Bansilal v. Ghulam*, (1926) L. R. 53 I. A. 58; *Sm. Tusliman Bibi v. Abdul Latif*, (1935-36) 40 C. W. N. 392; *Society for Propagation of Gospel v. R. Sama Rao*, A. I. R. 1938 Mad. 977. For fuller discussion, see Part II, Chap. X, pp. 281—288.
 - (ii) **Pecuniary jurisdiction** : The jurisdiction of the Court in an account suit does not depend on the amount for which the final decree may be passed: *Kannayya v. Venkata*, (1917) I. L. R. 40 Mad. 1 (F. B.); *Kandaswami Pillai v. Arunachalam*, A. I. R. 1932 Mad. 656; *Sudersan*

3. The plaintiff has in consequence been unable to ascertain how much the defendant has realised as rent and, if, and what, taxes, and rates he has paid (You may add, 'and is therefore unable to sue for a sum certain').

The plaintiff claims—

(1) To have a full and true account of the receipts of such rents and of the payments, if any, of such taxes and rates.

(2) Payment of such sum as may be found due from the defendant upon the taking of accounts.

(3) Interest by way of damages.

PLAINT.

2.

ACCOUNT.

CLAIM by Principal against Agent for Account, with Allegations of Wilful Default. (b)

1. By a registered power of attorney dated.....19..., the plaintiff employed the defendant as his paid agent to apply for and collect the rents of the various house properties of the plaintiff from the tenants and duly to account to the plaintiff therefor. Particulars of the said properties are set out in Schedule 'A' hereto.

2. The defendant acted in pursuance of the agreement fromto....., and during that time conducted his business so recklessly and negligently that the plaintiff has suffered damage.

Das v. Ram Prasad, (1911) I. L. R. 33 All. 97; *Iswarappa v. Dhanji*, (1932) I. L. R. 56 Bom. 23; *Mt. Urehan v. Mt. Kabutri*, (1934) I. L. R. 13 Pat. 344; *Dwarkanath v. Sm. Hemangini*, (1937-38) 41 C. W. N. 851.

(iii) **Statutory bar to jurisdiction:** *Of. Arts.* 29, 30 & 31 of Sch. II, Prov. S. C. C. Act, and Sec. 19. clauses (O) and (P), Pres. S. C. C. Act.

(b) **Wilful default—allegation of—***Barber v. Mackrell*, (1879) 12 Ch. D. 534. The plaintiff must allege at least one instance of wilful default: *Raja Peary Mohan Mookerjee v. Manohar Mookerjee*, (1922-23) 27 C. W. N. 989, 994. See 'Wilful default' under "Particulars", Chap. XX, p. 513.

3. Tenants of some of the houses quitted the same. The defendant, who knew or ought to have known about their impending departure, was guilty of negligence and wilful default in allowing the said tenants to depart without realising the rents due from them.

4. The plaintiff is unable to ascertain the whereabouts of the said tenants and cannot take steps to recover the arrears of rent due from them. The plaintiff is unable to give full particulars of the amounts due from the said tenants until after discovery and the following particulars are all that the plaintiff can give :

<i>Premises.</i>	<i>Tenant.</i>	<i>Monthly rent.</i>	<i>Date of departure.</i>	<i>Months in arrears.</i>
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5. The defendant, without any authority from the plaintiff, accepted reduced rent from some of the tenants.

Particulars :—

<i>Premises.</i>	<i>Tenant.</i>	<i>Rate of rent.</i>	<i>Reduced rent.</i>
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6. By notice in writing dated.....19..., the plaintiff terminated the defendant's said employment with effect from.....

7. The defendant has not rendered any account to the plaintiff although requested in writing dated.....19..., so to do and has not paid any sum to the plaintiff in respect of the rents actually realised by him.

The plaintiff claims—

(1) An account of what is due to the plaintiff from the defendant in respect of moneys received by the defendant for or on account of the plaintiff or which might have been so received but for the defendant's breach of duty, wilful default or neglect.

(2) Payment of the sum to be found due upon taking such account.

PLAINT.**3.****ACCOUNT.****CLAIM by an Agent against his Principal for an Account of Profits for Works done. (c)**

1. On.....19..., the defendant orally agreed with the plaintiff to employ him in connection with certain electric installations in Premises No....., in respect of which the defendant had secured a contract, and to pay him $\frac{1}{4}$ th share of the gross profits of the said work.

2. The plaintiff duly executed the said work, but notwithstanding his repeated demands (state whether verbal or in writing giving dates) the defendant has failed to pay to the plaintiff any part of his share of the gross profits, or to render to him any account of the gross profits, of the said work.

3. The plaintiff is unable to give any particulars of his share of the gross profits until after discovery.

The plaintiff claims—

(1) An account of what is due from the defendant to the plaintiff as his share of the gross profits of the said work.

(2) Payment of such sum as may be found due upon the taking of accounts.

- (c) **Agent's right to sue the principal for account :** Cf. *Qutab-ul-din Khan v. Faiz Bakhsh*, A. I. R. 1925 Lah. 100 (Under Sec. 213 of the Cont. Act, it is obligatory on an agent to render account to his principal but the principal is not under any such counter-statutory obligation towards the agent.); *Kesho Ram v. Joti Sarup*, A. I. R. 1932 Lah. 619 (The agent is ordinarily not entitled to claim accounts against the principal); *Jessaram Bhagwandas v. Ratanchand Fatehchand*, A. I. R. 1925 Sind 173 (Special circumstances must exist in order to entitle an agent to claim an account against his principal. The plaintiff must satisfy the Court that the defendant is an accounting party.); *Ram Lal Kapur & Sons v. Asian Assurance Co.*, A. I. R. 1933 Lah. 483 (While the principal is under no statutory obligation to render account to his agent, he does become an accounting party in special circumstances or under trade usage or a definite contract.). If an agent can satisfy that all accounts are rightly in possession of the principal and that he (agent) has not and could not have in his possession accounts which would enable him to determine his claim for commission against his principal, he will be entitled to sue for an account: *Gulabrai Dayaram v. India Equitable Insurance Co. Ltd.*, A. I. R. 1937 Sind 51; Cf. *Ram Lal Kapur & Sons v. Asian Assurance Co.*, *supra*.

PLAINT.

4.

ACCOUNT.

CLAIM by an Insurance Agent for Account against an Insurance Company. (d)

1. The plaintiff is an insurance agent. The defendant company carry on business in insurance at Bombay.

2. By an agreement in writing dated.....made at....., it was agreed that the defendant Company would pay the plaintiff a commission of.....per cent. calculated on the *premium* to be paid on the policies to be effected through or introduced by him.

3. The plaintiff acted in pursuance of the said agreement, and between.....and.....effected and also introduced various life policies of the defendant Company.

Particulars :

(Here give particulars)

4. The defendant Company have not paid to the plaintiff any money as commission or rendered to him any account of the *premium* paid on the policies effected through or introduced by him although thereunto requested in writing dated.....19....

5. The plaintiff does not know which of the said policies have lapsed, matured or been forfeited and, therefore, is unable to give particulars of the amounts due to him as commission until after discovery.

The plaintiff claims—

(1) That an account be taken of the policies effected through or introduced by the plaintiff and of the *premium*

- (d) **Agent's right to call for accounts from principal:** An agent can call on his principal for an account in certain special circumstances. Where the plaintiffs were to be remunerated by a commission calculated on the *premium* paid on all policies effected or introduced through the plaintiffs they cannot certainly know which of these policies have lapsed, matured or been forfeited and consequently it is not possible for them to calculate what commission would be payable to them on policies effected through or introduced by them as agents of the Insurance Company. In such special circumstances the agent can call for accounts from the principal : *Ram Lal Kapur & Sons v. Asian Assurance Co.*, A. I. R. 1933 Lah. 483. For other cases, see notes under Form No. 3.

paid on the said policies and of the amount due to the plaintiff in respect thereof.

(2) Payment of the sum to be found due to the plaintiff upon the taking of accounts.

PLAINT.

5.

ACCOUNT.

CLAIM by a Coparcener for Account against the Managing Member of a Joint Hindu Family. (e)

1. The plaintiff and the defendant are brothers and, at all material times, were members of a joint Hindu family governed by the Dayabhaga school of Hindu Law.

2. The plaintiff was 12 when his father died.

3. Since his father's death, which took place on....., the defendant has been managing the joint family properties in which the plaintiff has an undivided one-half share. The plaintiff is unable to give full particulars of the said properties until after discovery. Such particulars as the plaintiff can give are set out in Schedule "A" hereto.

(e) **Reference :** *Abhoychandra Roy Chowdhry v. Pyarimohon Guha*, (1870) 5 Beng. L. R. 347 (A managing member of a joint Hindu family is bound to render an account of his management to his co-sharers, and is liable to a suit if he refuses to do so. And such suit will lie even if the parties suing were minors during the period for which the account is asked).

(e) **Note :** A suit for accounts merely, against the manager of a joint Hindu family is not common. Generally, accounts against the manager are asked for in suits for partition. The Judicial Committee have held that in the absence of proof of misappropriation or fraudulent and improper conversion by the manager of a joint family estate, he is liable to account on partition only for assets which he has received, not for what he ought or might have received if the family money had been profitably dealt with : *Perrazu v. Subbarayadu*, (1920-21) L. R. 48 I. A. 280.

(e) A co-parcener in a joint Hindu family is not generally entitled to call upon the *karta* to account for his past dealings with the joint family property unless he can establish fraud, misappropriation or improper conversion ; but a co-parcener who is totally excluded from enjoyment

4. The plaintiff attained majority on or about.....

5. In.....19..., the plaintiff verbally requested the defendant to inform him what the joint family properties consisted of at the time of the death of their father and what they consisted of then, and also what portion of the family income had been actually saved, but the defendant refused to disclose any information to the plaintiff.

6. Since.....19..., the defendant is in possession and enjoyment of the joint family property to the exclusion of the plaintiff.

The plaintiff claims—

(1) An account of the receipts and disbursements of the joint family properties since.....

(2) Ascertainment of the plaintiff's share of the income derived from the joint family properties.

(3) Payment to the plaintiff his half share of the net profits of the joint family properties in the hands of the defendant.

(4) Discovery.

(5) Appointment of a Receiver.

PLAINT.

6.

ACCOUNT.

CLAIM for Account against Ex-guardian under the Guardians and Wards Act. (f)

The plaintiff through her husband and certificated guardian states—

1. The defendant, the paternal uncle of the plaintiff, was appointed guardian of her person and property by the District Judge of.....on the.....19...

of the joint family property is entitled to an account of the income derived from such property and to have his share of the income ascertained and paid to him; that is to say, he is entitled to what are called mesne profits : *Hira Lal v. Pyare Lal*, I. L. R. (1939) All. 897.

(e) **Limitation** : A suit for accounts by a member of a joint family against the manager thereof is governed by Article 120 : *Biswambar v. Giribala*, A. I. R. 1921 Cal. 571, 572; so also a suit by one co-sharer against another who has received the profits of the common property : *Jaffar v. Mohamed*, A. I. R. 1937 Bom. 217, 222.

(f) **Liability of ex-guardian who has not been discharged from all liabilities** : *Kaniz Fatima v. Sajjad Hosain*, (1907) I. L. R. 34 Cal. 211 (Unless the

2. On.....19..., after the plaintiff's marriage, the defendant filed his account in Court and applied to the District Judge of.....on.....for permission to resign his office.

3. On.....19..., the District Judge directed notice to issue on the husband of the plaintiff calling upon him to inspect, if he wished, the account filed by the defendant, upon the defendant putting in the process fee. The defendant did not however put in the process fee ordered and, accordingly, no notice was issued on the plaintiff's husband and he did not inspect the said account.

4. On.....19..., the plaintiff's husband presented an application to the District Judge of.....for the purpose of being appointed guardian of the person and property of the plaintiff. On.....19..., an order was made on the said application appointing him as such guardian. No order was made declaring the defendant to be discharged from his liabilities.

5. The properties specified in Schedule "A" hereto annexed remained under the administration of the defendant as the plaintiff's guardian from.....19... to.....19...

Court has passed an express order of discharge, a suit will lie for an account against the guardian. The legal effect of an order discharging a guardian under Clause 4 of Section 41 of the Guardians and Wards Act is to discharge him from all liabilities as a guardian save as regards any fraud which may subsequently be discovered.) Cf. *Nabadip v. Jugal Dasce*, (1912) 15 C. L. J. 57 (Having regard to the provisions of sub-sections 3 and 4 of Section 41 of Act VIII of 1890, a guardian is not discharged from his liability to account, unless he has obtained from the Court an express order to that effect, and a discharge cannot be implied or inferred from the fact that nikashes for several years had been filed in the Court of the District Judge. The mere fact that nikashes or abstract statements of assets and liabilities concerning the estate had been filed before the District Judge in a proceeding under the Guardian and Wards Act does not release the person filing them from liability to account to the present guardian of a minor, regard being had, specially, to the fact that he has not obtained any discharge from such liability from the District Judge). Cf. *Muralidhar v. Vallabdas*, (1909) I. L. R. 33 Bom. 419 (When a declaration is once made by the Court, under section 41 of the Guardian and Wards Act, 1890, discharging a guardian from liability, the latter cannot be exposed to suits in connection with the management of the minor's property except in the case of fraud discovered after the declaration.).

6. On..... 19... the plaintiff's husband as such guardian requested the defendant in writing to render to him the accounts of the period of his guardianship and to make over to him the books of account and the funds in his hands but the defendant has failed and neglected to do so.

7. The account filed by the defendant in Court is only up to.....and does not cover the full period for which he is liable to render accounts.

8. The plaintiff is unable to say, before examination of the account books which are in the defendant's possession, if the account filed by the defendant in Court is correct.

The plaintiff claims—

(1) To have a full and true account of the dealings of the defendant with the properties belonging to the plaintiff during the period specified in paragraph 5 hereof.

(2) Payment of such sum as may be found due from the defendant upon the taking of accounts.

(3) Interest on such sum by way of damages.

PLAINT.

7.

ACCOUNT.

CLAIM for Account against a Guardian after his discharge under Section 41 (4) of the Guardians and Wards Act. (g).

The plaintiff through her husband and certificated guardian states—

1. The defendant, uncle of the plaintiff, was appointed guardian of her person and property by the District Judge of

(g) **Liability of a discharged guardian:** Under Section 41 (4) of the Guardians and Wards Act, when the guardian of the property of a minor has delivered the property or accounts as required by the Court, the Court may declare him to be discharged from his liabilities save as regards any fraud which may subsequently be discovered. *Cf. Ramayya v. Tulassamma*, A.I.R. 1936 Mad. 868 (A suit for merely taking accounts in respect of the management of the minor's property by the guardian during his minority, instituted against a guardian is not maintainable. If the plaintiff's grievance is that the account is not true and that there are false entries in it and that she should be reimbursed the loss caused to

on the.....19... The properties of which he was appointed guardian are set out in Schedule "A" hereto.

2. On.....19..., after the plaintiff's marriage, the defendant as such guardian filed his account in Court and applied to the District Judge for permission to resign his office.

3. By an order dated.....19... made on the said application, the defendant was discharged from further acting as the guardian of the plaintiff and also discharged from all liabilities in respect of his management of the plaintiff's properties as her guardian, and the plaintiff's husband was appointed guardian in his place and stead.

4. Between.....19..., when the account was filed by the defendant as aforesaid, and.....19..., when the above order was made, the defendant verbally represented to the plaintiff's husband at.....that the said account was correct, and the plaintiff's husband, on behalf of the plaintiff, *bona fide* believing the said representation to be true, and induced thereby, did not challenge the correctness of the said account.

5. After his appointment as the guardian of the plaintiff, the plaintiff's husband discovered that the account filed by the defendant as aforesaid was not true and contained many false and fraudulent entries.

Particulars :

(Here state the particular entries which are not true and also the omissions in the account).

6. Rs.....will be found due from the defendant upon a proper taking of accounts.

The plaintiff claims—

(1) That the defendant do render a true and faithful account in respect of his management of the plaintiff's property during her minority as the plaintiff's guardian.

(2) Alternatively, liberty be given to the plaintiff to her as a result of the fraud played by the guardian upon her in the management of the estate, the plaint should be framed as one for falsifying and surcharging the account already rendered by the guardian, that is to say, the plaintiff should state the particular entries in the accounts which are not true and the omissions in the account also. The plaintiff ought also to specify the amount of money which she claims under the circumstances and pay the necessary court-fee.). Cf. *Muhammad Abdul Rab v. Khodaija Bibi*, A. I. R. 1925 All. 457.

surcharge and falsify the account filed by the defendant in Court as aforesaid.

- (3) Payment of Rs.....or such other sum as may be found due upon the taking of accounts.

PLAINT.

8.

ACCOUNT.

CLAIM by a Trustee against his Co-trustees for Account. (h)

1. In or about the year 19... one R. P., since deceased, founded a temple known as.....and installed therein an Idol known as.....and dedicated the same to the public. The said R. P. also endowed certain immovable properties for the support of the said institution. Particulars of the said properties are set out in schedule "A" hereto annexed.

2. By the usage of the said institution the trusteeship descends to the eldest members for the time being of the several branches of the family of the said R. P.

- (h) **Reference :** *Appanna Poricha v. Narasinga Poricha*, (1922) I.L.R. 45 Mad. 113 F. B. (In this case the question was raised as to whether a suit by a trustee of a public charitable or religious trust against his co-trustees for accounts falls within Sec. 92 of the Code of Civil Procedure and can be brought without the prior sanction of the Advocate-General. *Per* Kumarswami Sastri, J., "Co-trustees are co-owners of trust properties and are in law entitled to be in joint possession of all trust properties whether it be in the form of immovables, movables, or cash. It would ordinarily render a trustee personally liable if he allowed the cash or movables to be in the exclusive possession and management of a co-trustee and there was misappropriation. He is in law entitled to be in joint possession of the funds, even when the other trustee is carrying out the trust properly. Where moneys are in a co-trustee's hands an account would be necessary to ascertain his liability and the claim would, in a sense, be a suit for an account of trust moneys. I find it difficult to see why if a suit by a trustee against his co-trustees or strangers for joint or exclusive possession of immovable or movable properties does not require sanction of the Advocate-General or the joinder of another person, the mere fact that money is claimed, to ascertain which an account will have to be taken, should fall under section 92.).

3. The plaintiffs and the defendants are the present eldest members of the several branches of the said family as will appear from the pedigree set out hereunder :

(Here set out the pedigree).

4. From.....until such time as is hereinafter mentioned, the plaintiff and the defendants jointly managed the said institution and the said properties as joint trustees.

5. Since.....the defendants are in exclusive possession and management of items 2, 3 and 4 of the properties set out in the said schedule. The income of the said properties is about Rs..... annually.

6. The defendants are refusing to make over the income of the said properties or any portion thereof to the plaintiff for the use of the said temple and/or the said idol inspite of repeated verbal demands and also demands made in writing dated.....andThe defendants are wrongfully claiming the properties as their own and are converting the income thereof to their own use.

The plaintiff claims—

(1) A declaration that the properties, items 2, 3 and 4 of Schedule 'A' hereto form part of the trust properties.

(2) A declaration that the plaintiff is entitled to possession and management of the said properties jointly with the defendants.

(3) An account of the rents issues and profits of the said properties realised or received by, or on behalf of, the defendants.

(4) Framing of a scheme for the proper management of the trust.

(5) Appointment of a Receiver of the said properties.

PLAINT.

9.

ACCOUNT STATED.

CLAIM on an Account Stated. (i)

1. The plaintiff firm carry on business in mustard oil at....., and the defendant firm carry on business in ghee at.....

(1) Cause of action: An account stated constitutes a new cause of action:

2. Between.....and.....the plaintiff firm from time to time supplied mustard oil to the defendant firm and the defendant firm from time to time supplied ghee to the plaintiff firm.

Elcira Rodrigues Siqueira v. Noronha, (1933-34) 34 C. W. N. 813;
Bishun Chand v. Girdhari Lal, (1933-34) L. R. 61 I. A. 273.

- (1) **Limitation**: If an account stated is signed by the debtor, Art. 64, and if not signed, Art. 115, of the Limitation Act, applies; *Jatin Singh v. Choonev Lall*, (1910-11) 15 C. W. N. 882, 887.

In the case of 'a real account stated' it is not necessary that a balance should be struck within the period of limitation applicable to any of the items of the account: *Suraj Prasad v. Boucke*, (1920) 5 P.L.J. 371. In *Bishun Chand v. Girdhari Lal*, *supra*, the question as to whether there can be a real account stated, if all the items in the account were time-barred, was left open.

A "real account stated," in which there is mutual consideration to support the promises on either side, must be distinguished from a "mere account stated" which constitutes a mere acknowledgment of a debt in respect of transactions entirely unilateral. Such acknowledgment does not give rise to a new cause of action and, if made within time, may be relied upon as saving limitation: *Suraj Prasad v. Boucke*, *supra*; *Ramprasad v. Anandi*, A. I. R. 1938 Nag. 180.

- (1) **Stamp**: It often happens that after accounts are stated the debtor makes an endorsement in the books of account of the creditor promising to repay the loan on demand with interest and sometimes this endorsement is made on a one-anna receipt stamp. When the creditor files a suit on the account stated objection is taken by the defendant that the receipt coupled with promise to pay is a promissory note and being insufficiently stamped is inadmissible in evidence. The point has been recently considered by the Judicial Committee which have held that a receipt for money containing the terms on which it was to be repaid is not negotiable and is therefore not a promissory note and is not inadmissible as a defective promissory note: *Nawab Major Sir Mohammad Akbar v. Attar Singh*, (1935-36) 40 C. W. N. 937 (P. C.).
- (1) **Particulars of account stated**: Where the plaintiff simply alleges that a certain sum is due from the defendant to the plaintiff on an account stated, the defendant is entitled to ask for particulars of "the debts or claims in respect of which the said accounts are alleged to have been stated indicating whether such debts or claims are alleged to have been on both sides or on one side only, and stating the nature and amount of each such debt or claim." See O. XX, r. 8, R. S. C. and Annual Practice, 1938, p. 381. Cf. *Kleinberger v. Norris*, (1937) 183 L. T. Jo. 107 C. A. In India there is no specific rule corresponding to O. XX, r. 8, R. S. C., but it is submitted that the English rule would on general principles be applicable to India. It may so happen that the number of items in the accounts may be too large to be incorporated in the body

3. On.....19..., Mr....., a partner of the defendant firm, and Mr....., a partner of the plaintiff firm, verbally agreed at.....that the dues of the plaintiff firm in respect of mustard oil should be satisfied and discharged by setting off the dues of the defendant firm in respect of ghee and that the balance should be paid. Accordingly, on the same date, the accounts were gone into and the dues of the defendant firm were set off against the dues of the plaintiff firm, and there was found due from the defendant firm to the plaintiff firm Rs.....The said Mr.....entered the said balance in the account book of the plaintiff firm and signed the same on behalf of the defendant firm. (You may add—and also agreed in writing to repay the said sum with interest at 9 *per cent per annum*).

Particulars of claim :

Balance found due on account stated ...	...	Rs.
(If there was agreement to pay interest)		
Interest at 9 per cent from.....		
to.....	...	”
Nett amount due Rs.		

The plaintiff firm claim—

Rs.....with such interest as the Court may allow.

or

Rs.....including interest at the agreed rate.

PLAINT.

10.

ACCOUNT.

CLAIM to re-open a Settled Account. (j)

1. By a power of attorney dated....., the plaintiff employed the defendant as tahsildar of his zamindari known

of the plaintiff. In such cases at least the nature of the debts or claims and whether they are on both sides or on one side only should be stated in the plaint and if the defendant denies the account stated he may be entitled to inspection of the books of account of the plaintiff.

- (j) **Reference :** *Bharat Chandra v. Kiran Chandra*, (1925) 1. L. R. 52 Cal. 766.

as.....in the district of.....and it was, *inter alia*, agreed that the defendant would realise the rents, issues and profits of the said zamindary and, after defraying thereout the establishment charges and other costs of management, would submit monthly statements of account to the plaintiff at.....and also remit to the plaintiff all surplus moneys in his hands.

2. The defendant acted in pursuance of the said agreement from

3. On....., the defendant submitted a statement of accounts up to..... The plaintiff accepted the said account without scrutiny and without reference to any of the account books, or counter-foils of rent receipt books, or vouchers, etc.

The plaintiff has lately discovered that there are various fraudulent entries and omissions in the said statement of accounts.

Particulars :

(Here state the false entries and omissions with dates and amount).

The plaintiff claims—

- (1) That the said account be re-opened, or
- (2) that liberty be given to him to surcharge and falsify the items in the said account on the ground of fraud and/or material error.
- (3) Payment to the plaintiff of such sum as may be found due on the taking of accounts.

PLAINT.

11.

ACCOUNT

CLAIM for balance due on Open, Current and Mutual Account. (k)

1. The defendant is the proprietor of a Tea Estate in Assam called the B. T. Estate.

2. By a deed of hypothecation dated.....19..., in consideration of the plaintiffs' agreeing to make advances to the defen-

(k) **Reference :** *The Tea Financing Syndicate v. Chandra Kamal Bex Barua*, (1931) I. L. R. 58 Cal. 649 (*Per Rankin C. J.* : "To be mutual

dant to such extent only as the plaintiffs in their discretion should think fit, the defendant hypothecated to the plaintiffs the entire tea crop of the said Tea Estate for the season 19... and the produce thereof and agreed to send and transmit the said tea as soon as it would be manufactured and in a fit state for transmission to Calcutta to the plaintiffs in order that it might be sold in Calcutta by the plaintiffs by public auction.

3. By the said deed it was further agreed that the defendant's accounts in the plaintiffs' books should be made up with interest at 9 *per cent per annum* with half yearly rests and that all costs, charges and expenses incurred by the plaintiffs in connection with the security and the amount for the time being due to the plaintiffs on the said account should be repaid by the defendant to the plaintiffs on demand or, if no demand be made, within one year from the date of the deed.

4. Pursuant to the terms of the said deed the plaintiffs advanced moneys to the defendant to the extent of Rs..... and received from

there must be transactions on each side creating independent obligations on the other and not merely transactions which create obligations on one side, those on the other being merely complete or partial discharges of such obligations In my opinion plaintiff's liability to account to the defendant for the proceeds of the tea sold by them was an independent obligation and the circumstances that they were expected and intended to apply such sums as would be necessary in liquidation of their advances does not mean that this was an account in which the obligations were all on one side as distinct from an account in which there are cross claims or reciprocal demands. The account was open because it was not stated, and it was running and current until the sale of the defendant's tea was concluded in the ordinary course of business. The nature of the account remain the same and it was the right of the defendant to have the proceeds of sale brought into the account.''). For other cases, see *Mansa Ram v. Hiralal*, I. L. R. (1940) All. 147; *Bejoy Kumar v. (Firm) Satish Chandra*, (1936) 64 C. L. J. 513; *Bhimbai Morarji & Co. v. Firm Hargovind*, A. I. R. 1938 Rang. 270 (Whether an account is mutual or not depends upon the nature of the dealings between the parties. It is sufficient for an account to be mutual, if the dealings are such that the balance might have been in favour of either party and it is not essential that the balance should have been in favour of the defendants at some stage.); *Gokuldas v. Radhakishen*, A. I. R. 1933 Nag. 50 (Where the account is not mutual, limitation runs not from the close of the financial year in which the last transaction occurred but from the dates of the transactions themselves or from the last acknowledgment of liability.).

him consignments of tea, proceeds of which after sale were credited to the defendant.

5. On.....19..., the last consignment of tea was sold and by letter dated.....the plaintiffs informed the defendant that they would not make any further advances and demanded payment of Rs....., the balance then due.

Particulars of claim :

6. The defendant has not paid any part of the said sum.

The plaintiffs claim—

- (1) Rs.....
- (2) Further interest at.....per cent.

DEFENCE.

12.

ACCOUNT.

DEFENCE by Agent denying Agency (1).

1. The defendant denies that he was employed by the plaintiff as his agent as alleged or at all.

2. The defendant never acted as the plaintiff's agent, and has not collected any rent for or on behalf of the plaintiff as alleged or at all.

3. The defendant admits having received the letter dated..... mentioned in paragraph 2 of the plaint, but says that on..... he wrote to the plaintiff denying the alleged agency and his liability to account.

DEFENCE.

13.

ACCOUNT.

DEFENCE by Agent of Account rendered and accepted (m).

1. On or about.....19..., the defendant delivered to the plaintiff a full and true statement of account concerning the matters in which the defendant acted as agent for the plaintiff.

(1) This is a defence to Form No. 1.

(m) Cf. *Hunter v. Belcher*, (1864) 2 De G. J. & Sm. 194 (Although accounts rendered and not objected to are not of necessity to be considered as

The said account showed a balance of Rs..... due from the defendant to the plaintiff.

2. On or about.....19.....the defendant remitted to the plaintiff by postal money order the said sum of Rs..... The plaintiff accepted the said sum and did not question the said account and in such circumstances the account is a settled account between the parties.

DEFENCE.

14.

ACCOUNT,

DEFENCE showing Grounds of re-opening Settled Accounts. (n)

1. On or about.....19..... the plaintiff verbally represented to the defendant at.....that the account books of the plaintiffs had been truly kept and that Rs.....was the balance then due from the defendant. The said representation was false, as

settled, yet they will be so treated where they have been entered in the books of the person to whom they were rendered, and the balances shown upon them have been paid).

- (n) **Re-opening of settled account :** Where the accounts have been shown to be erroneous to a considerable extent both in amount and in the number of items, or where fiduciary relations exist and a less considerable number of errors are shown, or where the fiduciary relations exist and one or more fraudulent omissions or insertions in the account are shown, then the Court opens the accounts and does not merely surcharge and falsify : *Williamson v. Barber*, (1877) 9 Ch. D. 529, fd. in *Bhagwan Bakhsh Singh v. Joshi Damodarji*, (1920) I. L. R. 42 All. 230 ; cf. *A Rahim v. H. V. Low & Co.*, A. I. R. 1925 Rang. 210 ; *Krishna Bhatta v. Iswara Bhatta*, A. I. R. 1937 Mad. 579 (If after settling the accounts it turns out that there are errors in the account, it is a sufficient ground for opening the account and for setting it right in a court of equity. Where after the settlement of accounts, the account of the party is found to have been cooked up, the accounts can be re-opened at the instance of the aggrieved party.). A person is always entitled to prove, if he can, that there was a mistake in the accounts and that he signed them as correct by mistake : *Seth Bhojraj v. Panda Shankarnath*, A.I.R. 1922 Nag. 265.

the plaintiff well knew or ought to have known, and was made to induce the defendant to sign the said account. On the faith of this representation, and induced thereby, the defendant signed the plaintiff's account book without scrutinising the items in the said account.

2. The defendant has lately discovered that the said account contains many errors and omissions of which the following are a few instances :

Errors :

Item No.	Date of item.	Description.	Sum charged.	Sum chargeable.
----------	---------------	--------------	--------------	-----------------

Omissions :

Item omitted.	Description.	Amount.
---------------	--------------	---------

3. In the premises the said alleged account stated ought to be re-opened, alternatively, liberty be given to the defendant to surcharge and falsify the said account.

- (n) **Specific grounds for re-opening :** Where accounts are impeached on the ground of fraud, two or three instances of particular items, which can be taken as false and fraudulent, must be brought to the Court before it can be called upon to order the accounts to be re-opened from the first. But before the defendant could ask the Court to re-open the account, he is bound to allege fraud : *Sankalchand v. Chimanlal*, A. I. R. 1923 Bom. 16 (1). If a settled account is impeached for errors, particular errors must be stated and proved and the same rule holds even when the account has been settled 'errors expected' : *Mohesh Chandra v. Radha Kishore*, (1907-8) 12 C. W. N. 28. A Court will not hold a party to a settlement, which has been obtained from him under improper circumstances, liable on it and that it would allow him to surcharge and falsify it specially when the intention of the parties was merely to ascertain how the account stood, and not to accept a fixed sum in settlement of the difference : *Kripa Sindhu Sahu v. Raja of Kallikotah*, 29 I. C. 718.

DEFENCE.**15.****ACCOUNT.****DEFENCE by Agent that the Plaintiff never requested the Defendant to account. (o)**

1. The defendant was employed by the plaintiff as his agent upon the term that he should render an account only when requested to do so.

2. On or about....., the defendant, at the verbal request of the plaintiff, submitted to him a statement of account up to.....,together with all bills, vouchers, etc.

3. The defendant was ready and willing to explain the accounts if called upon to do so, but the plaintiff never called upon the defendant to explain the accounts before suit.

4. The plaintiff therefore has no cause of action.

DEFENCE.**16.****ACCOUNT.****DEFENCE of a Trustee to a Suit by a Co-trustee for Accounts. (p)**

1. Items 2, 3 and 4 of the properties set out in Schedule 'A' annexed to the plaint belong to the defendants and do not form part of the trust.

2. The defendants are entitled to possess and manage the said properties and to appropriate the income thereof to the exclusion of the plaintiff.

3. Save as aforesaid the statements contained in the plaint are admitted.

(o) **Reference :** *Bharat Chandra Chakrabarty v. Kiran Chandra Rai*, (1925) I. L. R. 52 Cal. 766 (Where all the papers have been submitted, the plaintiff is bound to call upon the defendant to explain the accounts; but if the plaintiff does not do so, and the defendant expresses his willingness to explain the accounts, if called upon to do so and avers that he had never been so called upon, the plaintiff's suit would be without a cause of action.).

(p) This is a defence to Form No. 8.

PLAINT.

17.

ADMINISTRATION.

CLAIM by a Creditor for Payment of Debt or for Administration. (q).

1. The plaintiff is a creditor of A. B., who died February 5th, 19..., having published his will dated.....19... and appointed the defendant his executor.

2. The defendant proved the will April 8th, 19... and has possessed himself of the movable and immovable properties of the deceased but has not paid the plaintiff his debt. Particulars of the said properties are set out in Schedule "A" hereto annexed.

Particulars of claim :

Principal due on a bond of the testator		
dated.....19...	.....	.....Rs.
Interest from the..... of		
at 6 per cent. per annum.....	.....	..... „
		<hr/>
	TOTAL	„
		<hr/>

The plaintiff claims—

To be paid Rs....., the amount due to him, or to have the estate of A. B., deceased, administered.

- (q) Though an administration suit is filed only by one creditor, the decree passed in the suit is in favour of all the creditors of the deceased debtor. The Court passing the administration decree may invoke section 151 or O. XXXIX, rr. 1 & 2, C. P. Code and pass appropriate orders to prevent the execution of his decree by any particular creditor, so that the Court may administer the entire estate for the benefit of all the creditors—all of whom after the preliminary decree should be considered as having become parties to the suit : *Nicholson Town Bank Ltd. v. Varadarajulu Naidu*, 1938 M. W. N. 1127.

PLAINT.

18.

ADMINISTRATION.

CLAIM by a Creditor for self and on behalf of all other Creditors for Administration. (q₁).

1. A. B., late of, was, at the time of his death, a Hindu governed by the Dayabhaga School of Hindu Law. He died January 5th, 1911, intestate, leaving him surviving the defendants, his sons and legal representatives.

2. The said A. B., was, at the time of his death, indebted to the plaintiff in the sum of Rs..... due on a promissory note dated 15th November, 19..., and, in relation to the said promissory note, his estate is now indebted to the plaintiff in the sum of Rs..... as hereinafter mentioned.

3. The defendants have possessed themselves of the movable and immovable property of the deceased and have not paid the plaintiff his debt. A list of the said properties, as far as the plaintiff has been able to ascertain, is set out in Schedule "A" hereto annexed.

4. There are various other creditors of the deceased whose claims have not been satisfied. A list of such creditors together with their respective claims is set out in Schedule "B" hereto annexed.

(q₁) **Object of an administration suit:** The object of an administration suit is to have the estate administered under a decree of the Court; in such a suit the whole administration and settlement of the estate are assumed by the Court; the suit in its essence is one for an account and for the application of the estate of the deceased for the satisfaction of the dues of all the creditors and for the benefit of all others who are entitled and the Court marshalls the assets and makes such a decree: *Shivaprasad Singh v. Prayagkumar*, (1935) I. L. R. 61 Cal. 711.

(q₁) **Non-maintainability of suit for administration of the estate of a deceased Hindu who was joint with his son:** A creditor cannot maintain a suit for administration of the estate of a deceased Hindu who was joint with his son and died leaving no property apart from his interest in the family estate. It does not mean that a suit may not be filed. A creditor cannot be prevented from filing a suit for the administration of the father's estate and may get a preliminary decree for account, but if it appears on the taking of accounts and the making of the usual inquiries that there is no property apart from what was before the

5. The plaintiff is suing on behalf of himself and all other creditors of the deceased.

Particulars :

15th November 19...	Principal sum	Rs.
	Interest up to	
	(date of suit.).	"
		<hr/>
	Net amount due.	"
		<hr/>

The plaintiff claims—

(1) That an account be taken of what is due to the plaintiff and all other creditors of the deceased.

(2) That the estate of the deceased be administered.

father's death was joint family estate the proceedings cannot be carried further: *Meenakshi Achi v. Ramaswami Chettiar*, A. I. R. 1939 Mad. 552, reversing *Meenakshi v. Ramaswami*, A. I. R. 1937 Mad. 785 and overruling *Anjappa v. Ankamma*, A. I. R. 1937 Mad. 99.

(q₁) **Parties to suit :** In an administration suit, the object of which always is to obtain an order for the administration of the estate of a deceased person under the supervision of the Court which must necessitate the payments of all the debts from the estate and therefore essentially a representative suit, it is not necessary that all the creditors should be arrayed as parties. All that is necessary in such cases is to call upon the creditors after the decree has been passed to prove their debts and to pay such debts as have been proved before distribution of the estate to the heirs: *Mt. Shahzadi Bi v. Mt. Rahmat Bi*, A. I. R. 1937 Lah. 761.

(q₁) **Preliminary decree in administration suit :** Cf. O. XX, r. 13, Form No. 17, App. D, C. P. Code.

(q₁) **Final decree in an administration suit: form and contents :** The Code nowhere lays down what are to be the contents of a final decree in an administration suit. It depends upon the nature of dispute in each case. Where the order in a suit has the effect of finally determining all the matters in controversy between the two disputing parties, it must be construed as a final decree to that extent: *Mt. Shahzadi Bi v. Mt. Rahmat Bi*, A. I. R. 1936 Lah. 879.

(q₁) **Receiver in a creditor's administration suit :** See notes under next form.

(q₁) **Essentials of a representative suit :** *Kumaravelu v. Ramaswami*, (1932—33) L.R. 60 I.A. 278.

PLAINT.

19.

ADMINISTRATION.

**CLAIM by a Creditor for self and on behalf of all other Creditors
for Administration and for Appointment
of a Receiver. (q₂)**

G. H., residing at....., for self
and on behalf of all other creditors of
A. B., deceased, late of.....
—Plaintiff.

—versus—

1. C. D.,
2. E. F.,

—executors of the said A. B., deceased, re-
siding at.....
—Defendants.

The plaintiff states—

1. The plaintiff is a creditor of A. B., deceased, in the sum hereinafter mentioned.

2. The said A. B. died February 4th, 19 .., having made his last will dated January 2nd, 19..., and appointed the defendants his executors.

3. The defendants proved the will April 8th, 19..., and possessed themselves of the movable and immovable property of the deceased, and yet have not paid the plaintiff his debt.

(q₂) **When creditor can have Receiver appointed :** A plaintiff in an administration action is only entitled to *interim* relief against the administrator or executor when a case is shown of assets being wasted. The law allows the administrator or executor to prefer one creditor to another and there is no equity which entitles the Court to interfere, except after judgment for administration : *In Re Wells* (1890) 45 Ch. D. 569, 575, *fg*, *Harris v. Harris*, (1887) 35 W. R. 713 ; *Philips v. Jones*, (1884) 28 Sol. Jo. 360, *fd*. in *Re Stevens* (1898) 1 Ch. 162, 173. The creditor is not entitled to the appointment of a Receiver simply because the estate is insolvent. Impropriety on the part of the legal representative or danger to the assets must be alleged : *Baird v. Walker*, (1890) 35 Sol. Jo. 56.

The general principles stated above would, it seems, equally apply to the Courts in this country. The Civil Procedure Code makes no distinction between the right of a simple creditor and that of a secured creditor

Particulars of claim :

Principal sum due on the promissory note (or bond) of the testator dated.....	Rs.
Interest from at 6 per cent. per annum	„
Total Rs. _____	

5. The said A. B. was, and his estate still is, indebted to various other unsecured creditors. A list of the said creditors together with their respective claims is set out in Schedule "A" hereto.

6. The estate is not of the value of more than Rs. which is insufficient to pay all the debts of the estate.

7. The defendants are guilty of wilful default and waste in administering the estate.

Particulars :

(a) The defendants wilfully omitted to get in a debt due to the testator from one K. N. on a promissory note dated for Rs. 5,000/- and allowed the same to be time-barred.

(b) The Bank Ltd. had a claim of Rs. 15,000/- against the testator on an overdraft account. The defendants, although they had sufficient funds of the estate in their hands within six months of the testator's death, did not pay off the said debt until...whereby the testator's estate has been diminished by the amount of interest which would have been saved if the debt had been paid sooner.

in the matter of appointment of receivers. Under O. XL, r. 1, C.P. Code, the Court will appoint a receiver whenever it is "just and convenient." In some of the decided cases some general principles have been laid down as regards the right of a simple contract creditor to have a receiver appointed. Thus it has been held in a Calcutta case that a simple contract creditor who has no specified charge or no right to be paid out of a specified fund cannot, in general, ask for the appointment of a receiver : *Dharendra Krishna v. Surendra Krishna*, (1929-30) 34 C.W.N. 440. The same view has been taken by the Patna High Court : *Prihi Chand v. Kulikanand* (1929) 6 P. L. J. 366 ; cf. *A. R. A. R. A. L. Chettyar Firm v. U. Sin*, A. I. R. 1935 Rang. 398.

(q₂) **Liability of Executor or Administrator for devastation and neglect :** See Secs. 368, 369, Ind. Suc. Act.

The above particulars are all that the plaintiff can give before discovery.

The plaintiff claims—

(1) That an account be taken of what is due to the plaintiff and all other the creditors of the deceased.

(2) That an account be taken of the dealings of the defendant with the estate of A. B., deceased, on the footing of wilful default or neglect.

(3) That the estate of the deceased be administered.

(4) That a Receiver be appointed of the said estate.

PLAINT.

20.

ADMINISTRATION.

CLAIM by Pecuniary Legatee for Administration. (r)

1. A. B., who was a Hindu governed by the Dayabhaga School of Hindu law, died February 2nd, 19..., having made his last will dated January 5th, 19..., and appointed the defendants his executors.

2. By his said will the testator, *inter alia*, bequeathed a legacy of Rs. 10,000/- to the plaintiff payable every year out of the income of his Zemindary properties at.....

-
- (r) For distinction between specific legacy and demonstrative legacy, see Sec. 150 Ind. Sec. Act. XXXIX of 1925; *Bhagirathibai v. Advocate General of Bombay*, A. I. R. 1937 Bom. 384.
- (r) **Limitation:** Art. 123, Ind. Lim. Act: *Rajamannar v. Venkatakrishnayya*, (1902) I. L. R. 25 Mad. 361, 364. In as much as a legacy is payable one year after the testator's death, a legatee has 13 years within which he may bring the suit: *Raja Parthasarathy v. Raja Venkatadri*, (1923) I. L. R. 46 Mad. 190 (F.B.).
- (r) **Right to sue:** A legatee can file a suit for the taking of accounts for the determination of the amount due to him in respect of the legacy: *Raja Parthasarathy v. Raja Venkatadri*, (1923) I. L. R. 46 Mad. 190, 225 (F.B.). When there has been no assent to the legacy the suit must include a demand for administration of the whole estate: *Sulebhai v. Bai Safiabai* (1912) I. L. R. 36 Bom. 111, 113.
- (r) **Parties to suits:** Ordinarily the only necessary party to a suit of this nature is the executor and not the other legatees; *Pramathanath Sarkar v. Suprakash Ghosh*, (1932) I. L. R. 58 Cal. 77. See, "Executors and Administrators" under "Classes of Persons," p. 139,

3. The defendants proved the will April 5th, 19..., and have duly possessed themselves of the movable and immovable property of the deceased, and have not paid the plaintiff his legacy.

4. The defendants have refused to give the plaintiff inspection of the accounts of and relating to the said Zamindari properties in spite of demand in writing dated.....19...

5. The defendants have wrongfully withheld their assent to the said legacy.

The plaintiff claims.—

(1) To recover arrears of legacy amounting to Rs.....

(2) To have the estate of A. B., deceased, administered, and for that purpose to have all proper directions given and accounts taken.

(3) To have a Receiver appointed of the said Zemindari properties.

PLAINT.

21.

ADMINISTRATION.

CLAIM by Specific Legatee to recover Legacy with ancillary

Claim for Administration. (s)

1. A. B., late of.....died January 15th, 19...

2. By his last will dated December 2nd, 19..., A. B. appointed the defendant his executor and bequeathed to the plaintiff all his

(s) **Specific legacy, what is a**—Sec. 142, Ind. Suc. Act, 1925. See Ills. to the Section.

(s) **Assent to legacy** : Sec. 332 Ind. Suc. Act, 1925. Where no assent is given plaintiffs must claim administration of the whole estate : *Salebhai v. Bai Safiabau*, (1912) I. L. R. 36 Bom. 111.

(s) **Limitation** : 12 years under Art. 123 of Sch. II of the Ind. Lim. Act : *Rajamannar v. Venkatakrishnayya*, (1902) I. L. R. 25 Mad. 361. This Article applies where the substantial claim is to recover a legacy, even though not assented to by the executor, and whether or not the suit involves the administration of the whole estate : *Salebhai v. Bai Safiabau*, *supra*. The mere fact that in a suit for a legacy there is a prayer for administration of the estate, as ancillary to the claim for legacy, will not take the case out of this Article and bring it under Art. 129 : *Rajamannar v. Venkatakrishnayya*, *supra*, at p. 364. A legacy is payable one year after the testator's death and a suit for legacy is in time if brought within thirteen years after the testator's death : *Raja Parthasarathy v. Raja Venkatadri*, (1923) I. L. R. 46 Mad. 190 (F. B.),

shares in the Imperial Bank of India which he might possess at the time of his death.

3. The defendant duly proved the will April 2nd, 19....., and is in possession of the assets of the testator, and, amongst others, of the said shares.

4. Particulars of the said shares as set out in Schedule "A" hereto are all that the plaintiff can give before discovery.

5. The defendant has not made over any of the said shares to the plaintiff, nor has assented to the said legacy although thereunto requested in writing dated.....and.....

The plaintiff claims.—

- (1) Discovery of the said shares.
- (2) Delivery to him of the said shares.
- (3) Administration of the estate of A. B., deceased.
- (4) All necessary directions, accounts and enquiries.

PLAINT.

22.

ADMINISTRATION.

CLAIM by Residuary Legatee against Executors for Administration and for Account on the Basis of Wilful Default. (f)

1. The plaintiff is the residuary legatee of A. B., late of....., who died January 3rd, 19..., having made his will dated December 12th, 19..., and appointed the defendants his executors.

2. The defendants proved the will March 20th, 19..., and have possessed themselves of the movable and immovable property of the deceased.

- (f) **Pleading wilful default:** If wilful default is not alleged, no order can be made on the footing of wilful default, either at the hearing or at any subsequent time; but where wilful default has been alleged, an account on the footing of wilful default can be directed either at the hearing or at any subsequent stage: *Per Fry J. in Barbar v. Mackrell*, (1879) 12 Ch. D. 534. In order to obtain an account on the footing of wilful default one must allege and prove at least one instance of wilful default: *Raja Peary Mohan Mookerjee v. Manohar*, (1922-23) 27 C. W. N. 989, 994, *fg. Re: Symons*, (1882) 21 Ch. D. 757 and other English cases.
- (f) **Parties to suit:** In an administration suit by a legatee the executor is ordinarily the only necessary party. The other legatees need not be

3. The defendants as executors have been guilty of wilful default in not getting in certain properties of the testator. The plaintiff is unable to give full particulars under this paragraph until after discovery and the following particulars are all that the plaintiff can give :

Particulars :

B. C. owed the testator Rs. 5,000/- on a promissory note dated19... repayable on demand with interest at 6 *per cent per annum*. The defendants were aware of the said fact but they never applied to B. C. for payment or acknowledgment, whereby the sum due on the said promissory note was time-barred and was lost.

joined as party defendants. It would suffice for a decree to be made and the other parties either brought on the record or notice given to them if that would suffice at the time of the reference if their interests were likely to be affected : *Per* Buckland J., in *Pramathanath Sarkar v. Suprakash Ghosh*, (1932) I. L. R. 58 Cal. 77.

- (f) **Court Fees and Suits Valuation :** The plaintiff is entitled to put his own valuation both for purposes of jurisdiction and for Court-fees ; *Shashi Bhusan Bose v. Manindra Chandra Nundy*, (1917) I. L. R. 44 Cal. 890 ; *Chandramani v. Basdeo*, (1919) 4 Pat. L. J. 57 ; *Khatija v. Sheikh Adam Husenally*, (1915) I. L. R. 39 Bom. 545.
- (g) **Limitation :** Art. 120, Ind. Lim. Act. But where the claim is for legacy and the prayer for administration is only ancillary to the claim for legacy, Art. 123 should apply ; *Rajamannar v. Venkatakrishnayya*, (1902) I. L. R. 25 Mad. 361. In a later Madras case, it was pointed out that in an administration action the bar of limitation will be of no avail : *Chidambara Mudaliar v. Krishnasami Pillai*, (1916) I. L. R. 39 Mad. 365, 374.
- (h) **Jurisdiction : Suit for administration, if a 'suit for land' :** According to the Bombay High Court, an administration suit is not a suit for land ; *Abdul Hussain v. Mahomedally*, (1921) 23 Bom. L. R. 1326. The Calcutta decisions are not uniform. Where the plaintiff claimed administration on an ordinary summons and also claimed to be entitled to the whole of the residuary estate of the testator and a declaration that a dedication purporting to create a debutter estate was void it was held by Page J., that it was a suit for land : *Pravas Chandra Sinha v. Ashutosh Mukherjee*, (1929) I. L. R. 56 Cal. 979. In a later case, *Vedabala Dabee v. The Official Trustee of Bengal*, (1935) I. L. R. 62 Cal. 1062, his Lordship Ameer Ali J. expressed his dissent from the view expressed by his Lordship Page J. in the last mentioned case. Cf. *Rabindranath Mitra v. Purna Chandra Singha*, I. L. R. (1938) 1 Cal. 531.
- (i) **Costs of parties in a suit for general administration :** See *Ismail Abdul Latif v. Haji Ibrahim Jan Mahomed*, (1935) I. L. R. 59 Bom. 397.

The plaintiff claims—

(a) An account of the dealings of the defendant with the testator's estate on the footing of wilful default.

(b) Administration of the estate.

PLAINT.

23.

ADMINISTRATION.

CLAIM for Administration against an Administrator

pendente lite. (u).

1. One A. B., a Sunni Mahomedan, died January 15th, 19..., having made his will dated November 19th, 19..., and appointed the defendant his executor. By the said will the testator, without obtaining the consent of the plaintiffs or any of them, purported to bequeath his entire estate to.....

2. The plaintiffs are the heirs at law of the said A. B. deceased (state relationship).

3. On.....19...the defendant applied for probate of the said will. Thereupon the plaintiffs entered caveat and the said application was set down as a contentious cause and marked Suit No.....of..... The said suit is still pending.

4. On.....19... the defendant was, on his own application made in the said suit, appointed administrator *pendente lite* of the estate and effects of A. B., deceased, and he has been administering the said estate since.

(u) **Reference :** *Meerxa Kuratul-Ain v. Braughton*, (1896-97) 1 C. W. N. 336 (Per Jenkins J., "A suit for administration is maintainable against an administrator *pendente lite*. The creditors of an estate who take *de hors* the will, are only entitled to sue for administration against an administrator *pendente lite* already in existence..... With regard to two-third of the said estate the plaintiffs take *de hors* the will and therefore their position is the same as that of creditors of the estate), expd. in *Balakbala Dasee v. Jadunath Das*, (1930) I. L. R. 57 Cal. 1358, 1365, 1366. Cf. *E. C. Jeeva v. H. H. Yacoob Ally*, (1928) I. L. R. 6 Rang. 524 (According to the Sunni School of Mahomedan Law a testator may bequeath one-third of his estate to a charity or to a stranger, but he cannot by a testamentary disposition reduce or enlarge the shares of his heirs, who are entitled to inherit, nor can he restrict their enjoyment of the property they inherit.). Cf. Sec. 247, Ind. Suc. Act.

5. The plaintiffs are entitled to two-thirds of the said estate under the Mahomedan Law.

The plaintiffs claim :—

(1) A declaration that the said will in so far as it purported to dispose of more than a third of the estate is void.

(2) That the said estate be administered by the Court.

PLAINT.

24.

ADMINISTRATION.

CLAIM by a Mahomedan Heir for Administration. (*v*).

1. One G. H., a Siah Mahomedan, died intestate, February 16th, 19..., leaving him surviving his father and mother, who were each entitled to 1/6th share in his estate and also the defendant No. 1, his son, and defendant No. 2, his widow, and one daughter, and leaving behind him immovable properties, situate at within the jurisdiction of this Court. A list of such properties, as far as the plaintiff has been able to ascertain, is set out in Schedule "A" hereto annexed.

2. The father of the said G. H. died on, his mother on, and his daughter on

3. The defendants 3 and 4 are the heirs (state relationship) of the said deceased daughter of G. H. The plaintiff is the brother of G. H. and is the heir of his father and mother, deceased.

(*v*) **Reference :** *Essafully v. Abdcali*, (1921) I. L. R. 45 Bom. 75 (In this case a contention was raised by the defendants that the administration suit was not maintainable and that the only suit that would lie was for partition. *Held*, The plaintiff can bring his suit in any form which the law allows. He may file a suit for partition or he may not. This is no reason why if he wishes to file an administration suit to get the estate administered in the proper way, he should not do so. It does not follow that because A. dies leaving certain definite property that that property will be divided amongst all the heirs. He may have left debts and charges in the estate and it is only when the estate has been administered and usual administration accounts have been taken that the interest of those entitled to shares as heirs can be ascertained.).

4. The defendants are in possession of the estate of G. H. deceased.

5. The plaintiff is not aware what the estate of G. H., deceased, consisted of at the time of his death and what it consists of now and whether there were any debts of the said G. H., and, if so, what debts are still outstanding.

6. The defendants are denying that the plaintiff has any title or interest in the estate of G. H., deceased.

The plaintiff claims—

(1) A declaration that he is entitled to 1/3rd share in the estate of G. H. deceased.

(2) Enquiry into what the estate of G. H. consisted of at the time of his death and what it consists of now.

(3) Administration of the said estate.

DEFENCE.

25.

ADMINISTRATION.

DEFENCE to a Creditor's Suit for Administration. (w)

1. The defendants admit the assets but not the plaintiff's claim.

Or

The defendants admit the plaintiff's claim but not the assets.

2. The plaintiff's claim is barred by the Statute of Limitation.

3. Payment in full (or in part, as the case may be) was made by deceased to the plaintiff.

Or

The debt is discharged by the plaintiff accepting Rs..... on..... in satisfaction of the whole debt.

4. The claim is fraudulent in the following particulars :

5. The defendant is entitled to a set off, of which the following are particulars :

(w) **Costs** : In a suit for construction of will and for administration of the estate left by the testator, the costs, in the absence of grounds established in favour of a departure, should ordinarily be paid out of the estate : *Upendra v. Purendra*, (1916-17) 21 C. W. N. 280. Cf. *Iswardas v. Chandip*, (1910) 6 I. C. 267.

DEFENCE.**26.****ADMINISTRATION.****DEFENCE by Executors to the Claim of a Pecuniary Legatee
for Payment of Legacy & for Administration. (x)**

1. The defendants admit the legacy mentioned in paragraphof the plaint but say that the assets of the testator, after payment of debts, specific legacies and costs of administration, are insufficient to pay all the legacies given by the will.

2. The legacy given by the will to the plaintiff is liable to abate in the same proportion as the other pecuniary legacies.

Or

1. The debts of the testator amount to Rs.....

2. The defendants are bound to discharge the debts of the testator before they can pay the plaintiff's legacy or any legacy under the will.

3. The other legatees ought to be added as parties so that the extent of abatement may be ascertained and be binding on all parties.

Or

1. The estate of the deceased is subject to contingent liabilities, such as,.....

2. The defendants admit that the plaintiff made demands for payment of his legacy, but say that they refused to pay the legacy, because the plaintiff refused to give them an indemnity for the amount of the legacy in spite of request in writing dated.....19...

And (if such be the case)

The suit has been instituted within one year of the testator's death and is therefore not maintainable.

(x) This is a defence to Form No. 20.

(x) **Abatement of legacies:** Sec. 175 Ind. Suc. Act, XXXIX of 1925. Cf. Sec. 327.

(x) **Debts to be paid before legacies:** Sec. 325, Ind. Suc. Act; cf. Sec. 329 of the said Act.

(x) **No suit lies to recover legacy until the expiration of one year from the testator's death:** Sec. 337. Ind. Suc. Act.

(x) **Joinder of other legatees:** *Purshottam v. Kala*, (1902) I. L. R. 26 Bom. 301; *Pramathanath v. Suprakash*, (1931) I. L. R. 58 Cal. 77.

(x) **Executor's right to claim indemnity:** Sec. 326, Ind. Suc. Act, 1925; *Rajamannar v. Sunnalakshmi*, (1892) 2 M. L. J. 180,

DEFENCE.**27.****ADMINISTRATION.**

DEFENCE by Executor to a Claim by Specific Legatee to recover Legacy and for Administration. (y)

1. The shares specifically bequeathed to the plaintiff did not belong to the testator at the time of his death. (or, The testator in his life-time sold the shares specifically bequeathed to the plaintiff).

2. The legacy is therefore adeemed.

Or

1. The testator in his life-time sold 20 out of the 30 shares specifically bequeathed to the plaintiff for Rs.....

2. The legacy is therefore adeemed to the extent of the sum of Rs.....so received.

Or

The shares specifically bequeathed to the plaintiff were pledged by the testator with the Imperial Bank of India to secure an advance of Rs..... repayable on demand with interest at 6 *per cent.* There is due to the said Bank Rs..... on the said loan. The plaintiff is liable to pay the said sum of Rs..... before he can claim the said shares or any portion thereof.

Or

The debts of the testator amount to Rs..... The defendants must discharge the said debts before the legacy can be paid.

(y) This is a defence to Form No. 21.

(y) **Ademption of specific legacy :** Sec. 152, Ind. Suc. Act. Cf. Sec. 159, Ind. Suc. Act, for ademption *pro tanto* where stock specifically bequeathed exists in part only at the testator's death.

(y) **Partial ademption of specific legacy :** Sec. 155, Ind. Suc. Act.

(y) **Non-liability of Executor where property specifically bequeathed is subject to any pledge, lien or incumbrance :** Sec. 167, Ind. Suc. Act.

(y) **Debts must be paid before Legacies :** Sec. 325, Ind. Suc. Act.

Note : If the suit is brought in less than one year from the date of the death of the testator, an objection can be taken that the suit is premature or is not maintainable : Sec. 337, Ind. Suc. Act.

PLAINT.

28.

ADMIRALTY.

CLAIM by Creditor to enforce a Bottomry Bond. (z)

1. On or about the 19... the "Elizabeth", a steamship, belonging to the defendants, of tons gross, whilst in the course of a voyage from to, met with bad weather and was compelled to put into the port of for repairs and necessaries.

2. The owners of the said steamship and her freight, and the shippers and consignees of the cargo on board of her, refused to provide the money wherewith to pay for the said repairs and necessaries and the master of the said steamship being without funds and without credit was compelled to borrow from the plaintiffs the sum of Rs..... on a bottomry bond dated..... which provided for maritime interest at the rate of per cent. and to hypothecate the said steamship, her cargo and freight to secure the repayment of the said sum with interest within thirty days after the safe arrival of the said steamship at her place of discharge in the port of

3. In consequence of the said advance the said steamship was enabled to proceed from the port of on a voyage to her place of discharge in the port of

4. The defendants have not made any payment although thirty days have expired after the safe arrival of the said steamship at her port of discharge.

Particulars of claim :

Principal sum Rs.

Interest up to „

Total Rs.

- (z) **Authority of Master to resort to Bottomry Bond :** *The "Karnak"*, (1869) L. R. 2 P. C. 505 (Where the Master having written to the Agent of the owners, of the ship, and of the cargo, and not receiving any answer within the time an answer might have been returned, raised funds necessary for the payment of supplies on Bottomry of the ship, cargo and freight. *Held* : the Master was warranted in resorting to a

The plaintiff claims—

Judgment against the defendants and their bail for the said sum of Rs. including interest.

PLAINT.

29.

ADMIRALTY.

CLAIM by Master for Wages and Disbursements.

1. By an agreement in writing dated.....the plaintiff was employed by the defendants as the master of the steamship, the property of the defendants, on a monthly salary of Rs.....

2. The plaintiff served as the master of the said steamship in pursuance of the said agreement from.....to.....

3. On or about.....19.., while the said steamship was lying in the port of....., the plaintiff purchased tons of bunker coal from.....on account of the said steamship for Rs....., i.e., at the price of Rs..... per ton.

4. The defendants have not paid the plaintiff's wages for the months of....., amounting to Rs....., and also have not paid the price of the said coal, although thereunto requested in writing dated.....

Particulars.

Wages from.....to.....	Rs.
------------------------	-----	-----	-----

Price of..... tons of bunker coal	„
-----------------------------------	-----	-----	---

Total Rs.	_____
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The plaintiff claims—

Rs.....

Bottomry Bond. But if money can be obtained from the shipowners, or cargo-owner's agent in the Port, or raised on personal credit, the Master will not be justified in resorting to the Bottomry Bond.). See also, *The "Onward"*, L. R. 4 A. & E. 38, 58; *Australasian S. N. Co. v. Morse*, (1872) L. R. 4 P. C. 222, 230.

PLAINT.

30.

AGENCY.

**CLAIM by Principal against Agent for Recovery of Secret
Profits earned by the Agent. (a)**

1. By letter dated.....19..., the plaintiff employed the defendant as his broker to negotiate for the purchase of a house at.....on the basis of an offer of Rs. 50,000/-, but eventually on.....19... the house was purchased by the plaintiff for Rs. 55,000/-, and the plaintiff paid the defendant Rs..... commission.

2. Some time prior to the sale, an arrangement had been made between A.B., the vendor of the house, and a broker named B.S., that if B.S. could sell the house for more than Rs. 52,000/-, he might retain for himself whatever could be obtained in excess of that amount. The defendant was aware of this arrangement at the time he was negotiating with B. S. for the purchase of the house, but it was unknown to the plaintiff; and a few days before the sale it was arranged between B. S. and the defendant, without the knowledge or sanction of the plaintiff, that the defendant should receive from B.S. one-half of such excess of purchase money.

3. The sum of Rs. 1,500/-, being one half of the said excess, was, without the knowledge or sanction of the plaintiff, paid by B.S. to, and retained by, the defendant.

4. On19..., the plaintiff discovered that the defendant had made the secret profit in the aforesaid manner.

(a) **Reference :** *Morison v. Thompson*, (1874) L. R. 9 Q. B. 480.

(a) **Cause of action :** Cf. Sec. 216, Ind. Cont. Act, 1872, and Sec. 88 of the Ind. Trusts Act, 1882. "No agent is permitted to acquire any personal benefit in the course of, or by means of, his agency without the knowledge and consent of the principal. Every agent must account to his principal for every benefit, and pay over to the principal every profit, acquired by him in the course of, or by means of, the agency without such knowledge and consent": Bowstead on Agency, 9th Edn. 112; cf. *Parker v. McKenna*, (1874) L. R. 10 Ch. 96.

(a) **Limitation :** Art. 90, Ind. Lim. Act. 1908; *Kishori Lal v. Jauhari Mal*, A.I.R. 1927 All. 436. Either Art. 62 or Art. 90: *Puran Mal v. Ford, MacDonald & Co.*, (1919) I. L. R. 41 All. 635.

The plaintiff claims—

To recover from the defendant Rs. 1500/-.

PLAINT.

31.

AGENCY.

CLAIM by Principal against Agent for Recovery of Secret Profits. (a₁)

(Another Form).

1. The plaintiff was desirous of buying a house suitable for conversion into flats and on.....19...he verbally instructed the defendant to furnish him with particulars of houses suitable for that purpose.

2. Thereafter, on or about.....19..., the defendant invited the plaintiff to go and see a house at.....and on the same

-
- (a.) **Reference:** *Ragier v. Campbell-Stuart*, (1939) 3 All. E. R. 235 (It was open to the plaintiff in this case to repudiate the contract on the ground of fraudulent misrepresentation. What she did was to accept the bargain, but she claimed damages and an account of the profits which the defendant had made as a result of these transactions. No doubt the scope of the agency was limited. What the defendant had undertaken to do was to provide particulars of any houses of which he should hear which he thought might be suitable for the purpose which the plaintiff had in mind and which had been communicated to the defendant. He was agent to that extent. Of course he was not an agent for the purpose of signing any contract on the plaintiff's behalf. No doubt, an agent may terminate the relationship of principal and agent by himself selling to his principal property which belongs to himself so long as the principal knows that the property does in fact belong to the agent, and that the agent is intending to sell the property. That must however be limited to the proposition that it is the duty of every agent to act honestly and faithfully to his principal, and, if the agent conceals most material facts from his principal, and, by a fraud obtains an advantage for himself by purporting to sell, or by selling, property which is his own, then the duty which lies upon him is not ended by such a contract, and he remains liable to account for any secret profit which he has made as a result of the transactions between himself and the principal (p. 239). The moment the true transaction by which the defendant acquired his property was concealed from the plaintiff, and

day the plaintiff and his wife went to the house and went all over it and told the defendant that it was exactly the sort of house which they wanted.

3. The defendant then told the plaintiff that he had purchased the house himself for Rs. 10,000/- and that he was willing to part with it to the plaintiff at the sum of Rs. 10,500/- which would give him Rs. 500/- partly as profit and partly as remuneration for his services.

4. The plaintiff then and there agreed to buy the house for Rs. 10,500/-.

5. On.....19...an agreement in writing was entered into between the defendant and the plaintiff by which the plaintiff agreed to buy and the defendant agreed to sell the house for the sum of Rs. 10,500/- and the plaintiff paid the defendant Rs. 500/- as earnest money.

6. On.....19...the transaction was completed by a formal conveyance and payment of the balance of purchase money.

7. On or about.....19... the plaintiff discovered the following facts :

(a) That the house belonged to one A. who informed the defendant that he would accept Rs. 5,500/- for the house.

(b) That having ascertained the price, the defendant proceeded to contract to buy the house for himself at that price. He did not however enter into the contract personally with the vendor but had the contract taken in the name of his brother-in-law H.B., who was his nominee. The consideration money was paid by the defendant.

(c) That on.....19... the defendant purported to enter into a contract with the said H. B., by which the defendant agreed to buy and the said H. B. agreed to sell the property in question for the sum of Rs. 10,000/-. The said transaction was a bogus one.

8. By representing to the plaintiff that the property had been purchased by him for Rs. 10,000/-, the defendant intended that he would be able to sell it, if possible, to the plaintiff at a handsome profit to himself.

deliberately concealed by means of a fraud from the plaintiff, and the plaintiff was induced to buy the property by reason of that fraud and in the honest belief that the defendant had paid £.....for the property, that was something the defendant was doing in direct breach of his duty. p. 240).

9. The true transaction by which the defendant had acquired the property was deliberately concealed by means of a fraud from the plaintiff, and the plaintiff was induced to buy the property by reason of that fraud, and in the honest belief that the defendant had paid Rs. 10,000/- for the property.

The plaintiff claims,—

1. Rs.....damages.
2. Alternatively, an account of the secret profit made by the defendant as a result of the aforesaid transaction between himself and the plaintiff, and
3. Payment of such sum as may be found due upon the taking of the account.

PLAINT.

32.

AGENCY.

CLAIM by Principal against Sub-agent for Recovery of Secret Profits. (*a*₂).

1. The plaintiffs, a Company incorporated under the Companies Act, are ship-owners carrying on business at.....

2. In19..., the plaintiffs were engaged in the formation of a steamship company and were desirous of raising money on debentures to be secured on certain ships.

3. By letter dated.....19..., the plaintiffs employed P. & T., brokers, to procure for the plaintiffs a loan of Rs..... on a commission of 2% on the transaction.

(*a*₂) **Reference :** *Powell & Thomas v. Jones (Evans) & Co.*, (1905) 1 K. B. 11
(Held upon the facts : (1) There was evidence that the contractual relation of principal and agent had been established between the principals and sub agent ; (2) even if no privity of contract existed between them, the sub-agent stood in a fiduciary relation to the principals, and was accountable to them for the commission he had received from the company.).

4. The said P. & T. with the assent of the plaintiffs employed the defendant as sub-agent on the terms that the defendant and the said P. & T. should share between them the commission payable by the plaintiffs.

5. In July, 19..., the defendant introduced Mr....., the representative of the plaintiffs, to the L. G. & T. Society of as being likely to advance the money required; and ultimately was successful in getting the advance made and the debentures issued on

6. On 19..., the plaintiffs paid the said P. & T. and the defendant the agreed commission.

7. On or about 19..., the plaintiffs discovered that the defendant had entered into an arrangement with the said L. G. & T. Society, without the knowledge of the plaintiffs or of the said P. & T., by which the said L. G. & T. Society agreed to pay the defendant on the completion of the transaction Rs..... and also five *per cent.* on the annual premiums payable upon a sinking fund policy of insurance which had to be taken out by the plaintiffs with the L. G. & T. Society to insure the ultimate payment of the amount of the said debentures.

8. On.....19..., the defendant secretly and corruptly received from the said L. G. & T. Society the said sum of Rs. 2,000/- and Rs..... being five *per cent.* on the annual premiums paid up to that date.

The plaintiffs claim—

(a) To recover from the defendant the said sum of Rs.....

(b) A declaration that the plaintiffs are entitled to recover from the defendant such further sums which the defendant may receive by way of commission from the said L. G. & T. Society in respect of future annual premiums on the aforesaid policy of insurance.

(a₂) **Sub-agent :** Who is a : Sec. 191, Ind. Cont. Act. For definition of substituted agent. see Sec. 194, Ind. Cont. Act.

(a₁) See Notes under Form No. 30. *Cf. Kaluram v. Chinniram*, A. I. R. 1934 Bom. 86 (measure of damages where a commission agent sells his own goods to principal.).

PLAINT.

33.

AGENCY.

**CLAIM by Principal against Agent to recover Secret
Commission and against Third Person who paid
such Commission to the Agent. (a₃)**

1. The plaintiffs are and at all material times were the proprietors of a factory known as situate at

2. From 1930 to 19..., the defendant S. H. was employed by the plaintiffs as the manager of the said factory, and in that capacity it was his duty to examine tenders for the supply of coals for the purpose of the factory and to report and advise the plaintiffs thereon.

3. On 19..., the defendant L. J., who was a coal merchant, submitted to the plaintiffs a tender for the supply of 200 tons of coal.

4. On 19..., the defendant S. H. advised the plaintiffs to accept the said tender, which they accordingly did.

5. On 19..., the plaintiffs acting on the advice of the defendant S. H. entered into contract with the defendant L. J. for the supply of 200 tons of coal.

6. In 19..., the coal was delivered to the plaintiffs under the contract so obtained and on 19..., the plaintiffs paid Rs..... to the defendant L. J. as the price of the coal.

7. On August 6th, 19..., the plaintiffs discovered that before submitting his tender above-mentioned, the defendant L. J., with the view of inducing the defendant S. H. to advise the plaintiffs

(a₃) Reference: *Salford Corpn. v. Lever*, (1891) 1 Q. B. 168, 181 (Where an agent, who has been bribed so to do, induces his principal to enter into the contract with the person who has paid the bribe, and the contract is disadvantageous to the principal, the principal has two distinct remedies: The right against the agent is, to recover the secret bribe he has received, and it is founded on his fraud in regard to that bribe. That right against the person who has paid the bribe is, to recover the excess of price which he obtained through his fraud—a fraud, no doubt, in conjunction with the agent but an entirely separate and distinct fraud from that in respect of which the action against the agent would be brought.).

to accept the same, corruptly agreed to pay to the said S. H. a secret commission or bribe of one rupee *per* ton on the quantity of coal tendered for, and in order to recoup himself for the commission so promised to the said S. H., he inserted in the tender a price which was in excess of the price at which he would otherwise have tendered by one rupee *per* ton. Thereupon, the defendant S. H., being induced thereto by the promise of the commission, advised the plaintiffs to accept the said tender which they did as aforesaid.

8. The price paid by the plaintiffs to the defendant L. J. for the said coal exceeded by a sum of Rs. 1,500/- the price which (but for the payment of the commission) the said L. J. would have received.

9. On 19..., the defendant S. H. in breach of his duty secretly and corruptly received from the defendant L. J. the said sum of Rs. 1,500/- which he has not paid over to the plaintiffs.

The plaintiffs claim—

Rs. 1,500/- from the defendants.

PLAINT.

34.

AGENCY.

CLAIM by Principal against Agent for acting contrary to Instructions. (b)

1. In July, 19..., the plaintiff verbally employed the defendant as his agent to sell one hundred bales of cotton lying at..... in accordance with the plaintiff's instructions.

2. On August 1st, 19..., the defendant wired to the plaintiff enquiring if he could sell the goods on that date at the rate of Rs. 80/- *per* bale. The plaintiff replied by wire the same day instructing the defendant to wait and not to sell unless the price reached Rs. 100/- *per* bale.

- (b) **Measure of damages :** Sec. 211, Ind. Cont. Act. The measure of damages, in a case where an agent has in breach of his duty sold goods of his principal below the limit placed upon them by the principal, is the loss which the principal has sustained, and if he has sustained no loss he can only ask for nominal damages : *Manchubhai Navatchand v. John H. Tod*, (1896) I. L. R. 20 Bom. 633 ; cf. *Chelapathi v. Surayya*, (1902) 12 M. L. J. 375,

3. The defendant in breach of his duty sold the goods on the said date at Rs. 80/- *per bale*.

4. On August 3rd, 19... the said goods could have been sold at Rs. 100/- *per bale*.

5. By reason of the premises the plaintiff has suffered damage.

Particulars of claim :

Value of 100 bales at Rs. 100/- <i>per bale</i>	...	Rs. 10,000/-
Price of 100 bales at Rs. 80/- <i>per bale</i>	...	„ 8,000/-
		<hr/>
Difference	...	„ 2,000/-
		<hr/>

The plaintiff claims

Rs. 2,000/-damages.

PLAINT.

35.

AGENCY.

**CLAIM by Principal against Agent for Recovery of Loss
caused by Agent's Negligence. (c)**

1. At all material times the plaintiff was the owner of a furnished house at.....which he was desirous of letting.

2. In.....19... the plaintiff, at the oral request of the defendant, employed him as his house agent for the purpose of letting or procuring for the plaintiff a fit and proper person as a tenant for the said furnished house for twelve months at a commission of 5 *per cent*.

3. In.....19..., the defendant introduced to the plaintiff one A. B. as a fit and proper person who would take the house and the plaintiff thereupon agreed to take the said A. B. as tenant at a monthly rent of Rs.....with effect from the 1st of January 19...

4. The said A.B. duly entered and paid the first month's rent on19..., but paid no more rent and left the house some time

(c) **Cause of action :** The house agent is bound to use reasonable care to ascertain the solvency of the tenants : *Heys v. Tindle*, (1861) 30 L. J. Q. B. 362.

in.....19..., and on or about.....19... got himself adjudged an insolvent leaving no assets for distribution among creditors, by reason whereof the plaintiff has wholly lost full eleven month's rent payable by A.B.

5. The said A.B. was not a fit person to be introduced as a tenant.

The plaintiff claims—

Rs.....being 11 months' rent of the said house by way of damage.

PLAINT.

36.

AGENCY.

CLAIM by Principal against Agent for Damages for Negligence. (d).

1. The plaintiff was the owner of a house inStreet, which was let to one C. D., a shopkeeper, for the term of years subject to the *proviso* that the lessee should not assign the demised premises without the written license or consent of the lessor first had and obtained.

2. On 19..., C. D. contracted to sell his lease and business to one A. G. and, accordingly, applied to the plaintiff for his consent in writing to the transfer of the lease to the said A. G., whereupon the plaintiff placed the matter in the hands of the defendant, who was an auctioneer and house agent, and gave

- (d) Reference: *Pape₁ v. Westacott*, (1894) 1 Q. B. 272 (*Per* Lindley L. J. at pp. 278, 279: You cannot say as a general rule that a person who is authorised to receive money is authorised to take a cheque from a person. In this case he did not get cash. He did not even get a cheque which in the ordinary course of business he would transmit to his principal. There is no proof of any usage or custom that would authorise such a transaction. He took a piece of paper which in the ordinary course, he would not send to his principal at all, and above all, that that piece
- of paper was never cashed—he has not pursued the authority with which he was entrusted. The agent is liable to his principal for the full amount of arrears of rent.). Cf. *Gokul Ohand Jagan Nath v. Nand Ram*, (1939) A. C. 106 at p. 113 where *Pape₁ v. Westacott* has been referred to and distinguished.

him a consent or license in writing to the said transfer and instructed him not to hand over the license to C. D. until he had paid Rs....., the rent in arrear.

3. Thereafter, on 19..., the defendant, C. D. and the said A. G. met at and the purchase was completed, and the defendant then handed over the license to C. D. on receipt of a cheque drawn by C. D. to the order of the defendant and crossed "& Co." for the amount of the rent in arrear, together with a small sum for the defendant's charges.

4. The defendant sent the said cheque to his Bank for credit to his account and himself gave the plaintiff a cheque for which was dishonoured as a result of the cheque given by C. D. to the defendant being dishonoured.

5. C. D. has disappeared and the plaintiff has lost the chance of recovering the rent from him.

6. The defendant has not made good the loss to the plaintiff.

The plaintiff claims—

Rs.....

PLAINT.

37.

AGENCY.

CLAIM by Principal against Third Person for Breach of Contract with an alternative Claim against Agent for implied Breach of Warranty of Authority. (e)

1. On19... the defendant A.B., professing to be the agent of the defendant C.D., purported to make a contract between the plaintiff and the defendant C.D. to sell and deliver to the

(e) **Reference :** *The Honduras Inter-Oceanic Ry. Co. v. Lefevre and Tucker*, (1877) 2 Ex. D. 801 C. A. (*Per* Cockburn, C. J. at p. 305 : "What the plaintiffs complain of is non-performance of a contract. If their claim is against Lefevre it is because the contract is broken ; if it is against Tucker it is also because the contract has failed and remains unfulfilled. The only difference is that, although the redress claimed is the same, if there had been separate actions the process would have been different

3. By reason of the premises the plaintiff has suffered damages.

Difference Rs.

Measure of damages : As against the principal Sec. 73, as against the agent, Sec. 235, Ind. Cont. Act: *Kishori Prasad v. Secy. of State*, I.L.R. (1939) 1 Cal. 463.

PLAINT.**38.****AGENCY.****CLAIM by Principal against Agent, for setting aside a Deed obtained under Coercion and for Account. (f).**

1. The plaintiffs carry on business as bankers at, amongst other places, Singapore.

2. By a registered power of attorney dated.....19..., the plaintiffs appointed the defendant as their agent to conduct their banking business at Singapore for a period of 3 years commencing on.....The said period expired on.....

3. On.....19..., the plaintiffs sent another agent, named, to Singapore to replace the defendant and wrote to the defendant requesting him to make over charge of the business and to hand over all the account books, documents etc., relating to the business and the cash, if any, in his hand, to the new agent.

4. The defendant refused to make over charge of the business or to hand over the books of accounts etc. or any cash money in his hand to the said new agent until and unless the accounts between him and the plaintiffs were settled and a release deed was executed in his favour releasing him from all claims against him with reference to his agency.

5. As the defendant was obdurate and as the deed of release could not be executed before examination of the accounts and the plaintiffs feared that they would suffer heavy loss by the stoppage of the business they were compelled to authorise their new agent by telegraphic communication to give release to him, and the said new agent accordingly executed a deed of release in favour of the defendant on....., and thereupon the defendant made over charge of the business and handed over the account books etc., and Rs.....as cash in hand to the said new agent. The said deed of release was in the circumstances obtained under coercion.

6. From the account books made over by the defendant it appears that the defendant has improperly debited the plaintiffs with the loss of Rs.....sustained by the defendant in his own

(f) **Reference :** *Muthiah Chetty v. Karuppan Ohettiar*, (1927) I. L. R. 50 Mad. 786, applying Sec. 15, Ind. Cont. Act.

See 'Coercion' under "Particulars", Chap XX.

(f) **Limitation :** As regards claim for accounts, Art. 89, Ind. Lim. Act. As regards setting aside a deed obtained under Coercion, Art. 91,

private transactions in dollars and there are also various errors and omissions in the said account.

Particulars :

The plaintiffs claim—

(1) That the said deed of release be set aside and delivered up to be cancelled.

(2) That the defendant be directed to render a true and faithful account of his dealings as, and during the period he was, the plaintiffs's agent.

(3) Payment of Rs....., wrongfully debited to the plaintiffs as aforesaid and such other sum as may be found due upon the taking of accounts.

PLAINT.

39.

AGENCY.

CLAIM of Principal against Agent for Benefit of an Invention made by the Agent in the Course of his Employment. (g)

1. The plaintiff company at all material times were and are manufacturers of safety glass chiefly used in motor cars.

2. By a contract in writing dated January 5th, 19... the plaintiff company agreed to employ the defendant as an assistant chemist for a period of three years commencing from 19...

3. The said agreement *inter alia* provided as follows :—

(a) The assistant chemist shall keep himself informed of and acquainted with all matters pertaining to safety glass of all makes and the manufacture thereof and at all times when required to give the company such available information.

(g) **Reference :** *Triplex Safety Glass Coy. v. Scora*, (1938) 1 Ch. 211, 217 (Any invention made in the course of the employment of the employee in doing that which he was engaged and instructed to do during the time of his employment, and during working hours and using the materials of his employer, is the property of the employers and not of the employee, and that, having made a discovery or invention in the course of such work, the employee becomes a trustee for the employer of that invention or discovery, and he is therefore as a trustee bound to give the benefit of any such discovery or invention to his employer.). Cf. The Patents and Designs Act II of 1911,

(b) Any discovery or invention made in the course of the employment of the employee in doing that which he was engaged or instructed to do during the time of his employment, and during working hours, and using the materials of his employers, shall be the property of the employers and not the property of the employee.

4. In April 19..., the defendant was instructed by Mr., the plaintiff company's head chemist, to discover, if he could, a method of producing what was known as acrylic acid.

5. In December, 19..., the defendant discovered a method of producing the said acid in the course of his employment, during working hours, using the plaintiff company's materials.

6. The plaintiff company took no steps to patent the discovery or to do anything in the matter while the defendant was in their employ, although the defendant suggested that it might be used as an adhesive in the manufacture of safety glass.

7. Shortly after the defendant left the plaintiff's employ in 19..., he set up on his own account as a manufacturer of laboratory glass and discovered that acrylic acid could be used as an adhesive for his own purposes as a manufacturer of laboratory glass.

8. On..... 19..., the defendant without the plaintiff company's knowledge applied for a patent to protect the discovery.

9. The patent was granted and, according to the specifications, it was for the protection of the invention or discovery made in.....and for its use as an adhesive.

10. Subsequently, the plaintiffs attempted to patent the discovery and, on..... 19..., they learned that a grant had already been made to the defendant, whereupon the plaintiffs requested the defendant by letter dated.....: 19... to assign the patent to them, offering to pay his expenses in patenting the invention and to allow him a free license to use the discovery for all purposes of his own, except for the making of safety glass. This the defendant declined to do.

The plaintiffs claim—

(1) A declaration that they were entitled to the patent granted to the defendant and that the defendant held it as trustee for the plaintiffs.

(2) Order that the defendant should forthwith assign the said patent to them.

PLAINT.

40.

AGENCY.

**CLAIM against a *del credere* Agent for the
Price of Goods sold. (h).**

1. By an agreement in writing dated 19..., the plaintiff employed the defendant as his agent to sell timber for the plaintiff upon the terms that he would be responsible to the plaintiff for the discharge by the buyers of their contractual obligations and would receive ten *per cent.* commission, on all sales.

2. On 19..., the plaintiff, under instructions in writing from the defendant, sent a quantity of timber to A. B. at....., but the price of the same, though due, has not been paid.

Particulars :

The Plaintiff claims—

Rs.....

PLAINT.

41.

AGENCY.

**CLAIM by Agent against Principal for Breach of implied Term
in a Contract to supply Goods in a Merchantable State. (i).**

1. The plaintiffs are fruit brokers of Bombay.

2. The defendants are purchasers of oranges and shippers in Palestine, whose branded goods are well known in the Bombay market as of standard quality.

(h) See 'Del credere agent' under classes of Persons, Chap. IX, p. 121.

(i) Reference : *Broome v. Pardess Co-Operative etc. Ltd.*, (1939) 3 All. E. R. 978 (In this case the plaintiffs entered into a contract with the defendants who were producers of oranges in Palestine to sell the defendants' oranges in London. The question was whether, in this particular contract, there should be implied a term that the goods should reach London in a merchantable state. It was held, following *Livock v. Pearson Bros*, (1928) 33 Com. Cas. 188, that the principle

3. By a contract in writing dated 19..., and made at the plaintiffs agreed to sell in Bombay 40,000 cases of the defendants' oranges of the Ophir brand during the season, shipment 30 *per cent.* November—December 19..., 70 *per cent.* January—March 19..., on the following terms :

(a) The defendants to ship and, after shipment, to draw upon the plaintiffs for 7s. 6d. *per* case of oranges f. o. b. Palestine ports, which was to be treated as an advance made by the plaintiffs.

(b) The plaintiffs to obtain delivery of the goods from the ship by paying the freight and to pay the duty and expenses such as landing charges and haulage from the docks.

(c) The plaintiffs to sell the oranges and, after sale, to account to the defendants, deducting from the sale proceeds first of all 7½ *per cent* on the gross sales as brokerage, 6d. *per* case covering repacking expenses and haulage, freight, duty, and then the advance, and to pay the balance, if any, to the defendants.

4. It was an implied term of the said contract that the oranges, should reach Bombay in a merchantable state.

on which the Courts have acted when asked to imply terms into contracts between parties, is that the implication is one which the law draws from what must obviously have been the intention of the parties, with the object of giving efficacy to the transaction. It was held that the defendants were known as first class traders whose branded goods were known to be goods of a standard quality. The parties knew that they were both contracting about perishable goods. They knew what to expect on arrival in London of goods so far as wet or waste oranges were concerned and oranges that would require repacking. Those were the surrounding circumstances in which the contract was entered into. The contract in this case is what the business man calls a consignment contract. It is not a contract of purchase and sale. The plaintiffs were not buying from the defendants. They were undertaking to act for the defendants. They were making common purpose with the defendants in the marketing of the defendants' goods. What the parties appeared to have contemplated was certainly the sale of Ophir oranges in the London market in saleable and merchantable condition, because they have arranged in the contract for a charge of some repacking, and some repacking is done in the normal way, and is expected to ensure that the oranges may be sold not merely as oranges of Ophir brand but as oranges of Ophir brand in saleable and merchantable condition.).

5. The defendants began to make shipments on account of these 40,000 cases on by the Steamship V. and went on shipping at ten different ships down to

6. Thereafter, the consignment of 5000 cases which arrived on by the Steamer were oranges that were abnormally wet and in process of deterioration, and the plaintiffs were unable to sell the said oranges as merchantable oranges of the Ophir brand. Large numbers of oranges had to be sold as wet, wasty and slack, because their condition was such as to make it impossible to repack them, and such as were saleable, required an excessive amount of repacking.

7. In the premises, the plaintiffs have suffered damage.

Particulars :

The plaintiffs claim—

Rs.,..... damage.

PLAINT.

42.

AGENCY.

CLAIM by Agent against Principal for Indemnity against Damage for Breach of Contract. (j)

1. The plaintiffs are brokers at Bombay. The defendants are merchants at Calcutta.

2. On 19..., the plaintiffs, under instructions in writing dated.....from the defendants, contracted in writing with

- (j) **Reference :** Illustration (a) to Sec. 222 of the Ind. Cont. Act, 1872; *Frizione v. Tagliaferro & Sons*, (1856) 10 Moo. P. C. C. 175, which was an action by an agent in Malta against his principal to recover damages sustained by him in a suit brought in Genoa upon a breach of contract which he had defended on behalf of his principal. It was held (1) in order to entitle an agent to recover from his principal under such circumstances he must show (a) the loss arose from the fact of his agency, (b) he was acting within the scope of his authority, (c) the blame was not attributable to any fault or laches on his part; (2) the liability the defendant was under to indemnify the plaintiff extended to protect him against the expenses and trouble of an action arising out of his agency in the matter; (3) damages should be decreed against the principal. Cf. *Halbronn v. International Horse Agency & Exchange*,

B., a merchant of Bombay, to sell and deliver to him 20 bales of woollen socks (here state description) within one month from the date of contract, at the price of Rs.....*per* bale.

3. The defendants did not supply the goods and, accordingly, the plaintiffs could not fulfil the contract, whereupon in... .. 19..., B. sued the plaintiffs in the High Court at Bombay (Suit No..... of.....) for recovery of Rs.....as damage for breach of contract.

4. By letter dated.....the plaintiffs informed the defendants of the suit, and by their letter dated.....the defendants authorised the plaintiffs to defend the suit.

5. The plaintiffs defended the suit, but on.....the said suit was decreed for Rs.....with costs and interest on judgment at 6 *per cent*.

6. On.....the plaintiffs paid Rs.....to B. in satisfaction of the said decree and on.....paid Rs.....to his own solicitors as taxed costs as between attorney and client.

Particulars :

The plaintiff claims—

Rs.....for such damages, costs and expenses.

PLAINT.

43.

AGENCY.

CLAIM by Agent against Principal for Damages for Anticipatory Breach of Contract. (k)

1. The defendants are proprietors of stone-quarries in the district of.....

2. On.....19... the Corporation of Calcutta advertised for

(1903) 1 K. B. 270, where it was held that the defendants were not liable as the damages recovered against the plaintiff arose not from any act done by him in pursuance of his employment by defendants.

(k) **Reference :** *Manindra Chandra Nandy v. Aswini Kumar*, (1921) I. L. R. 48 Cal. 427. *Per* Mookerjee, A.C.J. : "A breach of contract may take place before the time fixed for performance of the contract has arrived where the promisor has repudiated the contract. In such an event, the promisee may elect to sue him for breach of the contract without wait-

tenders for the supply of twenty lakhs cubic feet of stone metal annually for a period of twenty years.

3. On.....19... the defendant submitted their tender to the Corporation.

4. On.....19... it was agreed in writing between the plaintiff and the defendants at.....that if the plaintiff could secure acceptance of their offer by the Corporation, and defrayed, at his own risk, the preliminary expenses in connection therewith, the defendants would pay the plaintiff (i) Rs. 20,000/-, (ii) brokerage at 2 annas for every cubic feet of stone metal to be delivered to the Corporation during the subsistence of the contract and (iii) two fifths share of the profits

ing for the time fixed for the performance. This principle applies where the contract is to be performed in instalments ; in such cases the question may arise, whether the refusal to perform any part of the contract amounts to a repudiation of the whole contract or not. No such question, however, arises in the present case because the defendants have repudiated in its entirety their arrangement with the plaintiff. The point here consequently reduces to the proper mode of assessment of damages (p. 431). The damages for breach of a contract by renunciation thereof before performance is due are measured by what the injured party would have suffered by the continued breach of the other party down to the time of complete performance less any abatement by reason of circumstances of which he ought reasonably to have availed himself. The substance of the matter then is (p. 432) that the damages are assessed, as on the date of the breach ; nevertheless, they are to be compensation for the loss caused by depriving the plaintiff of the benefit of the contract as it was originally made..... Since the injury is the destruction of the contract, regarded as an article of property, the measure of damages is the value of such property at the time of destruction The damages are to be assessed according to the cost of performance, not at the time and place of the breach but at the time and place set for the performance (p. 433). As regards brokerage, the plaintiff is *prima facie* entitled to the present value of the annuity of Rs. 2,500/- for 20 years ; this may easily be shown, by calculation, to amount to Rs. 31,115/- or Rs. 28,674/- according as the rate of interest is assumed to be 5% or 6% *per annum* (p. 434). As regards share of profits, the man who has agreed to be paid by commission upon sales, speculates to a certain extent on the prosperity of the company. There is also the inevitable uncertainty of life and health. Consequently in circumstances like these the damages cannot be assessed with any approach to mathematical accuracy. In view, however, of the fact that the Court below has assessed the damages at less than 3 years' estimated profits we are not prepared to hold that the award is excessive. (p. 437)".

of the business which was to be placed under his management for the same period.

5. In pursuance of the said agreement, the plaintiff interviewedand.....and other officers and Councillors of the said Corporation as the representative of the defendant and by all legitimate means tried to persuade them to accept the tender of the defendants.

6. The plaintiff also incurred all preliminary expenses amounting to Rs.....at his own risk in connection with the acceptance of the said tender and it was mainly through his efforts that the defendants were able to secure the contract on..... 19...

7. Although the plaintiff carried out his part of the agreement, the defendants, by letter dated....., 19..., purported to repudiate altogether the said agreement alleging that the plaintiff was of no assistance to them in the matter of securing the contract.

8. By reason of the premises the plaintiff has lost the benefit of the contract and has suffered damage.

Particulars :

(i) The amount payable to the plaintiff other than brokerage and 2/5ths share of profits	...	Rs. 20,000/-
(ii) Present value of brokerage at the rate of Rs.....a year, for twenty years	...	„
(iii) Present value of two-fifths share of the average net annual profit for twenty years	...	„
		<hr/>
	Total	„
		<hr/>

The plaintiff claims—

- (1) Rs.....damages.
- (2) An enquiry, if necessary, into the damages suffered by the plaintiff.

PLAINT.

44.

AGENCY.

CLAIM by Agent against Principal for Damages for preventing him from earning his Commission. (1)

1. In July 19..., the plaintiff approached Mr. W. A. P., managing director of the defendant company, and inquired of him whether the defendant company would be interested in purchasing all the shares in A. & M. Ltd., a limited company associated with B. & Co. Ltd.

2. On.....19...the said W.A.P. on behalf of the defendant company entered into an agreement with the plaintiff in the terms of the following letter dated..... 19...

“Dear Sir, With reference to the purchase of shares in A. & M. Ltd., in the event of our making the purchase of the whole of the ordinary and preference shares of the company now issued, we agree to cover you to the extent of Rs. 10,000/-. For and on behalf of A. I. C. Ltd., W.A.P., Managing Director.”

3. The negotiations on the part of the vendors were mainly in the hands of a Mr. R., then the Chairman of A. & M. Ltd. and B. & Co. Ltd., and the shares to be purchased were held by B. & Co. Ltd.

(1) **Reference :** *Kahn v. Aircraft Corporation Ltd.*, (1937) 1 All. E. R. 757 :

The agent in this case was held not entitled to commission since that was only payable “in the event of our making the purchase”; and because the purchase in this case was in fact not completed. It was held that the plaintiff was entitled to damages for being prevented from earning his commission and the *quantum* of damage was decided upon the principles laid down by the Court of Appeal in *Trollope (George) & Sons v. Caplan*, (1936) 2 K. B. 382. *Trollope (George) & Sons'* case was an ordinary estate agent's case and in that case it was held that there should be implied a term that if the purchaser introduced by the plaintiff was ready and able to complete the contract, the defendants would not, by refusing to complete prevent the plaintiff from earning the commission; that before an award of damages could be made equal to the commission the plaintiffs would have earned, had the transaction gone through, it must be found as a fact that but for the conduct of the defendant a binding contract with the purchaser would have been entered into.

4. After the agreement aforesaid, with the approval of Mr. W. A. P., the plaintiff and Mr. K., the defendant company's accountant saw Mr. R. and also other directors of B. & Co. Ltd. and negotiated on behalf of the defendant company.

5. At the desire of Mr. W. A. P. the plaintiff made an offer as instructed and brought about an agreement on.....between B. & Co., Ltd. and the defendant company on terms which were acceptable to both.

6. This agreement was complete in all its terms but the defendant company refused to complete it because Mr. R. would not agree to the additional terms of the defendant company, namely, that the commission payable to the plaintiff should be included in the purchase price and that the un-issued shares of A. & M. Ltd. should be issued at *par* to the defendant company. These terms were no part of the agreement or of the negotiations which preceded the agreement, and were wholly improper.

7. The agreement accordingly went off and the defendant company by their wilful default prevented the plaintiff from earning his commission.

The plaintiff claims—

Rs. 10,000/- damages.

PLAINT.

45.

AGENCY.

CLAIM by Estate Agent against Principal for Commission. (m)

1. On.....19... the defendant wrote to the plaintiffs who were estate agents, stating that he wished to sell certain premises at.....consisting of a shop occupied by a tenant under a lease granted in 1934 for 30 years at Rs. 150/- *per* month and requesting

(m) **Reference :** *George Trollope & Sons v. Caplan*, (1936) 2 K. B. 582, 389.
(The defendant is not at liberty to prevent the commission being earned. Such prevention will give rise to a right of action for damages for breach of the agency contract even though there are still many terms of the contract between vendor and purchaser to be agreed to before the

the plaintiffs to endeavour to find a purchaser for the same for Rs. 30,000/-.

2. Thereupon the plaintiffs proceeded to communicate with likely purchasers, and on 19 wrote to the defendant stating that they had received an offer of Rs. 25,000/- from A. B. for the property "subject to contract."

3. The defendant declined to accept this offer but stated that if the plaintiffs could get an offer of Rs. 27,500/- he would accept that, whereupon the plaintiffs informed the defendant by letter dated.....19... that A. B. was willing to purchase for that sum.

4. On receiving that letter the defendant telephoned to the plaintiff.....stating that although the lease referred to stated the rent to be Rs. 150/- *per* month, he had verbally agreed to a temporary reduction of the rent and allowed the tenant to pay Rs. 125/- only, and would not wish to take advantage of the strict terms of the lease to effect a sale, whereupon the plaintiffs replied that the intending purchaser was not prepared to proceed at the agreed price of Rs. 27,500/- in view of the fact that the income was Rs. 25/- *less per* month unless a proportionate reduction of the purchase price was made. As this was not agreed to by the defendant the transaction went off.

5. The defendant by refusing to allow the transaction to go through except on the basis that the rent should be reduced to Rs. 125/- *per* month, deprived the plaintiffs of the chance that the work they had done would result in the sale of the property at the agreed figure of Rs. 27,500/-

The plaintiffs claim.—

(a) Rs.....commission.

commission, *qua* commission would become due to the agents) following *Trollope & Sons v. Martyn Brothers*, (1934) 2 K. B. 436.

- (m) **When brokerage or Commission becomes due:** Sec. 219, Ind. Cont. Act; *cf. Fazal Ilahi Abdul Qayyum v. Maulvi Muhammad Sared*, (1935) 156 I. C. 131. For other cases, see "Broker" under Classes of Persons, Part II, Chap. IX, p. 92.
- (m) **Right to reasonable commission:** *Cf. Khurshed Alam v. Asa Ram*, A.I.R., 1933 Lah. 784 (1),

PLAINT.**46.****AGENCY.****CLAIM by Estate Agent against Principal for Damages for preventing him from earning his Commission. (n)**

1. On or about.....the plaintiffs, who were estate agents, were instructed in writing by the defendants to find a purchaser for Premises no "subject to contract".

2. On the plaintiffs wrote to the defendants in these terms: "With reference to our conversation on the telephone to day, we confirm your acceptance of the offer made by H. M., to purchase the property (Premises no) "subject to contract" for the sum of Rs. 50,000/-. We take this opportunity of confirming that in the event of the sale materialising we shall look to you for payment on the usual scale of commission".

3. To that letter the defendants replied as follows: "We have to acknowledge receipt of your letter and confirm our telephone conversation with you when we instructed you to accept the offer of Rs. 50,000/- for this property "subject to contract". We have instructed our solicitors Messrs to prepare the contract and forward same to Messrs, the purchaser's solicitors. We also confirm that, in the event of this sale being satisfactorily completed, we shall pay you the usual scale of commission".

4. On Messrs....., the purchaser's solicitors, wrote a letter to the defendants' solicitors in these terms: We are engrossing the contract preparatory to exchange. You can doubtless satisfy us on the few outstanding points when we call for the purpose."

5. The defendants refused to proceed further with the sale.

The plaintiffs claim :—

Rs. as damages for preventing the plaintiffs from earning their commission.

(n) **Reference :** *Trollope (George) & Sons v. Martyn Bros.*, (1934) 2 K. B. 436.

The proposition that if the employer prevents the agent from earning his commission he is liable is much too wide. The prevention must be a fault or a default, in the sense that it is a breach of an express contract or of some contract that must of necessity be implied, as where the employer has no title to the property he contracts to sell, or in breach

PLAINT.

47.

AGENCY.

CLAIM by Agent for Breach of Contract of Employment. (o).

1. At all material times the defendant company (hereinafter referred to as 'the company') carried on business in

2. By an agreement in writing dated 19..., and made between the plaintiff and the company, in consideration of the plaintiff subscribing for Rs. 5,000/- in shares of the company, and in consideration of the plaintiff having suggested introducing to the company certain classes of cotton goods to be manufactured by them, the company appointed the plaintiff their sole agent in Bengal, Behar and Assam for the sale of those goods for the term of seven years, and thereafter until the agreement should be determined by six months' notice on either side.

3. The said agreement *inter alia* provided that—

(a) the plaintiff was to use his best endeavours to obtain orders for the said goods of the company at prices to be from time to time agreed upon between them and to communicate to the company all orders to be obtained by the plaintiff, and the company were to accept and execute all orders sent by the plaintiff unless they had reasonable grounds for refusal ;

(b) the company were to pay to the plaintiff so long as he should continue to be their agent a commission of four

of contract does not perform a term of the contract. The prevention by the employer must be wrongful, a "default", a breach of the contract with the purchaser to entitle the agent to base an action upon it. Cf. *Trollope (George) & Sons v. Caplan*, (1936) 2 K. B. 382 and cf. *Kahn v. Aircraft Industries Corp. Ltd*, (1937) 1 All. E. R., 757, (where the plaintiff's remedy was for damages for being prevented from earning his commission).

(o) **Reference :** *Reigate v. Union Mfg. Coy.*, (1918) 1 K. B. 592 (In this case the Union Mfg. Coy. went into voluntary liquidation and then sold their business without making provision for the plaintiff's agreement being taken over by the purchaser. *Per Scrutton L. J.* at pp. 605, 606, 607, "The first thing is to see what the parties have expressed in the contract ; and then an implied term is not to be added because the Court thinks it would have been reasonable to have inserted it in the

per cent. upon the invoiced price of all goods delivered by the company and duly paid for by the respective purchasers thereof.

4. In pursuance of the said agreement the plaintiff subscribed Rs. 5000/- in the capital of the company and acted as the sole agent for the company for the sale of the above-mentioned goods until such time as is hereinafter mentioned.

5. After January, 19...; the plaintiff obtained and duly communicated to the company diverse orders for the aforesaid goods, yet the company in breach of the agreement unreasonably refused to accept some of the said orders.

contract. A term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated some one had said to the parties, "What will happen in such a case", they would both have replied, "Of course, so and so will happen; we did not trouble to say that; it is too clear". It is suggested that the contract is only to remain in force so long as the company carry on their business. Is that a necessary implication? If this matter had been mooted at the time when the contract was being negotiated, I expect that the parties would at once have disagreed as to what the position was". Therefore I find an express term that the contract is to continue for seven years, the company having power to refuse orders which they have reasonable grounds to refuse, and no ground for implying a term that the seven years shall be subject to the company continuing to carry on business. It is clear that the company by that resolution (for voluntary winding up) intended to stop business with the plaintiff, they treated that resolution as terminating the agreement with him. There was therefore a repudiation of the contract by the company accepted by the plaintiff by the issue of the writ claiming damages for the breach. It by no means follows that the damages are to be assessed on the assumption that a flourishing business was going to be carried on for the remainder of the seven years. The Official Referee will have to consider what was the probability that orders could have been obtained at prices which could have been profitable to the company so that the company could not reasonably reject the goods; and on the other hand, if the price which would have been profitable to the company was such that no orders could have been obtained, the Official Referee will have to take that into account in estimating that the plaintiff has lost by the stoppage of the business. The price was to be agreed, and no order need have been accepted at that price if there was reasonable ground in refusing. It might be that the profitable prices would have been so large that no orders could have been obtained. Therefore it may be that the Official Referee would find that the damages were extremely small.).

6. By reason of the premises the plaintiff lost the commission which he would have earned upon the orders not accepted by the company aforesaid.

Particulars :

<i>Date.</i>	<i>Name of the intending purchaser.</i>	<i>Quantity of goods.</i>	<i>Value of goods.</i>	<i>Commission.</i>
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7. On..... the company sold their business without making provision for the plaintiff's agreement being taken over by the purchaser, thereby treating the agency and agreement as terminated.

8. By reason of the premises the plaintiff has lost the benefit of the said agreement for the remainder of the said term of seven years and has suffered damage.

Particulars.

(Here set out the number of orders that would probably be obtained during the remainder of the period of the agency and the value of the said orders).

The plaintiff claims—

(1) Rs.....damages in respect of the orders specified in.....

(2) Rs.....damages for loss of the benefit of the said agreement.

PLAINT.

48.

AGENCY.

**CLAIM by Agent against Principal for Indemnity against
Consequences of lawful Acts. (p)**

1. The plaintiffs are brokers, and the defendants are dealers in linseed oil, at Bombay.

(p) **Reference :** Illustration (b) to Sec. 222, Ind. Cont. Act, 1872; *Broom (Brown) v. Hall*, (1859) 7 C. B. N. S. 503, where it was left to the jury to say whether the broker in the former action had pursued the course which a prudent and reasonable man would have done in his own case.

2. The plaintiffs, by the orders of the defendants contained in their letters dated.....and....., contracted in writing with B. for purchase on their own credit for the defendants 10 casks of linseed oil at Rs.....*per* cask.

3. On or about.....19...the goods were tendered to the defendants by B. but they refused to accept the goods, whereupon, on.....19..., B. sued the plaintiffs for recovery of Rs..... as damages for breach of contract.

4. By letter dated.....the plaintiffs informed the defendants of the said suit, but they repudiated their liability under the contract altogether. The plaintiffs defended the suit but unsuccessfully and had to pay damages and costs.

Particulars :

Amount of damages ...	...	...	Rs.
Costs incurred ...	...	...	"

			"

The plaintiffs claim—

Rs.....damages.

PLAINT.

49.

AGENCY.

CLAIM by Agent against Principal for Indemnity against Resale Damage. (q)

1. The plaintiff carries on business as commission agent at.....
2. By letter dated.....the defendant instructed the plain-

The jury having found for plaintiff it was held that he was entitled to recover the damages and costs. Illustration (b) to Sec. 222 omits to mention the fact that the agent did what a prudent and reasonable man would have done in his own case. This condition may be taken to be sufficiently implied in the said Illustration. See Pollock and Mulla's Contract Act, 6th Edn., p. 624. An agent will not be entitled to recover costs of an action in a case where he was not justified in defending the action : *Clegg v. Townshend*, (1867) 16 L. T. 180. Before an agent can successfully maintain and claim for indemnity against his principal, he must establish the fact that he has actually incurred a loss : *Rughnath v. Rampartab*, A. I. R. 1935 Sind 38.

- (q) **Reference :** *Babasa v. Hombanna*, A. I. R. 1932 Bom. 593 (Under Sec. 222, Ind. Cont. Act, 1872, the principal is bound to indemnify the agent

tiff to purchase for and on their behalf 300 bags of tamarind at the prevailing market rate, and accordingly on.....the plaintiff purchased the said 300 bags of tamarind from the market at Rs.....

3. On.....the plaintiff informed the defendant by letter about the said purchase but the defendants failed and neglected to pay for and take delivery of the goods.

4. The plaintiff waited for some time and after notice in writing dated.....to the defendants resold the goods on their account on.....and has suffered loss.

Particulars :

Purchase price of the goods	...	...	...	Rs.
Less re-sale price	...	...	...	"

Difference...Rs.

5. The defendants have not paid the said sum of Rs.....although requested to do so by the plaintiff in his letter dated.....

The plaintiff claims—

Rs.....

against the consequences of the lawful acts done by such agent in exercise of the authority conferred upon him. This section is founded upon a well recognised principle of the English law that every agent has a right against his principal founded upon an implied contract to be indemnified against all losses and liabilities and to re-imburse all expenses incurred by him in the exercise of his authority. Now, where an agent by contracting renders himself personally liable for the price of goods bought on behalf of his principal the property in the goods as between the principal and agent vests in the agent and does not pass to the principal until he pays for the goods, and the agent has the same rights with regard to the disposal of the goods and with regard to the stopping them in transit as he would have had if the relation between him and his principal had been that of seller and buyer. The decision in *Jenkyns v. Brown*, (1849) 14 Q. B. 496 is an authority in support of this proposition. Reference may be made to the well known case of *Imperial Bank v. London & St. Katherine Docks Co.* (1877) 5 Ch. D. 195 and *Feise v. Wray*, (1802) 3 East 93. This principle is now expressly recognised by the Sale of Goods Act, 1930. In Chap. 5 which deals with the rights of unpaid seller against the goods, Sec. 45 (5) lays down that the term "seller" includes an agent who has himself paid or is directly responsible for the price. Art. 85 of the Lim. Act will apply to such a case.

PLAINT.

50.

AGENCY.

**CLAIM by Creditor against Principal for Money
borrowed by Agent. (r)**

1. At all material times the business of the defendant company consisted in working certain factories at and also in the import and export of produce.

2. On the 19... the defendant company gave a power of attorney to one S. C. to manage and administer in the name of the house of the defendant company all the business of the house in the establishments it possessed at The said power enabled the said S. C. to substitute another in his place for the purposes of the power. Accordingly, on 19... the said S. C. transferred all the powers given him by the defendant company to one G. G. in the same manner as if the power had been originally given him direct.

3. Under that authority, the said G. G. for some years acted as agent for the defendant company and the management of the entire business of the said company rested with him.

4. On 19..., the said G. G. verbally represented to the plaintiff that he would require some Rs. 10,000/- for the pur-

(r) **Reference :** *Montaignac v. Shitta*, (1899) 15 A. C. 357 (*Per* Lord Herschell at p. 362 : "If in the absence of the means of raising money needed for a business by the sale of bills, or by obtaining accommodation from some other merchant with whom the house had transactions, an agent who had to raise money for his firm must have had recourse to one of these native financiers or money-lenders, then in the opinion of their Lordships the power which this agent possessed under his mandate from his principals would authorise his borrowing from such a source under such circumstances ; and if the occasion might have arisen on which his borrowing powers would have been properly interpreted as comprising the recourse to such means as these, then their Lordships do not think it was incumbent upon the lender to inquire whether in the particular case the emergency had arisen or not ; but if he, in good faith and without any notice of the fact that the agent was not obeying or intending to obey the mandate of his employers, advanced money to him, the loan would be one by which, having regard to their authority to their agent they would be bound, and he would be entitled to recover.). For liability of principal on negotiable instruments, see 'Agent' under Classes of Persons, Part II, chap. IX, p. 74.

pose of the factories under his charge. He also represented to the plaintiff that he could not raise money needed for the business by obtaining accommodation from some other merchant with whom the house of the defendant company had transactions.

5. On 19... and at various dates down to in that year, the plaintiff in good faith made eight payments to the said G. G. amounting in all to Rs. 8,000/-, and the said G. G. executed a promissory note for each such loan as the agent of the defendant company, agreeing to repay the same on demand with interest at 9 *per cent. per annum*.

Particulars of claim :

6. The defendant has not paid any portion of the said sum.

The plaintiff claims—

Rs. on the promissory notes aforesaid.

PLAINT.

51.

AGENCY.

**CLAIM against Principal for Fraudulent Conduct
of the Agent. (s)**

1. In.....19...the defendant obtained a decree for Rs.....against the plaintiff and one C. D. in Suit No.....of 19...in the Court of.....at.....

2. The defendant sought to execute the decree against the said

- (s) **Reference :** *Sherjan Khan v. Alimuddi*, (1916) I. L. R. 43 Cal. 511 (*Per* Mookerjee J., "It cannot be disputed that the attachments were illegal ; when execution had been taken out against D. alone, the property of B. could not be attached ; besides, when the judgment-debtors offered to satisfy the decretal debt, their property could not be lawfully sold..... The sole question of controversy is, whether the defendant is liable for the fraudulent conduct of his agent who, in collusion with the peon, has fraudulently brought about this result.....A principal is liable for the fraud of his agent acting within the scope of his authority..... The principal is liable to third persons for the fraud, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances or misfeasances and omissions of duty of his agent in the course of his employment, although the principal did not authorise or justify or participate in or, indeed, know of such misconduct or even if he forbade the acts or disapproved of them.") *folg. Lloyd v. Grace*, (1912) A. C. 716.

C. D. alone by attachment and sale of his movables, and on.....
19...the warrant of attachment was ordered to be issued.

3. On July 4th, 19..., the peon A. D., on the identification of E. F., agent of the defendant, with whom the plaintiff had been in terms of enmity, attached three heads of cattle, the property of the plaintiff.

4. The plaintiff then and there protested against the said attachment and tendered the decretal amount to the said A. D., who, at the instigation of the said E. F., did not receive the same and had the cattle sold on.....for the insignificant sum of Rs.....

5. The said cattle were worth Rs.....

The plaintiff claims—

Rs.....damage.

DEFENCE.

52.

AGENCY.

**DEFENCE by Principal that the alleged Agent was
not in fact his Agent.**

1. The defendant denies that the said was his agent as alleged or at all.

Or,

By letter dated the defendant revoked the authority of the said to act on his behalf.

2. At all material times the plaintiff had notice that the said had no authority to act on behalf of the Defendant.

DEFENCE.

53.

AGENCY.

**DEFENCE by Principal alleging Unsoundness of Mind
of the Agent.**

1. At the time when it is alleged that the said entered into a contract with the plaintiff on behalf of the defendant, the said was a person of unsound mind incapable of entering into any contract.

DEFENCE.**54.****AGENCY.****DEFENCE by Principal to Claim for Commission.**

1. The defendant denies that he requested the plaintiff to find a purchaser for his house as alleged or at all or that he agreed to pay the plaintiff the alleged or any commission.

2. The defendant admits that he sold the house to but denies that the said was introduced to him by the plaintiff.

DEFENCE.**55.****AGENCY.****DEFENCE by Principal that Plaintiff has elected to Claim against Agent. (t)**

1. The plaintiff admits that the said was his agent as alleged in paragraph of the plaint but states that the plaintiff elected to sue the said agent as the person liable on the said contract and has proceeded to judgment.

- (t) Two contrary views have been taken on the liability on joint contracts under the Indian Contract Act. In *Moselle Solomon v. Martin & Co.*, (1934-35) 39 C. W. N. 461 his Lordship Lord Williams J., held that under secs. 43 and 44 of the Indian Contract Act, as under the English law, the liability under a joint contract is joint, and not joint and several, and gives rise to only one cause of action. If one of the joint contractors is sued to judgment on this cause of action, it is merged in the decree and no second suit against the other joint contractors can be brought upon it. A contrary view was taken by Jack J., as follows: "The liability in terms of both sec. 43 and sec. 233 of the Indian Contract Act is joint and several. The English theory of a single cause of action rests on the right of joint debtors in England to have all their co-contractors joined as Defendants in a suit on the contract, and that right having been excluded by both the above sections, there is no question in India of a single cause of action. Under sec. 233 of the Contract Act read with sec. 230, the causes of action against agent and principal are different and a decree against an agent is no bar to getting a subsequent decree against the principal in respect of the same contract. The full decree, however, can no more be executed against each of them than can a decree obtained against both jointly in the same suit." See "Agent" under "Classes of Persons," Chap. IX, p. 74.

DEFENCE.**56.****AGENCY.****DEFENCE by Agent to Claim for Damages for Breach of Duty.**

1. The defendant denies that he has been guilty of the alleged or any breach of duty.

2. Alternatively, if he has committed any breach of duty, which is not admitted, he denies that the plaintiff has suffered the alleged or any loss.

DEFENCE.**57.****AGENCY.****DEFENCE by Agent to Claim to recover Secret Commission.**

1. The defendant denies that he received the alleged or any commission from the said.....

2. Alternatively, if the defendant received any such commission, which is not admitted, he says he did not receive it either secretly or corruptly or that by receiving the said commission he is guilty of any breach of duty towards the plaintiff. The said commission was received by him with the knowledge and consent of the plaintiff, and/or in accordance with the known usage of the trade.

DEFENCE.**58.****AGENCY.****DEFENCE by Agent that he contracted for and on behalf of a Disclosed Principal. (u)**

The defendant admits that he entered into an agreement with the plaintiff as alleged in paragraph..... of the plaint, but states that he entered into the said agreement not on his own account but as the agent for A. B., as the plaintiff at the time of the making of the said agreement, well knew.

(u) **Agent not liable, where Principal Disclosed :** Sec. 230, Ind. Cont. Act.
See under 'Classes of Persons', p. 75, *et seq.*

DEFENCE.**59.****AGENCY.****DEFENCE by Agent to Claim for Damages for acting
contrary to Instructions. (v).**

1. The defendant was employed as the plaintiff's agent to sell 100 bales of cotton at the best price he could obtain according to market rates and upon the term that the defendant would get 2 *per cent.* commission on the transaction.

2. The defendant admits having sent the telegram on August 1st, 19..., mentioned in paragraph 2 of the plaint but says that he did not receive the plaintiff's reply thereto until the next day.

3. The defendant sold the goods at the best price he could obtain.

4. On 19..., the defendant sent a cheque for Rs.....
..... to the plaintiff as the price at which the said goods were sold less his commission but the plaintiff refused to accept the said cheque.

5. The defendant brings into Court the said sum of Rs.....

DEFENCE.**AGENCY.****DEFENCE by *Del Credere* Agent. (w).**

1. The defendant denies that he agreed to act as the plaintiff's *del credere* agent as alleged or at all.

2. The defendant admits that he sold the goods mentioned in paragraph of the plaint but says that he did so upon the term that he would get a commission of two *per cent.* on the transaction, and has not received any payment in respect thereof.

3. Except as is hereinbefore admitted, all the allegations in the plaint are denied.

(v) This is a defence to Form No. 34.

(w) See *del credere* Agent under 'Classes of Persons', Chap. IX, p. 121.

PLAINT.

61.

ALIENATION.

**CLAIM by a Creditor under Section 53 of the Transfer
of Property Act for Declaration that an Alienation
by the Debtor is void. (x).**

1. On 19..., the plaintiff obtained a money decree in Suit No. of in the Court of against the defendant A. B. for Rs. 2,750.

2. The said A. B. was at the time of the transfer hereinafter mentioned and still is indebted to various other creditors whose claims amount to Rs. 10,000/-. Particulars of the said claims are set out in Schedule "A" hereto.

3. On 19..., the defendant A. B. collusively and with intent to delay or defeat his creditors executed a sale-deed purporting to convey all his properties worth Rs. 50,000/- in favour of the defendant C. D., his brother-in-law. No consideration passed under the said sale-deed and the transaction was a benami one. Particulars of the said properties are set out in Schedule "B" hereto.

4. The plaintiff is suing on behalf of all the creditors of the defendant A. B.

The plaintiff claims—

A declaration that the sale aforesaid is not binding upon the creditors of the defendant A. B. including the plaintiff to the extent of their debts.

-
- (x) **Form of Prayer:** *Per Wordsworth J. in Vellaya Konar v. Ramaswami Konar, I. L. R. (1940) Mad. 73* (There is a difference between a suit for the cancellation of an instrument and a suit for a declaration that the instrument is not binding on the plaintiff When the plaintiff seeks to establish a title in himself and cannot establish that title without removing an insuperable obstruction such as a decree to which he has been a party or a deed to which he has been a party, then quite clearly he must get that decree or deed cancelled or declared void *in toto* and his suit is in substance a suit for the cancellation of the decree or deed even though it is framed as a suit for a declaration. But when he is seeking to establish a title and finds himself threatened by a decree or a transaction between third parties, he is not in a position to get that decree or that deed cancelled *in toto*. That is a thing

PLAINT.

62.

ALIENATION. (Hindu Law)

**CLAIM by Presumptive Reversionary Heir to have an Alienation
by Hindu Widow declared void beyond the Life-
time of the Widow. (y)**

1. One A.B., who was a Hindu governed by the Dayabhaga, died January 5th, 1920, childless and intestate, leaving him surviving the defendant C.B., his widow, and the plaintiffs, his brothers and the nearest reversionary heirs.

which can only be done by parties to the decree or deed or their representatives. His proper remedy is therefore, in order to clear the way with a view to establish his title, is to get a declaration that the decree or deed is invalid so far as he himself is concerned and he must therefore sue for such a declaration and for the cancellation of the decree or deed. The proper prayer in such a suit is a prayer for a declaration that the sale is not binding on the creditors to the extent of the debts and not a prayer for the cancellation of the sale-deed. In this view I hold that the suit falls in substance under Art. 17-A (i) of the Schedule II of the Court Fees Act.

- (x) **Frame of suit:** Under Sec. 53, Transfer of Property Act, a suit instituted by a creditor shall be instituted on behalf of, or for the benefit of all the creditors. But though the purpose of Sec. 53 is to protect all creditors, the fact that there is only one creditor and not more, is no reason to exclude the application of the section, if it is clear that the transfer is fraudulent and made for the purpose of defeating or delaying him : *Mohammad Ishaq v. Mohammad Yusaf*, (1927) I. L. R. 8 Lah. 544 ; *Mt. Bibo v. Sampuran Singh*, A. I. R. 1936 Lah. 222, *fd. in Naraindas Pirumal v. Bhojraj Premchand*, A. I. R. 1939 Sind 97. The transfer which defeats or delays creditors is not an instrument which prefers one creditor to another but an instrument which removes property from the creditors for the benefit of the debtor : *Chettyar Firm v. Chettyar Firm*, A. I. R. 1937 Rang. 531 ; *Musahar Sahu v. Hakim Lal*, (1915-16) 43 I. A. 104, *fd. in Naraindas Pirumal v. Bhojraj Premchand, supra.*
- (x) **Limitation :** Under Art. 120, the period of limitation is 6 years from the time when the right to sue accrues : *Narasimham v. Narayana Rao*, (1926) 92 I. C. 405 ; *Venkateswara Aiyar v. Somasundaram*, (1918) M. W. N. 244 ; *Lal Singh v. Jai Chand*, (1931) I. L. R. 12 Lah. 262 ; *Parkash Narain v. Raja Birendra*, (1931) 132 I. C. 51.
- (y) **Reference :** Illustration (c) to Sec. 42, Sp. Rel. Act. 1877, reads as follows : "The widow of a sonless Hindu alienates part of the property of which she is in possession as such. The person presumptively entitled to possess the property if he survives her may, in a suit against the

2. The said A.B. left behind him various house properties in the town of.....within the jurisdiction of this Court, including the premises No....., which is hereinafter referred to as 'the said property.'

3. On.....19..., the defendant C. B. executed a deed of gift purporting to confer the absolute estate in the said property on the defendant J. D.

The plaintiffs claim—

A declaration that the said deed of gift is invalid and inoperative as against the plaintiffs after the death of the defendant C. B.

alienee, obtain a declaration that the alienation was made without legal necessity and was therefore void beyond the widow's life time." Cf. *Saudagar Singh v. Pardip Singh*, (1917-18) L. R. 45 I. A. 21 (In this case the widow and daughter of a deceased Hindu governed by the Mitakshara executed a deed of gift of his property in favour of the next reversionary heir to the deceased. Three brothers who claimed to be reversionary heirs equally with the grantee sued for a declaration that the deed was invalid and not operative as against them after the death of the grantors. It was found that the plaintiffs were also next reversioners. *Held* by their Lordships of the Judicial Committee: "It is clear on the section (Sec. 42 Sp. Rel. Act, 1877) that where any deed is executed, the result of which may be to prejudice the interests of the reversionary heirs, those heirs, though still reversionary and though they may never get any title because events may preclude them from doing so may have a declaration as to the effect of the deed. The declaration here is simply confined to that. It is a declaration that a certain deed which was executed by the Hindu widow in possession, and purporting to confer the absolute estate in the property on one of the reversionary heirs, is not binding on the other reversionary heirs." Cf. *Isri Dul v. Mt. Hunsbuti*, (1882-83) L. R. 10 I. A. 150. Only one suit to challenge alienation is maintainable: *Deebal Mahton v. Moti Mahton*, A. I. R. 1938 Pat. 510. Alienation by widow without legal necessity is valid as against strangers to reversion: *Bipat Mahton v. Kulpat Mahton*, A.I.R. 1934 Pat. 498. Next reversioner is not entitled to a declaration under the Specific Relief Act, 1877, Sec. 42, that he is the next reversioner: *Janki Ammal v. Narayanasami Aiyer*, (1915-16) L. R. 43 I. A. 207. Suit for declaration of his status as presumptive reversionary heir is not maintainable: *Mt. Deoki v. Jwala Prasad*, (1923) I. L. R. 50 All. 678. Where, while a widow is still alive, a presumptive reversioner brings a representative suit for a declaration that certain alienation by the widow would be ineffectual as against the reversioners and pending suit he dies, the right to sue survives not to his personal heirs but to the next presumptive or contingent heirs: *Rameshwar v. Mt. Ganapati Devi*, A. I. R. 1936 Lah. 652.

PLAINT.

63.

ALIENATION (Hindu Law).

CLAIM by a Remote Reversioner for a Declaration that an Alienation made by a Hindu Widow is void except for her Life. (z)

1. A. B., who was a Hindu governed by the Dayabhaga, died January 5th, 1927, childless and intestate, leaving him surviving the defendant C. B., his widow, the defendant F. B., his father, and the plaintiff, his brother, and leaving behind him various immovable properties including a tenanted house, premises No....., situate

- (y) **Limitation** : A suit by a reversioner for a declaration that an alienation made by a widow or other limited heir is void except for her life must be brought within 12 years from the date of the alienation (Art. 125), but a suit by a Hindu for a declaration that the alienations made by a Hindu female who has a life estate by virtue of a transfer or grant *inter vivos* or by virtue of a bequest are void and are not binding on him as the next reversioner of the last male owner is governed by Art. 120 and not Art. 125 : *Kanhya Lal v. Mst. Hira Bibi*, (1936) I. L. R. 15 Pat. 151.

A suit by reversioners, entitled to succeed to the estate on the death of a widow or other limited heir, for possession of immovable property from an alienee from her must be brought within 12 years from her death, Art. 111 : *Bijoy Gopal Mukerjee v. Sm. Krishna Manishi*, (1906-07) L. R. 34 I. A. 87.

- (z) **Cause of action** : The right to bring such a suit is limited, and, as a general rule, belongs to the presumptive reversionary heirs. If such nearest heir refuses without sufficient cause to sue, or has precluded himself by his own act or conduct from suing, or has colluded with the widow, or concurred in the act alleged to be wrongful, the next presumable reversioner would, on proof thereof, and subject to the discretion of the Court, be entitled to sue : *Rani Anunt Koer v. The Court of Wards*, (1880-81) L. R. 8 I. A. 14, fd. in *Bakhtawar v. Bhagwana*, (1910) I. L. R. 32 All. 176. Cf. *Lakshmi Ammal v. Anantharama*, A I. R. 1937 Mad. 699 F. B. ("Under Hindu law, it is the death of the female heir that opens the inheritance to the reversioners, who till then possess an inchoate right, generally termed a *spes successionis*; in other words, the male holder is regarded by the Hindu law as having lived up to and died at the moment of the death of the female heir. When a female heir intervenes, therefore, the fictional death of a Hindu male is something different from his actual death, the result being that the date of his death is for this purpose postponed to the death of the limited owner. Thus, there is no vesting at

within the jurisdiction of this Court. The income of the estate left by the deceased is about Rs. 300/- a month. The deceased left no debts.

2. By a deed of sale dated the.....19..., the defendant C.B. purported to transfer and convey the said tenanted house to the defendant X. Y. for an alleged consideration of Rs..... ..

3. The said transfer was made without any legal necessity.

4. The defendant F. B., in collusion with the defendant C. B., refused to take any legal proceedings to have the said alienation declared void except for the life of the defendant C. B., although thereunto requested in writing by the plaintiff on.....and.....

The plaintiff claims —

A declaration that the said alienation was made without any legal necessity and is void beyond the lifetime of C. B.

PLAINT.

34.

ALIENATION (Hindu Law).

CLAIM by a Minor Coparcener to have a Deed of Gift executed by his Father set aside. (a)

The plaintiff, minor, by his next friend abovenamed, states—

1. The plaintiff and his father, defendant No. 1, at all material times were and are members of a joint Hindu family governed by the Mitakshara.

the date of the male holder's death, in other words, the crucial date is that of the death of the female heir, on whose death alone the succession opens. Where therefore a Hindu male dies intestate before the passing of Act 2 of 1929, leaving a limited female heir who is alive after the Act 2 of 1929 has come into force, the succession to the deceased male member opens after the passing of the Act and is governed by the provisions of that Act").

- (a) **Reference :** *Ramanna v. Venkata*, (1888) I. L. R. 11 Mad. 246 (The plaintiff is entitled to recover the whole of the land alienated." In the case of a sale, the alienation is upheld to the extent of the alienor's share as a matter of equity, which the purchaser is entitled to insist upon, but in the case of gift there is no such equity.).

2. By a registered deed dated 19..., the said defendant purported to make a gift of an ancestral garden house situate in, hereinafter referred to as "the said property", in favour of the defendant No. 2.

The plaintiff was born on 19... and at the time of the said transaction was in his mother's womb.

4. The defendant No. 2 is in occupation of the said property on the strength of the said deed of gift.

The plaintiff claims—

- (1) Cancellation of the said deed of gift.
- (2) Possession of the said property.
- (3) Rs. as mesne profits.
- (4) Future mesne profits.

PLAINT.

65.

ALLUVION.

CLAIM for Possession of Diluviated Land reformed in situ. (b)

1. The plaintiffs are and their predecessors in title were the proprietors of Mouzah.....in Touzi..... in the..... Collectorate. The said Mouzah is situate immediately to the north-west of Mouzah..... in Touzi.....in the.....Collectorate, of which the defendants are and their predecessors in title were the proprietors.

- (a) **After born son—right to challenge** : A living child should be presumed to have been conceived at least 210 days before birth, and therefore a child born within 210 days of an alienation must be presumed to be *en ventre sa mere* : *Rama Rao v. Venkata Subbayya*, A. I. R. 1937 Mad. 274.
- (a) **Institution of suit** : See "Minor" under "Classes of Persons", p. 197.
- (b) **Reference** : *Sarat Chandra v. Bhupendra Narain*, (1932) 56 C.L.J. 263. Cf. *Secretary of State v. Sm. Fahamidunnissa Begum*, (1889-90) L. R. 17 I. A. 40 (Act IX of 1847 was not intended to deal with the case of lands in permanent settlement which had become derelict of the sea or a river. They cannot be said to have been "added" to the estate to which they already belonged).
- (b) **Measure of Mesne Profits** : *Gurudas Kundu Chowdhury v. Hemendra Kumar Roy*, (1929-30) 34 C. W. N. 89.

2. At the time of the Thak Survey of 18..., the river..... flowed by the west of the plaintiffs' Mouzah and by the south-west of the Mouzah of the defendants.

3. Since the Thak, the said river gradually shifted its course, and between.....and.....the lands of the plaintiffs' Mouzah were diluviated on several occasions and again reformed in *situ*.

4. The last diluviation began in.....and continued till, after which reformation commenced, the river receding towards the west and throwing up a chur or reformed land measuring..... bighas appertaining to the plaintiffs' Mouza.

5. In.....19..., the plaintiffs came into possession of the said chur but were dispossessed by the defendants on or about19....

6. Since...19..., the defendants have been in possession of the said chur to the exclusion of the plaintiffs.

The plaintiffs claim—

(1) Declaration that the said chur appertains to the said Mouza.....

(2) Recovery of possession of the said chur.

(3) Rs.....as mesne profits from.....to.....

(4) Future mesne profits.

PLAINT.

66.

ANIMALS.

CLAIM for Damage for Injury caused by Savage Horse known to be dangerous. (c)

1. At the time material hereto the defendant was the owner of a horse which he knew to be a savage animal dangerous to mankind.

(c) **Reference :** *Lowery v. Walker*, (1911) A. C. 10, *per* Lord Lareburn L. C., at p. 12, "The plaintiff was not proved to be in the field as of right; he was there as one of the public who habitually used the field to the knowledge of the defendant; the defendant did not take steps to prevent user. In those circumstances it cannot be lawful that the defendant should with impunity allow a horse which he knew to be a savage and dangerous

2. At all material times the defendant was the occupier of a field known as.....near....., which he knew the public were in the habit of crossing without his leave on their way to..... At no material time did the defendant take any steps to prevent that user.

3. On the.....day of...19..., the defendant put the said horse into the said field without placing any restraint upon its movements and without giving any warning whatever either to the plaintiff or to the public of the dangerous character of the animal.

4. At about 4 p.m. on that day, the plaintiff, as one of the public, while crossing the said field, was attacked, bitten and stamped on by the said horse and seriously injured.

Particulars of injury :

5. By reason of the matters hereinbefore stated the plaintiff has suffered damage.

Particulars of special damage :

The plaintiff claims—

Rs.....damages.

DEFENCE.

67.

ANIMALS.

DEFENCE to Claim for Injury by a Vicious Animal. (d).

1. The defendant denies that there was the alleged or any

beast to be loose in that field without giving any warning whatever, either to the plaintiff or to the public, of the dangerous character of the animal'). Cf. *Glanville v. Sutton & Co. Ltd.*, (1928) 1 K. B. 571 (Defendant's knowledge that his horse has a propensity to bite horses is not evidence of knowledge of a propensity to bite mankind). Cf. *May v. Burdett*, (1846) 9 Q. B. 101 (*Per Denman, C. J.*, "Whoever keeps an animal accustomed to attack and bite mankind, with knowledge that it is so accustomed, is *prima facie* liable in an action on the case at the suit of any person attacked and injured by the animal, without any averment of negligence or default in the securing or taking care of it. The gist of the action is the keeping of the animal after knowledge of its mischievous propensities. The negligence is in keeping such an animal after notice.").

(d) This is a Defence to Form No. 68.

horse belonging to the defendant in the field referred to in paragraphs 1 and 2 of the plaint as alleged or at all.

2. The defendant does not admit that the alleged horse was savage or dangerous to mankind. Alternatively, the defendant denies that he knew the said horse to be savage or dangerous to mankind.

3. The defendant denies that the plaintiff or any other member of the public used the said field for the alleged or any purpose with the knowledge, leave or license of the defendant.

4. The defendant does not admit that the plaintiff suffered the alleged or any injuries.

5. If the plaintiff suffered the alleged or any injuries (which is not admitted), the defendant says that the plaintiff brought the said injuries on himself by coming near the animal and catching it by the tail.

6. At each of the four gates of the said field the defendant prominently exhibited notices warning the public that there were horses in the said field which might be dangerous to persons crossing the same. The plaintiff knew or ought to have known of the said notices.

PLAINT.

68.

ANNUITY.

CLAIM for Recovery of Arrears of Annuity. (c).

1. A. B. late of, died April 2nd, 19..., having made his will dated March 3rd, 19..., and appointed the defendant his executor who proved the will June 1st, 19....

2. By his said will the testator gave C. D., the plaintiff's father,

- (c) **Reference:** *Hemangini Devi v. Anil Krishna*, (1938) I. L. R. 17 Pat 350. (Where an annuitant dies in the interval between the times of payment, his representative would be entitled to recover an apportioned amount within twelve years of the date when the annuity was payable to the deceased annuitant. A suit under the provisions of a will against an executrix is governed by Article 123 of the Lim. Act., 1908. Sec. 10 of the Act has no application.)

since deceased, an annuity of Rs. 50/- per month 'descendible in the male line generation after generation'.

3. The plaintiff's father received only Rs. 200/- as annuity, and died June 6th, 19..., intestate, leaving him surviving the plaintiff, his only son and legal representative.

4. The defendant has not paid the plaintiff the arrears of annuity or any portion thereof, in spite of demand in writing dated..... 19....

Particulars of claim :

Arrears of annuity from to Rs.

Interest at 6 p. c. per annum "

TOTAL Rs.

The plaintiff claims—

Rs.....

PLAINT.

69.

APPRENTICE.

CLAIM by Apprentice for Breach of Covenant in an Apprenticeship Deed. (f)

1. The defendant Company (hereinafter referred to as 'the Company') is a Company Limited whose registered office is at

2. By a deed of apprenticeship dated 19..., and made between the plaintiff and the Company, the plaintiff put himself apprentice to the Company in their business carried on by them at aforesaid for the term of five years from the date thereof, and the Company, in consideration of the plaintiff so put and bound himself, and also in consideration of the sum of Rs. 500/- then paid to the Company by the plaintiff, covenanted and agreed with the plaintiff to teach him the art, trade and business of, to board and lodge him and to pay him the weekly wage of Rs. 5/-, during the said term.

3. The plaintiff accordingly on 19..., entered upon his duties as such apprentice, but the Company refused to keep, teach and maintain the plaintiff after December 31st, 19....

4. By reason of the premises the plaintiff has suffered damage.

Particulars :

(State special damage if any).

The plaintiff claims —

- (1) Rs..... damage
- (2) Alternatively, refund of the said sum Rs. 500/- or so much thereof as was not exhausted by keeping, teaching and maintaining the plaintiff.

DEFENCE.

70.

APPRENTICE.

DEFENCE by Employer to Claim for Breach of Covenant in an Apprenticeship Deed. (g)

1. The defendant Company admit having agreed to take in the plaintiff as an apprentice in their business for the term of five years, but state that by the deed of apprenticeship referred to in paragraph 2 of the plaint, the plaintiff was bound to order and behave himself as a true and faithful apprentice and not to steal or waste the defendant Company's goods.

(g) This is a defence to Form No. 69.

(g) **Reference :** *Laroyd v. Brook*, (1891) 1 Q. B. 431 (Where an apprentice by his own wilful act prevents a master from teaching him, the master can set this up as a defence when sued upon his covenant to keep, teach and maintain the apprentice, irrespective of the question whether the apprentice has performed his obligations under the deed or not: This is settled by the case of *Raymond v. Minton*, (1866) L. R. 1 Ex. 244. The *ratio decidendi* of that case is not that the master is absolved because the apprentice has not performed the obligations imposed upon him by the Articles, but because the apprentice by his own acts has put it out of the power of the master to carry out what he had contracted to do.), *fd.* in *Corn v. Mathews*, (1893) 2 F. & F. 397 and *Whincup v. Hughes*, (1871) L. R. 6 C. P. 78 (Where there is no total failure of consideration, a proportionate part of the premium cannot be recovered.).

2. Ever since the plaintiff entered upon his duties as apprentice, that is, from....., his conduct was disreputable. He frequented singing rooms and theatres, smoked cigars and stayed out till late hours of the night and persisted in his conduct in spite of warnings given to him by the manager of the defendant Company.

3. Prior to December 31st, 19..., the plaintiff was detected having stolen Rs.....from the defendant Company's till.

4. By reason of the premises it became unsafe for the defendant Company to continue the plaintiff in their service, wherefore the defendant Company dismissed him on.....

PLAINT.

71.

ASSAULT.

CLAIM for Damages for Assault. (h)

1. The plaintiff is a licensed medical practitioner of.....

2. On.....19..., at about.....P. M, the plaintiff was lawfully walking along.....Road when the defendant who was following the plaintiff overtook him and assaulted him by pointing a revolver at him and repeatedly threatening to shoot him therewith if he moved a single step forward, by reason whereof the plaintiff was prevented from walking along the said street as aforesaid and suffered from a nervous shock and was unable to do any work for a week.

3. By reason of the premises the plaintiff has suffered damage.

Particulars of special damage :

The plaintiff claims—

Rs.....damages.

- (h) **Definition of assault :** "It is not every threat, when there is no actual personal violence that constitutes an assault, there must be in all cases, the means to carry the threat into effect : *Per Tindal C. J., in Stephens v. Myers*, (1830) 4 C. & P. 349. Cf. *Cuma v. Morgan*, (1864) 1 B. H. C. R. 205, 206. See Sec. 351, Ind. Penal Code.
- (h) **Civil liability for assault :** Conviction by Criminal Court for assault is no bar to a civil action for damages : *Ali Buksh v. Shaikh Suneerooddeen* (1869) 4 B. L. R. 31 ; *Akhil Chandra Biswas v. Akhil Chandra Dey*, (1901-02) 6 C. W. N. 915 ; *Chandan v. Sumera*, (1897) 7 A. W. N. 104.
- (h) **Measure of Damages :** See Notes under Form No. 73.

DEFENCE.**72.****ASSAULT.****DEFENCE to a Claim for Assault. (i)**

1. The defendant denies that he assaulted the plaintiff as alleged in the plaint or at all.

2. Alternatively, the defendant denies that the plaintiff suffered from the alleged or any shock or has suffered the alleged or any damage by reason of the alleged or any assault by the defendant. In any case, the damages claimed are excessive.

PLAINT.**73.****ASSAULT and BATTERY.****CLAIM for Damages for Assault and Battery. (j)**

1. On.....at about.....P. M., the plaintiff was lawfully walking along.....Road when the defendant approached the plaintiff and wrenched a stick from his hand, and with the said stick gave the plaintiff many violent blows and caused him physical injury.

Particulars of Injury :

2. By reason of the matters hereinbefore complained of the plaintiff has suffered damage.

Particulars of special damage :

The plaintiff claims—

Rs.....damages.

(i) This is a Defence to Form No. 71.

(j) **Reference :** *Blunt v. Beaumont*, (1835) 2 Cr. M. & R. 412 (Upon the facts it was held that there was battery with the stick as well as assault with it and that every battery includes an assault.) For battery as an offence see S. 350, Ind. Penal Code.

(j) **Measure of Damages :** Damages in actions for assault and battery will vary according to the facts and circumstances of each case. The circumstances of time and place and the degree of mental pain, distress, indignity are elements to be considered. The plaintiff's position should

PLAINT.

74.

ASSAULT and BREACH OF CONTRACT.

CLAIM for Assault committed by Theatre Proprietor's Servant
with an additional Claim for Breach of Contract.—(k)

1. The defendants at all material times were and are proprietors of a cinema theatre, known as....., in.....

2. On.....19..., the plaintiff purchased a ticket for the purpose of witnessing a performance therein and was shown a seat which he occupied lawfully and peaceably until such time as is hereinafter mentioned.

3. After the performance had proceeded for some little time, the defendants' servant or agent assaulted the plaintiff by taking

be taken into consideration for the purpose of determining how far the compensation awarded is commensurate with the injury inflicted: *Joypal Roy v. Mukoond Roy*, (1872) 17 W. R. 280. Cf. *Ramjoy v. Russell*, (1864) W. R. (Gap. No.) 370 (Damages should be commensurate to the injury and annoyance); *Abdul Ghaffar Khan v. Gokul Prasad*, A. I. R. 1936 Nag. 231. Costs of criminal prosecution can be recovered: *Gangadhar v. Bhang*, A. I. R. 1926 Nag. 365; *Contra, Lahori v. Ram Chand*, A.I.R. 1931 Lah. 648 (1).

(k) **Reference:** *Hurst v. Picture Theatres, Ltd.*, (1915) 1 K. B. 1, 10, 11 (*Per* Buckley L. J., "The defendants had for value contracted that the plaintiff should see a certain spectacle from its commencement to its termination. They broke that contract and it was a tort on their part to remove him. They committed an assault upon him in law.....There was no justification for the assault then committed. Under the circumstances it was for the jury to give him such a sum as was right for the assault which was committed upon him and for the serious indignity to a gentleman of being seized and treated in this way in a place of public resort". Note: In this case the jury assessed the damage at £150/-). Cf. *Butler v. Manchester, Sheffield and Lincolnshire Ry. Co.*, (1898) 21 Q. B. 1. 207 (case of forcible removal from a railway carriage of a passenger who had lost his ticket and was unable to produce it when required). Cf. also *Pratab Daji v. B. B. & C. I. Ry.*, (1875) 1 L. R. 1 Bom. 52 (where upon the facts it was held that the passenger was a trespasser and therefore his removal was not wrongful)

(k) **Measure of damages:** The amount of damage must be commensurate with the injury inflicted; *Joypal Roy v. Mukoond Roy*, *supra*. Damages should be commensurate with the injury and annoyance caused even though there was no serious personal injury: *Ramjoy v. Russel*, *supra*.

hold of the plaintiff under the arms and forcibly ejecting him from the said theatre.

4. The plaintiff was exposed to great indignity by the said assault committed in the presence of the audience and has incurred loss and expense.

The plaintiff claims.—

- (1) Rs.....damage for assault.
- (2) Rs.....damage for breach of contract.

DEFENCE.

75.

ASSAULT and BREACH OF CONTRACT.

DEFENCE of Justification to Claim for Assault and Denial to Claim for Breach of Contract. (1).

1. The defendants deny that the plaintiff purchased the alleged or any ticket for the alleged or any seat in their said theatre, or that he lawfully occupied the alleged or any seat in the said theatre.

2. The plaintiff was a trespasser. Alternatively, the plaintiff was occupying the said seat by the leave and license of the defendants.

3. The plaintiff refused either to pay for or leave the said seat although requested by the defendants' manager to do so, and further, created a row whereupon the said leave and license became and was revoked and the defendants' door-keeper, gently held him under the arms and raised him from his seat using no more force than was necessary.

(1) This is a Defence to Form No. 74.

(1) **Reference :** *Hurst v. Picture Theatres, Ltd.* (1915) 1 K. B. 1 (In this case it was proved that the plaintiff had purchased a ticket. It was held that the purchaser of a ticket for a seat at a theatre has a right to enter and stay and witness the performance from its commencement to its termination). To justify the removal of the plaintiff the defendants must prove that the plaintiff did not purchase any ticket and that he was either a trespasser or was there by the leave and license of the defendants. A license is revoked by signifying to the licensee that it is no longer the licensor's will to allow the acts permitted by the license : See Pollock on Torts, 14th Edn., p. 301. As soon as the license was revoked the plaintiff became a trespasser (*Wood v. Leadbitter*, (1845) 13 M. & W. 838) and could be forcibly removed provided the force used did not

PLAINT.

76.

ASSIGNMENT.

CLAIM by Assignee of an Actionable Claim. (m).

1. One N. B. was the owner of two taluks, named Narendrapur and Krishnapur, in the district of

2. On December 9, 19..., N. B. executed a lease of the two taluks in favour of the defendant for the term of five years with effect from

3. Under this lease the lessee agreed to pay the lessor a yearly rent of Rs., and, in addition, the Government revenue, cesses and other public demands. The lease also contains a provision that in case of any breach of the covenants to be observed by the lessee he should be liable in damages.

4. During the currency of the lease, the defendant E. F. as the lessee failed to pay certain revenue instalments.

exceed that which was reasonably required in the circumstances : *Pratab Daji v. B. B. & C. I. Railway Co.*, (1876) I. L. R. 1 Bom. 52, 56.

- (m) **Reference :** *Manmatha Nath Mullick v. Hedait Ali*, (1931-32) L. R. 59 I. A. 41 (In this case a question arose as to whether what was assigned to the plaintiff was a mere right to recover damages, that is to say, a mere right to sue. The Judicial Committee held : What was assigned to the appellant was not a mere right to sue but a claim for a definite sum of money which the lessee was bound by his contract to repay to the lessor. This would, their Lordships think, be an actionable claim to which Sec. 130 of the Transfer of Property Act would apply. The failure of the lessee to fulfil this obligation does not give rise to a claim of damages within the meaning of the clause in the lease, but to a claim for re-imbursement of the precise sum which the landlord has disbursed to meet the obligation).
- (m) **Assignment—conditions of—**An assignment must be of the whole debt. Even assuming that assignment of part of a debt can be made, assignment of part which is indefinite is invalid : *Ghisulal Goneshilal v. Gumbhirmall*, (1935) I. L. R. 62 Cal. 510. Assignment of part of a debt is not invalid : *Travancore National Bank etc. Ltd. v. T. N. & Q. Bank Ltd.*, A. I. R. 1940 Mad. 258 ; *Durga Singh v. Kesho Lal*, A. I. R. 1940 Pat. 170.
- (m) **Form of assignment—**Sec 130 does not require that an assignment should be in any particular form or that there should be consideration for it. No particular words are necessary to effect the transfer of debt or any beneficial interests in movable property, if the intention of

Particulars :

Taluk.	Revenue.	Cess.	Amount.
			Rs. As. P.
Narendrapur	Instalment due in November, 19...		
Krishnapur	Instalment due in April, 19...,		

TOTAL

5. On..... 19..., N. B. executed a deed by which he assigned to the plaintiff his right to recover the instalments with

transfer is clear from the language used : *Ramaswamy Chettiyar v. Manickam Chettiar*, (1938) 1 M. L. J. 56. In the Punjab where the Transfer of Property Act has not been applied, there can be an oral assignment : *Ram Rattan v. Gobind Ram*, A. I. R. 1939 Lah. 501.

(m) **Notice to the debtor**—The effect of Sec. 130 (1) is in the cases which it covers, to confer without notice to the debtor, a legal title on the transferee as opposed to an equitable title only. Its purpose and effect is merely to confer a title and to enable the assignee to sue in his own name and has nothing to do with possession. It is merely designed to circumvent the necessity for notice to be given to the debtor before the assignee sues him : *Aviel Stephens, In the matter of—*, A. I. R. 1938 Rang. 1. Until the debtor receives notice of the assignment, his dealings with the original creditor will be protected : *Gopal Krishna v. Gopal Krishna*, (1910) I. L. R. 33 Mad 123.

(m) **Joint debt—assignment by one of the creditors**—Where debt is a joint debt, an assignment by one of the joint creditors would not enable the assignee to enforce the payment of the whole debt : *In re. A. K. Fazlal Huq.*, A. I. R. 1937 Cal. 532.

(m) **Interest** : When a debt is assigned, interest payable on it goes with the assignment : *Travancore National Bank etc. Ltd. v. T. N. & Q. Bank Ltd.*, A. I. R. 1940 Mad. 258.

(m) **Parties to suit** : The assignee can sue in his own name and it is not necessary for him to obtain the transferor's consent, or to make him a party to the suit : *Muthukrishnier v. Veeraraghava Iyer*, (1915) I. L. R. 38 Mad. 297 (F. B.) ; *Arunachellam Chettiar v. Madaswami*, (1920) 27 Mad. L. T. 269. In a recent Madras case it has been held that the transferor may maintain an action on the claim for the benefit of the transferee, and hand over the amount when collected to the transferee : *Chandrasekaralingam v. Nagabhushanam*, A. I. R. 1927 Mad. 877.

(m) **Notice under Bengal Money Lenders' Act, VIII of 1940** : Under Sec. 28 of the said Act the assignor shall before the assignment is made, (a) give to the assignee notice in writing that the debt, interest thereon, agreement or security is affected by the operation of this Act,

interest thereon at 12 *per cent. per annum* and appointed the plaintiff his attorney to sue for the amount of the instalments with interest at 12 *per cent.*

6. In order to save the said taluks from sale for non-payment of revenue the plaintiff paid the said instalments on 19....

Particulars of claim :

Instalments paid	...	...	...	Rs.
Interest	...	...	...	"

TOTAL Rs.

The plaintiff claims—

Rs.....

PLAINT.

77.

ASSIGNMENT.

CLAIM by Assignee of a Promissory Note. (n)

1. The defendant executed a promissory note dated 5th June, 19..., for Rs. 5,000/- in favour of one C. D. agreeing to repay the loan on demand with interest at 6 *per cent. per annum*.

and (b) supply to the assignee all information as to the state of loan together with copies of documents relating thereto. Any person who acts in contravention of any of the provisions of this section shall be liable to indemnify any other person who is prejudiced by such contravention. Cf. Sec. 29 of the said Act

- (n) **Assignment of promissory note—Form of.** Endorsement is not the only means by which a negotiable instrument can be transferred. Ch. 4, Negotiable Instruments Act, deals with the manner of the negotiation of these instruments. In the ordinary way, under S. 43 of the Act, a hand-note would be negotiated by endorsement and delivery thereof; a promissory note endorsed in blank or a promissory note to the holder or bearer, is negotiated in simpler fashion. But the Negotiable Instruments Act itself does recognize that negotiable instruments may be transferred and for consideration otherwise than by negotiation (see provisions of S. 118 (a) of the Act). A transfer of a promissory note by means of a registered instrument is therefore valid. Section 130 of the Act provides for transfers of actionable claims which include negotiable instruments also by means of written instruments. S. 137, however,

2. By a registered deed of assignment dated.....19..., C. D. assigned the said promissory note to the plaintiff.

Particulars of Claim :

Principal sum	...	...	Rs. 5,000
Interest up to.....19...,	...	...	,,
			Total Rs.

The plaintiff claims—

Rs.....

merely excludes the negotiable instruments from the operation of S. 130. There is nothing in S. 137 which prohibits the transfer of such instruments by means of separate written instruments. The transfer therefore of a promissory note by means of a registered deed is valid: *Ghanshyam Das v. Ragho Sahu*, (1937) I. L. R. 16 Pat. 74.

- (n) **Place of Suing:** Is the place of assignment the place where part of the cause of action can be said to have arisen? This question was considered by the Calcutta High Court in connection with applications for revocation of leave granted under Clause 12 of the Letters Patent, the fact in each case being that the defendant resided, and the promissory note was executed, outside the jurisdiction, but the assignment was made within the jurisdiction and the plaintiff filed the suit after obtaining the leave of the Court under Clause 12 of the Letters Patent. In *Kalooram Agarwalla v. Jonistha* (1936) I. L. R. 63 Cal. 435 and in *Daulatram Rawatmull v. Maharajlal*, (1936) I.L.R. 63 Cal. 526 his Lordship Panckridge J. revoked the leave having regard to the defendant's residence and because the circumstances of assignment suggested collusion for the purpose of creating jurisdiction. The same learned Judge refused to revoke the leave granted under Clause 12 where the defendant had taken some preliminary steps in the litigation. In a later case, *Radhika Mohan Roy v. Bhabani Prasanna Lahiri*, (1936) I. L. R. 63 Cal. 908, where an assignment of a promissory note was admittedly for value and not brought about simply for the purpose of embarrassing the defendant and creating jurisdiction and where hardship upon the defendants was not apparent—the note having been executed within the municipal limits of the town of Calcutta although outside the original jurisdiction of the High Court—as also on the principle that any discrimination between the plaintiffs and the defendants who are interested in negotiable instruments on the grounds of hardship or humanity or even on the ground of legitimate collusion to assign would effect in striking at the very root of the law of negotiability his Lordship Cunliffe J. declined to give effect to the contention of the defendants that leave to sue granted under Clause 12 of the Letters Patent ought to be revoked. On appeal, their Lordships Derbyshire C. J. and Costello J. endorsed the view taken by his Lordship Cunliffe J.: *Bhabani Prasanna Lahiri v. Radhika Bhusan Roy*, (1935-36) 40 C. W. N. 1349.

DEFENCE.**78.****ASSIGNMENT.****DEFENCE of Set-off to Claim by Assignee of Debt. (o)**

1. The defendant says that the plaintiff's assignor..... at the time of commencement of this suit, was and is indebted to the defendant in the sum of Rs..... for goods sold and delivered, particulars of which are set out in schedule "A" hereto and the defendant claims to set off this amount against the plaintiff's claim.

PLAINT.**79.****ATTACHMENT.****CLAIM for Damages for Wrongful Attachment. (p)**

1. On.....19..., the defendant obtained a decree in the Court of....., for Rs.....against one X. Y.

2. On.....19..., the defendant made an application for, and obtained an order of, attachment of 1900 bales of jute, more or

(o) **Liability of transferee of actionable claim:** Under Sec. 132 of the Transfer of Property Act, the transferee of an actionable claim shall take it subject to all the liabilities and equities to which the transferor was subject in respect thereof at the date of the transfer. See Illustration (i) to that section. A debtor is entitled when sued by the assignee of his creditor to set off a debt due to him by the assignor independent of the debt assigned: *Arunachellam v. Subramanian*, (1907) I. L. R. 30 Mad. 235; *Subramanian Pattar v. Kiradadasan*, (1912) M. W. N. 1235; *Ram Bhaj Datta v. Ram Das*, (1922) I. L. R. 3 Lah. 414. It is incumbent on the purchaser of a right of action to make enquiries as to any equities affecting the subject-matter of the purchase: *Mangles v. Dixon*, (1852) 3 H. L. C. 702; *Subbaraya Aiyer v. Srinivasa*, (1900) 10 M. L. J. 211.

(o) **Onus:** Since the assignee of an actionable claim takes it subject to all existing equities, the onus of proving affirmatively that the assignment is free from an existing right is upon the assignee: *Venkata Subbiah v. Subba Naidu*, (1915) M. W. N. 822.

(p) **Reference:** *Kissorymohun v. Hursook Dass*, (1889-90) L. R. 17 I. A. 17; A creditor who caused attachment of goods not belonging to the

the plaintiff's premises at....., which the defendant alleged to be the property of the said X. Y.

3. Pursuant to the said order, on....., a perwana was issued directing the nazir of the Court to proceed to the spot and make an inventory of the bales of jute on the identification by the defendant and to attach the same.

4. The nazir, in execution of the warrant, proceeded to the plaintiff's said premises on....., and there attached 1000 bales of jute, which were pointed out to him by the defendant as the property of the said X. Y., inspite of the plaintiff's assertion that those bales had been purchased by him from the said X. Y.

5. By reason of the premises the plaintiff has suffered damage.

debtor was liable for damages after sale although there was no malice, *fd. in Mangal Chand v. Zainab Bibi*, A. I. R. 1926 All. 177 (A judgment-creditor is responsible in damages to any person who is not a party to the proceedings and whose property he wrongfully causes to be attached in execution of his decree, without proof of *mala fides*). Damages resulting from wrong attachment can be recovered from the decree-holder though he acts in good faith: *Dr. N. Lobo v. Babulal*, A. I. R. 1925 Nag. 390. Crops of a third party wrongfully attached by a decree-holder as those of his judgment-debtor, and, while so attached, were stolen by the bailiff—decree holder was responsible: *Bishambhar v. Gaddar*, (1911) I.L. R. 33 All. 306. Plaintiff is not precluded from recovering ordinary damages by reason of his failing to prove the special damage, unless the special damage is the gist of the action. He is entitled, at least, to a judgment for nominal damages: *Mudhun Mohun v. Gokul Doss*, (1863-66) 10 M. J. A. 563.

- (p) **Limitation** : 3 Years under Art. 49, Ind. Lim. Act: *Manavikraman v. Avisilan*, (1896) I.L.R. 19 Mad. 80. Art. 29 does not apply to a suit for compensation on the grounds of improper attachment of the plaintiff's goods (paddy and jute), damage to goods and conversion. To bring a case under Art. 29 (1 year), it must be shown that the seizure was wrongful under legal process. A seizure cannot be said to be wrongful except where the writ was without jurisdiction, where the writ was executed against a person who was no party to the decree and where the goods were outside the scope of the suit: *Arjun Biswas v. Abdul*, (1922) 35 C. L. J. 480. If a litigant executes any form of legal process which is invalid for want of jurisdiction, irregularity or any other reason, and in so doing he commits any act in the nature of trespass to person or property, he is liable therefore in an action of trespass; it is not necessary to prove any *malice* or want of reasonable or probable cause: *Bishun Singh v. Watt*, (1911-12) 16 C. W. N. 540.

Particulars :

The plaintiff claims—

- (1) A declaration that the said 1000 bales of jute belong to him.
- (2) Removal of the attachment.
- (3) Rs.....damages.

PLAINT.**80.****ATTACHMENT.****CLAIM for Damages for Attachment before Judgment. (q).**

1. On..... 19..., the defendant instituted a suit (No..... of 19....) in this Court against the plaintiff for recovery of Rs. 6,000/- due on a promissory note dated on 19... executed by the plaintiff in favour of the defendant.

(q) **Reference:** *Nanjappa v. Ganapathi*, (1912) I. L. R. 35 Mad. 598 (In a suit for damages for attachment before judgment, the plaintiff is bound to prove want of reasonable and probable cause for applying for attachment and *malice* in fact. The plaintiff in such a suit must prove special damage. It is not necessary, however, to show pecuniary loss. It will be sufficient if the plaintiff must have sustained some damage such as the law takes notice of—damage to reputation and credit is sufficient.)

(q) **Measure of damages:** Damages, not exemplary, but only nominal damages (which is not necessarily small damages) may be allowed: *Rama Ayyar v. Govindu Pillai*, (1916) I. L. R. 39 Mad. 952. (Procuring an order for attachment before judgment, however maliciously, does not of itself afford a cause of action for damages, as damage does not necessarily and naturally flow from an application for attachment before judgment.) In the case of malicious attachment, plaintiff may be entitled to compensation, even though the attachment was not completed, if, notwithstanding that, he sustained injury by what was actually done. The absence of reasonable and probable cause for taking legal action in execution or otherwise is, some evidence, from which *malice* may be inferred. The termination of the proceedings in the plaintiff's favour, is essential, but this is applicable only to cases in which a distinct termination in favour of one party or other is possible, and not to a case in which the proceedings cannot end by their nature in any judicial disposal: *Joseph Nicholas v. Sivarama*, A. I. R. 1922 Mad. 206.

2. On 19..., the defendant made an application in the said suit for, and obtained an order of, attachment before judgment of all the properties of the plaintiff. The said properties are worth at least Rs. 60,000/-. Particulars of such properties are fully set out in the schedule annexed hereto.

3. In pursuance of the said order, the said properties of the plaintiff were attached on 19....

4. The defendant obtained the said order maliciously, without any reasonable and probable cause, and on a false allegation that the plaintiff was attempting to surreptitiously transfer his properties and to defraud the defendant.

5. The plaintiff has suffered damage.

Particulars :

The plaintiff claims—

- (1) Removal of attachment.
- (2) Rs..... damages.

PLAINT.

81.

AUCTIONEER.

CLAIM by Auctioneer for Commission.

1. The plaintiffs are auctioneers carrying on business at.....

2. By letter dated.....19..., the defendant instructed the plaintiffs to sell by auction an 8-cylinder Humber Saloon motor car bearing registered no....., and agreed to pay the plaintiffs commission of 5 *per cent.* on the net sale-proceeds of the said car.

3. At an auction sale conducted by the plaintiff at..... on.....19..., the said car was sold to one A. B. for Rs. 3,510.

Particulars of claim :

Price of the car	...	...	...	Rs. 3,500
Less advertisement charges and other incidental expenses	...	...	...	"
Net amount				Rs.....
Commission at 5 <i>per cent.</i> on the said sum	...	...	...	Rs.....
The plaintiff claims—				
Rs.....				

PLAINT.

82.

AUCTIONEER.

CLAIM by Auctioneer for the Price of Goods bargained
and sold. (r)

1. The plaintiffs are auctioneers carrying on business at.....
2. At an auction sale conducted by the plaintiffs at.....
aforesaid on..... 19..., the following articles were knocked down
to the defendant as the highest bidder at the following prices :

<i>Articles.</i>	<i>Price.</i>
Lot No. 12. One dining table by Lazarus	... Rs.....
Lot No. 16. One secretariat table „.....
Lot No. 20. One G. E. C. refrigerator	... „.....
	<hr/>
	Total Rs.....
	<hr/>

3. The defendant has not paid the said price or any part thereof.

The plaintiffs claim—

Rs.....

PLAINT.

83.

AUCTIONEER

CLAIM by Auctioneer for Indemnity.

1. The plaintiffs are auctioneers carrying on business at
2. On 19..., the defendant instructed the plaintiffs (verbally, or in writing, as the case may be) to sell by auction all the furniture and other goods lying at premises No and by letter dated 19..., the plaintiffs agreed to act as such auctioneers.

(r) For right of suit of auctioneer, see 'Auctioneer' under "Classes of Persons," Chap. IX.

3. It was an implied term of the said agreement that the defendant would indemnify the plaintiffs against all liabilities incurred by the plaintiffs in and about conducting the said sale.

4. At the auction sale held on 19... at aforesaid in accordance with the said instructions of the defendant, the said goods were sold including a Buick motor car bearing Registered No. which was knocked down to one A. B. as the highest bidder for Rs. 4,000/-.

5. Later on, one C. D. claimed the said car as belonging to him and sued the plaintiffs in the Court of claiming Rs. 5,000/- damages against the plaintiffs for wrongful conversion of the said car.

6. By letter dated the the plaintiffs informed the defendant of the said suit.

7. The plaintiffs contested the said suit but judgment was given on 19..., in favour of the said C. D. for the sum of Rs. 5,000/- with costs and interest on judgment at 6 *per cent*.

8. On.....19..., the plaintiffs paid the said C. D. Rs..... in full satisfaction of his decree.

9. The defendant has failed and neglected to indemnify the plaintiffs against the said loss.

The plaintiffs claim—

Rs.....

PLAINT.

84.

AUCTIONEER.

CLAIM by Auctioneer against Buyer for Deficiency upon a Re-sale.

1. The plaintiffs are auctioneers of

2. On 19..., the plaintiffs put up at auction at sundry goods, subject to the express condition that all goods not paid for and removed by the purchaser thereof within seven days after the sale, should be re-sold by auction on his account and risk.

3. At the auction held on that day, the defendant purchased a grand piano (Lot no. 20) for Rs. 1250,

4. The defendant did not pay the purchase money and, accordingly, on 19..., the plaintiffs resold the same by public auction on account of the defendant for Rs. 900.

Particulars of claim :

Difference between the price at which it was sold to the defendant and the Re-sale price	Rs. 350
Expenses attendant upon such re-sale	... ..
Net amount	Rs.

5. The defendant has not paid the deficiency thus arising amounting to Rs. in spite of demand in writing dated

The plaintiffs claim—

Rs. damage.

PLAINT.

85.

AUCTIONEER.

CLAIM by Principal against Auctioneer for acting contrary to Instructions. (s)

1. On 19..., the plaintiff employed the defendant, an auctioneer, to sell and dispose of, for ready money, the furniture of the house No. in Street.

2. On or about 19..., the defendant in breach of his duty sold the said furniture by private contract to one M. for Rs. on his giving the defendant a bill for the amount, drawn by himself upon, and accepted by one D., who respectively were and are in insolvent circumstances, by reason whereof the said bill has been and is of no use or value to the plaintiff.

3. The defendant sent this bill to the plaintiff, who objected to take it, and sent it back.

(s) **Reference :** *Ferrers (Earl) v. Robins*, (1835) 2 Cr. M. & R. 152. The general authority of an auctioneer as to receiving payment of purchase money is to take cash, unless he has express authority, or is justified by some usage to the contrary: *Williams v. Evans*, (1866) L. R. 1 Q. B. 352.

4. On.....19..., the plaintiff demanded in writing payment of the amount of the sale from the defendant, but the defendant has refused to pay.

The plaintiff claims—

Rs....., the full value for which the goods were sold.

PLAINT.

86.

AUCTIONEER.

CLAIM by Principal against Auctioneer for wrongful Detention of Goods.

1. The defendants are auctioneers of.....

2. On.....19..., the plaintiff delivered to the defendants a piano, the property of the plaintiff, of the value of Rs. 1,500/-, to be sold by the defendants by public auction subject to a reserve price of Rs. 1250/-.

3. On.....19..., the said piano was put up to public auction and the reserve price was not reached and the piano was not therefore sold.

4. On.....19..., the plaintiff verbally requested the defendants to return the piano, but the defendants refused to do so.

The plaintiff claims—

(i) The return of the said piano or Rs....., its value.

(ii) Rs..... damage for its detention.

PLAINT.

87.

AUCTIONEER.

CLAIM by Principal against Auctioneer for Negligence in omitting to receive from the Purchaser the Deposit (t)

1. The defendants are auctioneers of.....

2. By an agreement in writing dated.....19..., the plaintiff employed the defendants as his auctioneers to sell for him a ship

(t) Reference : *Hibbert v. Bailey*, (1860), 2 F. & F. 48.

for reward by public auction subject to a reserve price of Rs. 55,000/- and upon the terms that they should use due care in selling it, and on selling, that the conditions of sale under which it was sold were duly complied with.

3. On.....19..., the ship was put to public auction upon the usual conditions for sale which, *inter alia*, provided that the highest bidder should forthwith sign the contract and pay a deposit. There were several biddings but the ship was knocked down at the price of Rs. 55000/- to the highest bidder, a man, unknown to the defendants, but who gave the name 'S. & Co.' and whom the defendants thereupon announced as the purchaser.

4. The said purchaser left without signing the contract for completion of the sale or making any deposit and could not be discovered.

5. The defendants negligently and in breach of their duty to the plaintiff omitted to procure the signature of the said purchaser to the contract for the completion of the said purchase or to procure from him the payment of the deposit, whereby the sale became abortive, and the plaintiff lost the deposit and all benefit which he would have otherwise obtained from the sale.

6. The ship was thereafter sold by the plaintiff on..... 19..., to one.....for Rs. 50,000/- which was the best price the plaintiff could obtain.

7. By reason of the premises the plaintiff has suffered damage.

Particulars of claim :

The plaintiff claims—

Rs.....damages.

PLAINT.

88.

AUCTIONEER.

**CLAIM by Principal against Auctioneer for Negligence in
parting with Goods before Payment. (u)**

1. The defendant is an auctioneer carrying on business under the name of.....at

(u) See *Brown v. Staton* (1816), 2 Chit. 353.

2. On.....19..., the plaintiff delivered to the defendant a Grandfather clock, the property of the plaintiff, for sale by public auction by the defendant at his aforesaid place of business.

3. On.....19..., the said clock was sold by the defendant by public auction for and on behalf of the plaintiff and was knocked down to one B.D. at the price of Rs. 1,200/-.

4. Thereafter the defendant negligently and in breach of his duty to the plaintiff and without the plaintiff's knowledge or consent permitted the said B. D. to take away the said clock before payment therefor.

5. The said B. D. was on.....adjudicated insolvent. He left no assets for distribution among creditors and, accordingly, the said sum cannot be recovered from him.

The plaintiff claims—

Rs.....damages.

PLAINT.

89.

AUCTIONEER.

CLAIM by Principal against Auctioneer for Negligence in preparing Particulars of Sale. (v)

1. The defendants are auctioneers carrying on business at.....

2. By an agreement in writing dated.....19..., the defendants agreed to sell by public auction Premises No..... consisting of a three-storied house with a tennis court, the property of the plaintiff, and to prepare Particulars of Sale and to do all things necessary for the proper conduct of the sale without any reference to the plaintiff.

(v) **Reference :** *Parker v. Farebrother*, (1853) 1 W. R. 370 (*Held*: As it was impossible to say that the house would not have sold for the same price, if it had been properly described, defendant was not entitled to have the damages reduced either in part or to nominal damages).

3. The defendants prepared Particulars of Sale wherein they negligently and in breach of their duty to the plaintiff described the house as two-storied and made no mention about the tennis court.

4. At the auction sale conducted by the defendants on..... 19..., one C. D. agreed to purchase the house for Rs. 15,000/-.

5. On.....19..., the plaintiff paid the said purchaser Rs. 2,000/- compensation and got himself relieved of his obligation to convey the said house to him at Rs. 15,000/-.

6. The house was worth and would, if it had been properly described in the Particulars of Sale, have fetched more than Rs. 17,000/-.

7. By reason of the premises the plaintiff has suffered damage.

The plaintiff claims—

Rs. 2,000/- damages.

PLAINT.

90.

AUCTIONEER.

CLAIM by Third Party against Auctioneer for Conversion.

1. The defendant is an auctioneer carrying on business at.

2. At the time material hereto the plaintiff was the owner of certain furniture lying at..... Particulars of the said furniture are set out in Schedule "A" hereto.

3. On.....19..., the defendant sold the said furniture by public auction without the knowledge, consent or authority of the plaintiff and delivered the same to one C. D. of....., thereby wrongfully depriving the plaintiff of the same.

4. The said furniture are worth Rs.....

The plaintiff claims—

Rs.....damages.

PLAINT.**91.****AUCTIONEER.****CLAIM by Purchaser against Vendor for Misrepresentation
by Auctioneer. (w)**

1. Messrs. B. & Co. are auctioneers carrying on business at.....

2. On.....19..., a horse was put up to public auction by the said auctioneers at aforesaid as the property of the defendant and was knocked down to the plaintiff as the highest bidder for Rs. 500/-. The defendant was present throughout the sale.

3. On.....19..., the plaintiff discovered that the horse was not the property of the defendant at the time of the sale, he having already sold it privately to one A.D.

4. The defendant had instructed the said auctioneers to put up the horse as his property and they accordingly did so, describing it in the catalogue of sale as the defendant's property.

5. By letter dated.....19..., the plaintiff rescinded the said contract and claimed to recover Rs. 500, the price which he had paid, from the defendant on the ground that there was a material misrepresentation as to ownership.

6. The defendant has not paid back the said price or any portion thereof to the plaintiff.

The plaintiff claims—

Rs.....damages.

(w) Reference : *Whurr v. Devenish*, (1904) 20 T. L. R. 385 (It was held : (1) the representation as to ownership was material ; (2) the auctioneer in making it, was acting as D's agent and with his authority, inasmuch as D. assented to the auctioneer's conducting and authorised him to conduct the sale on the basis of the original representation.).

PLAINT.

92.

AUCTIONEER.

**CLAIM to enforce Agreement between intending Purchasers
for a Knock-out. (x)**

1. On June 12th, 19..., at a sale by public auction of surplus Government stores held at....., the plaintiff and the defendant verbally agreed, in order to avoid competition, that the defendant alone should bid on the joint account of the plaintiff and himself and that whatever he purchased should be divided equally between them, each paying half the purchase money.

2. In pursuance of the said agreement the plaintiff abstained from bidding and the goods were knocked down to the defendant for the price of Rs.....

3. On June 14th, 19..., the plaintiff wrote to the defendant offering to sell him his share of the profits for Rs.....

4. To that letter the defendant did not reply until June 27, when he repudiated the alleged agreement and maintained that he had purchased the goods on his own account alone.

The plaintiff claims—

(1) To recover one-moiety of the goods purchased, or Rs.....

(2) The value of the said moiety over and above the price paid for it at the auction.

(3) Alternatively, an account of the profits realised by the defendant on the resale of the goods.

- (x) **Reference:** *Rawlings v. General Trading Company*, (1921) 1 K. B. 635 (Held, by Bankes and Atkin L. JJ. (Sutton L. J. dissenting) that the agreement was not illegal and judgment should be entered for the plaintiff); *Jyoti Prakash v. Jhoomull*, (1909) I. L. R. 36 Cal. 134 (A combination among bidders at an auction, not to bid against each other, even if the combination amounts to a "knock-out," does not give rise to an action at the suit of the vendor); *Hari Balkrishna Joglekar v. Naro Moreswar*, (1894) I. L. R. 18 Bom. 342 (There is nothing necessarily unlawful in two or more persons agreeing not to bid against one another at an auction sale).

DEFENCE.**93.****AUCTIONEER.****DEFENCE to Claim by Auctioneer for Commission setting up that he made a Secret Profit. (y)**

1. The defendant admits the letter referred to in paragraph 1 of the plaint, but states that by the said letter the defendant agreed to pay the plaintiffs 5 *per cent.* commission inclusive of all charges and expenses.

2. The defendant admits that the plaintiff conducted an auction sale on.....19..., as mentioned in paragraph 2 of the plaint, but says that on or about.....19..., the plaintiff in breach of his duty to the defendant secretly and corruptly received from one C. D. to whom the said property was knocked down at the said auction sale, a sum of Rs..... by way of commission and has accordingly forfeited his claim, if any, to recover the alleged or any commission from the defendant.

DEFENCE.**94.****AUCTIONEER.****DEFENCE by Auctioneer to Claim by Principal for wrongful Detention of Goods setting up Lien. (z)**

1. The defendant admits that he received the goods referred to in paragraph.....of the plaint but says that he received them pursuant to a verbal agreement made between the plaintiff and the defendant on....., by which the plaintiff agreed to pay all

(y) This is a defence to Form No. 81.

(y) Cf. *Solomons v. Pender*, (1865) 3 H. & C. 639 (An agent employed to sell land sold it to a company in which he was interested as a shareholder and director:—*Held*: he was entitled to no commission from his employer in respect of the sale).

(y) Cf. Sec. 216, Ind. Cont. Act.

(z) The auctioneer has a lien on the goods for his charges and expenses. See "Auctioneer" under "Classes of Persons", Chap. IX, and Pollock and Mulla's Ind. Sale of Goods Act, p. 346.

expenses to be incurred by the defendant in cataloguing and advertising the same.

2. The defendant spent Rs.....in cataloguing and advertising the said goods. An account of such expenses was sent to the plaintiff on.....

3. The plaintiff has failed to pay the said sum inspite of demand in writing dated.....

4. The defendant was and is entitled to a lien on the said goods to the extent of the said sum of Rs.....and detained and still detains the same for such sum.

DEFENCE.

95.

AUCTIONEER.

DEFENCE to Claim by Auctioneer for Price of Goods bargained and sold, setting up that a Puffer was employed by the Vendor to make pretended Biddings. (a)

1. The defendant admits that the plaintiff conducted a sale by auction as alleged in the plaint but says that, although by the conditions of sale no right to bid was reserved expressly by or on behalf of the vendor, bids were accepted by the plaintiff at the said auction sale from one B. T. who, the plaintiff at all material times knew, was a puffer employed by the vendor to make pretended biddings to raise the price of the goods put up for sale.

2. By reason of the premises the said sale was fraudulent and void.

(a) Sec. 64, Ind Sale of Goods Act, 1930; Cf. *Thronett v. Haines*, (1846) 15 M. & W. 367 (recovery of deposit); *Green v. Baverstock*, (1863) 14 C. B. N. S. 204 (where the vendor of goods secretly employed a person to bid for him and the goods were knocked down to the defendant the highest bidder who subsequently refused to complete his contract and the goods were ultimately resold at a loss. In an action for the loss sustained:—*Held*: the secret employment of the bidder by plaintiff was evidence to go to the jury in support of a plea of fraud), Consd. in *Parfitt v. Jepson*, (1877) 46 L. J. Q. B. 529.

PLAINT.**96.****AWARD.****CLAIM to recover Costs of Reference and Award. (b)**

1. By an agreement in writing, dated April 6th, 1938, the plaintiff and the defendant referred all matters in dispute between them in relation to the construction of a building for the defendant by the plaintiff to the award of A. B. of, and it was further agreed that the costs of the reference and award should be in the discretion of the said A. B.

2. The said A. B. entered upon the said arbitration and duly made and published his award in writing, dated 16th May, 1938, by which he awarded that the defendant should pay to the plaintiff Rs. 1500/- and also the costs of the reference and award, which the said A. B. fixed at Rs. 200/-.

3. The defendant has not paid the said sums or any portion thereof.

The plaintiff claims—

Rs. 1,700/-

PLAINT.**97.****AWARD.****CLAIM for Specific Performance of an Award. (c)**

1. By an agreement in writing, dated June 1st, 1938, the plaintiff and the defendant referred all matters in dispute between

(b) **Note :** Since the passing of the Ind. Arb. Act X of 1940 (which came into force on the 1st day of July 1940) the necessity for filing regular suits to enforce awards will not arise. Any party to the reference can make an application to the Court for having the award filed in Court and for judgment in terms of the award (Sec. 17). The new Act, however, does not affect references or awards made before it came into force.

(b) **Limitation :** Art. 120, Ind. Lim. Act : *Kuldip v. Mahaul Dube*, (1912) I. L. R. 34 All. 43, 48 ; *Rajmal v. Maruti*, (1921) I. L. R. 45 Bom. 329, 335 : *Bhajahari v. Behary*, (1906) I. L. R. 33 Cal. 881.

(c) **Limitation :** Art. 113, Ind. Lim. Act ; *Talewar v. Bahori Singh*, (1904)

them with reference to the plaintiff's right to a lease from the defendant for the term of 10 years, of a colliery known as in the district of, to the arbitrament and award of S. N. B. Esq., Barrister-at-law.

2. The said S. N. B. entered upon the said reference, heard the parties and their witnesses and duly made and published his award in writing dated by which he directed the defendant forthwith to execute a lease of the said colliery to the plaintiff for the said term of 10 years with effect from

3. The defendant has failed and neglected to execute the said lease.

The plaintiff claims—

That the defendant be ordered to execute the said lease of the said colliery to the plaintiff and specifically to perform the directions in the award in that regard.

PLAINT.

98.

AWARD.

CLAIM by Arbitrator to recover his Fees. (d)

1. By an agreement in writing dated January 15th, 1939, the defendants referred all questions and matters in difference between them, touching and concerning the license granted by the defendant No. 1 to the defendant No. 2 and the user thereof, to the arbitrament and award of the plaintiff and it was further agreed that

I. L. R. 26 All. 497 ; cf. *Bhajahari v. Behary*, (1906) I. L. R. 33 Cal. 881 and *Kuldip Dube v. Mahaul Dube*, (1912) I. L. R. 34 All. 43, 47. See notes under Form No. 96.

- (d) Reference : *Crampton & Holt v. Ridley*, (1887) 20 Q. B. D. 48, 54. (Per A. L. Smith, J., "If I were not fettered by authority and were asked the simple question whether, upon a purely mercantile and business arbitration as this was, where men in the position in which the arbitrators and umpires in this case were, were appointed, there was or was not an implied promise by the parties appointing jointly to pay them reasonable remuneration for their services, I should not have hesitated to answer the question in the affirmative. This is not the case of a dispute among friends upon social or such

the costs of the reference and award should be in the discretion of the plaintiff who might award by whom, to whom, and in what manner the same should be paid.

2. The plaintiff entered upon his duties as such arbitrator and duly made and published his award in writing dated 19..., by which he awarded that each of the defendants should bear his own costs of reference and pay half costs of the award which he fixed at Rs. 500/-

3. There was an implied promise by the defendants to pay

like matters asking mutual friends to settle the dispute between them, in which case I should agree that there was no implied undertaking to pay for the services to be rendered. Nor is it a case of counsel being retained to adjudicate. It is a purely business transaction of common daily occurrence, and which during the last half century has become more and more in practice as a well-known way of settling mercantile and business disputes, without having recourse to the Courts of law; in all which cases, and I have never in my experience known one to the contrary, except there may have been an express bargain on the subject, the arbitrators and umpires have universally looked for and been paid remuneration for their services rendered. In my opinion if the point now in hand ever comes to be decided by a court of review, if that be necessary, it will be held, and I believe the law to be, that upon an arbitration such as we are now dealing with, there is an implied promise by the parties appointing the arbitrators and umpires jointly to pay them for their services." Where a party to an arbitration is compelled to pay to a lay arbitrator an exorbitant sum in order to take up the award, he may maintain an action for money had and received to recover the excess beyond what is a proper remuneration for the arbitrator's services: *Barnes v. Braithwaite & Nixon*, (1857) 2 H. & N. Ex. R. 569.

Under Sec. 38 of the Ind. Arb. Act, 1940, if in any case an arbitrator or umpire refuses to deliver his award except on payment of the fees demanded by him, the Court may, on an application in this behalf, order that the arbitrator or umpire shall deliver the award to the applicant on payment into Court by the applicant of the fees demanded, and shall, after such inquiry, if any, as it thinks fit, further order that out of the money so paid into Court there shall be paid to the arbitrator or umpire by way of fees such sum as the Court may consider reasonable and that the balance of the money, if any, shall be refunded to the applicant. The above section is no bar to a suit filed by the arbitrator to recover his fees.

the plaintiff for his services. The said sum of Rs. 500/- is a reasonable sum for such services.

The plaintiff claims—

Rs. 250/- from each of the defendants.

PLAINT.

89.

BAILMENT.

CLAIM by Bailor to recover Money bailed (as Deposit for Safe Custody). (e)

1. On.....19..., the plaintiff paid into the hands of the defendant, Rs. 50,000/- for safe deposit.

(e) **Limitation :** *Suleman Haji v. Haji Abdulla*, (1939-40) 44 C.W.N. 1041 (P.C)

(In this case a very important question, namely, whether the money, bailed was a deposit or a loan was decided by their lordships of the Judicial Committee. If the money due from the defendant (Appellant) to the plaintiff (Respondent) was "money payable for money lent" within the meaning of Art. 57 of the Ind. Lim. Act, the suit would be barred. If on the other hand, it was "money deposited under an agreement that it shall be payable on demand, including money of a customer in the hands of a Banker so payable within the meaning of Art. 60 of the Lim. Act, the suit would not be barred and the Respondent would be entitled to recover the money, as time runs only from the date of the demand for payment which in this case was made shortly before the suit was filed. The test to be applied is to ascertain whether upon the facts there was an obligation on the Appellant to "seek out" the Respondent and repay him, or whether he was to keep the moneys till the Respondent asked for them. There is nothing in the evidence to suggest that the Appellant ever "sought out" the Respondent to repay him, it was always the Respondent who made request to the Appellant. The Appellate Court noted the total absence, on the admitted facts, of features one or more of which it would have expected to be present, had these bailments or any of them been a loan, the absence, namely, on any security for the alleged loans, or any receipt in writing, of any promissory note, or of any agreement as to what rate of interest the loan was to carry. If any one of these bailments had been a loan it would have been reasonable to expect it to be attended by one or other of these things.) *fg. Nawab Major Sir Mahommad Akbar Khan v. Attar Singh*, (1935-36) L. R. 63 I. A. 279, 288.

2. The defendant has refused to refund the said deposit to the plaintiff in spite of demand in writing dated.....19...

The plaintiff claims.

Rs.....

PLAINT.

100.

BAILMENT.

CLAIM by Bailor against Gratuitous Bailee for Injury to Goods bailed.

1. On.....19..., the plaintiff left with the defendant an oil painting of.....depicting the Battle of Plassey, which he had purchased for Rs....., and the defendant orally undertook to take proper care of the same whilst under his charge and to return it to the plaintiff on his request.

2. The plaintiff has suffered damage by the defendant's negligence in keeping the picture in a damp place open to and infested by moths.

3. On.....19..., the defendant delivered the said picture to the plaintiff in a damaged condition.

Particulars of damage :

The plaintiff claims—

Rs.....damages.

PLAINT.

101.

BAILMENT.

CLAIM by Bailor against Gratuitous Bailee for Negligence and Failure to redeliver Goods bailed. (f).

1. On or about the plaintiff left with the defendant a diamond ring of the estimated value of Rs..... to be kept

- (f) **Pleading Negligence :** Where goods are given unto the sole custody of a person and accepted by him as bailee, and they are lost while in his custody, the onus lies upon him to show circumstances negating negligence on his part : *Phipps v. New Claridge's Hotel*, (1905) 22 T. L.

by him for the plaintiff and the defendant orally undertook to take proper care of the said article whilst under his charge and to return it to the plaintiff on his request.

2. The defendant failed to redeliver the ring to the plaintiff although verbally requested to do so by the plaintiff on

The plaintiff claims —

(1) Return of the said ring, or rupees, its value, in case delivery cannot be had.

(2) Rs..... damage for detention.

PLAINT.

102.

BAILMENT.

CLAIM by Bailor against Bailee for Unauthorised Dealing with Goods bailed. (g)

1. By a contract in writing dated 19..., the defendant agreed for reward to warehouse certain drapery goods for the plaintiff at the defendant's depositary No. 5 Road, and on 19..., the plaintiff, in pursuance of the said agreement, entrusted the defendant with the said goods.

R. 49 (case of dogs placed in the defendant's custody). The mere allegation in the plaint that the goods were lost is sufficient. For application of the term 'gross negligence' in the case of gratuitous bailees, see *Giblin v. McMullen*, (1868) L. R. 2 P. C. 317, 336, 337.

- (g) **Reference :** *Lilley v. Doubleday*, (1831) 7 Q. B. D. 510 (*Per* Grove, J., "The defendant was entrusted with the goods for a particular purpose and to keep them in a particular place. He took them to another, and must be responsible for what took place there. The only exception I see to this general rule is where the destruction of the goods must take place as inevitably at one place as at the other. If a bailee elects to deal with the property entrusted to them in a way not authorised by the bailor, he takes upon himself the risks of so doing except where the risk is independent of his acts and inherent in the property itself. I do not give my opinion whether what was done here amounted to a conversion, but I base my judgment on the fact that the defendant broke his contract, by dealing with the subject-matter in the manner different from that in which he contracted to deal with it.").

2. In breach of the said agreement and without the plaintiff's knowledge or consent, the defendant deposited a portion of the said goods at No. 6, Street. Particulars of the said goods are set out in Schedule 'A' hereto annexed.

3. On 19..., a fire occurred on the said premises No. 6, Street, and the said goods were destroyed.

4. The plaintiff had insured the goods with, giving No 5, Road as the place where they were deposited, and as a result of the aforesaid unauthorised dealing with the goods by the defendant, the plaintiff has lost the benefit of the insurance.

5. The said goods were worth Rs.....

The plaintiff claims—

Rs..... damages.

PLAINT.

103.

BAILMENT.

CLAIM by Depositor against Warehousemen for acting contrary to Instructions. (h) (Another form).

1. On.....19..., the defendant contracted to warehouse certain drapery goods, the property of the plaintiff, at the defendant's depository at.....

2. The plaintiff insured the said goods against fire with..... Company, giving the said depository as the place where they were deposited.

3. The defendant, contrary to the plaintiff's instructions, and without the plaintiff's knowledge, deposited a portion of the said goods elsewhere, namely, at.....

(h) **Reference:** See Notes under Form No. 102. The question here is whether the defendant was responsible for the goods, and if so, the damages must be their value). See Sec. 211, Ind. Cont. Act, 1872.

4. On.....19..., the goods so deposited elsewhere were destroyed by fire and in consequence the plaintiff lost the benefit of the insurance.

Particulars of damage :

Quantity of goods.

Value of goods.

The plaintiff claims—

Rs.....the value of the goods as damages.

PLAINT.

104.

BAILMENT.

CLAIM by Bailor against Bailee for Destruction of Goods by accidental Fire after Request to re-deliver. (i)

1. The defendant carries on business as bookbinder at.....

2, On.....19..., the plaintiff entrusted 20 volumes of the Indian Law Reports, Calcutta Series, to the defendant, for binding, and the defendant undertook to deliver the bound books to the plaintiff in accordance with his instructions in that behalf.

3. On.....19..., the plaintiff, on being informed by the defendant that all the said volumes had been bound, orally requested the defendant to re-deliver to him the said volumes.

4. The defendant failed to deliver any of the said volumes and on.....19..., a fire occurred on the defendant's premises and the said books were wholly destroyed in the fire, whereby the plaintiff has suffered damage.

5. The books were worth Rs.....

The plaintiff claims—

Rs.....damages.

-
- (i) **Reference :** *Shaw & Co. v. Symmons & Sons*, (1917) 1 K. B. 799 (It was held that the defendants were bound to deliver within a reasonable time after the order for delivery of bound books. The breach of contract had been committed before the fire occurred. The plaintiffs are therefore entitled to judgment for damages, the amount of which will be the value of the goods included in the order and not delivered.)

PLAINT.

105.

BAILMENT.

CLAIM by Bailor against Warehouseman for Damages for wrongful Conversion. (j)

1. The defendant is and at all material times was a warehouseman.

2. By a contract in writing dated.....19..., the defendant agreed for reward to remove certain furniture, the property of the plaintiff, from the plaintiff's house No..... and to store the same in the defendant's warehouse at....., and to redeliver the goods to the plaintiff on his request. Particulars of the said furniture are set out in Schedule "A" hereto.

3. In pursuance of the said agreement the defendant removed the said furniture on.....19..., and warehoused the same at.....

- (j) **Reference :** *Ranson v. Platt*, (1911) 2 K. B. 291 (In this case the husband of the plaintiff a married woman living separate from her husband, claimed the goods and obtained the order of the magistrate for delivery of the goods to him. The defence which was set up was that the defendant acted under the compulsion of the magistrate's order. The question was whether the action was maintainable notwithstanding the magistrate's order. *Held*: Upon a hostile claim being made to the goods, it was undoubtedly *prima facie* the duty of the bailee to take reasonable steps to protect the title of the person who had deposited the goods with him under such circumstances as existed in the case.The defendant in this case did not take such steps to communicate to the plaintiff that an adverse claim was being made to the goods as a reasonable man ought to have taken.Further, there is good ground for saying that if the defendant had given notice of the claim to the plaintiff, and she had attended at the hearing, the order which was made by the magistrate would never have been made. A person who is affected by an order may be under an obligation to show cause against the order. Here the defendant not only did not give notice to the plaintiff of the claim being made against her goods, but when the case was before the magistrate, though the defendant stated that there was another claimant of the goods, he in no way seems to have put the case of the bailor properly before the magistrate. He showed no cause whatever why the order should not be made. Under the circumstances the defendant is estopped by his own conduct from relying upon the magistrate's order.)

4. By letter dated.....19 .., the plaintiff requested the defendant to re-deliver the goods to him. The defendant did not reply to the said letter until.....19..., when he informed the plaintiff that one B. D. had made an adverse claim to the goods and obtained a magistrate's order on.....19... directing him to deliver the goods to the said B. D., and, accordingly, on.....19..., he under the compulsion of the magistrate's order, delivered the goods to the said B. D.

5. The defendant had not previously given any notice to the plaintiff of the alleged or any adverse claim made to the goods or of the issue of any summons to appear and show cause before the magistrate.

6. It appears that the defendant stayed away from the hearing of the criminal case and sent a clerk who knew nothing about the matter to attend the hearing, and the said clerk did not put the case of the plaintiff properly before the magistrate.

7. If the defendant had given notice of the adverse claim to the plaintiff and she had attended at the hearing before the magistrate, or if the case of the plaintiff had been properly put before the magistrate by the defendant on behalf of the plaintiff, the order which was made by the magistrate would never have been made.

The plaintiff claims —

- (1) Return of the said goods, or,
- (2) Rs.....damages for wrongful conversion.

PLAINT.

106.

BAILMENT.

CLAIM against a Workman for Failure to re-deliver Goods bailed.

1. The defendant is a watch-repairer.
2. On 19..., the plaintiff delivered to the defendant a gold watch to repair.
3. The defendant failed to re-deliver the said watch to the plaintiff although requested to do so on 19....

4. The said watch is worth Rs.....

The plaintiff claims—

- (1) Return of the said watch or its value.
- (2) Rs..... damages for its retention.

PLAINT.

107.

BAILMENT.

CLAIM by Bailee against Bailor for Injuries caused by Faults in the Goods bailed. (k).

1. On 19..., the plaintiff hired from the defendant a carriage, a pair of horses and a driver for a journey from to

2. On 19..., during the journey, a bolt in the under-part of the carriage broke, the splinter bar became displaced, the horses started off, the carriage was upset and the plaintiff was thrown down and was injured.

Particulars of injury :

3. The defendant failed in his duty to provide a fit and proper carriage for the purpose for which it was hired.

4. By reason of the facts hereinbefore complained of, the plaintiff has suffered damage.

Particulars of damage :

The plaintiff claims—

Rs..... damage.

- (k) **Reference :** *Hyman v. Nye*, (1831) 6 Q. B. D. 635 (*Per* Lindley, J., "..... A person who lets out carriages is not responsible for all defects discoverable or not; he is not an insurer against all defects, nor is he bound to take more care than coach proprietors or railway companies who provide carriages for the public to travel in, but he is bound to take as much care as they, and although not an insurer against all defects, he is an insurer against all defects which care and skill can guard against. His duty is to supply a carriage as fit for the purpose for which it is hired as care and skill can render it, and if whilst the carriage is being properly used for such purpose it breaks down, it becomes incumbent on the person who has let it out to show that the break down was in the proper sense of the word an accident not preventible by any care or skill."); cf Sec. 150, Illus. (b), Ind. Contract Act.

PLAINT.**108.****BAILMENT.****CLAIM by Borrower against Lender for Injuries caused by undisclosed Defects. (1).**

1. On 19..., the defendant lent to the plaintiff a horse for riding.

2. The said horse at the time it was lent by the defendant to the plaintiff, as the defendant well knew, was vicious and unfit for the purpose for which it was lent.

3. The plaintiff was not aware and was not warned by the defendant of the vicious nature of the said horse.

4. On 19..., while the plaintiff was riding the said horse, it started jumping and kicking and the plaintiff was thrown down, whereby he sustained injury and suffered damage.

Particulars of injuries :

Particulars of damage :

The plaintiff claims--

Rs..... damage.

DEFENCE.**109.****BAILMENT.****DEFENCE by Gratuitous Bailee to claim for Injury to Goods bailed. (1₁)**

1. The defendant admits that he received the picture referred to in paragraph 1 of the plaint from the plaintiffs but says that the

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- (1) Sec. 150, Ind. Cont. Act provides as follows : "The bailor is bound to disclose to the bailee faults in the goods bailed, of which the bailor is aware, and which materially interfere with the use of them, or expose the bailee to extra-ordinary risks ; and, if he does not make such disclosure, he is responsible for damage arising to the bailee directly from such faults. If the goods are bailed for hire, the bailor is responsible for such damage, whether he was or was not aware of the existence of such faults in the goods bailed."

- (1₁) This is a defence to Form No. 100.

picture was already moth-eaten and injured by damp when received by the defendant.

2. The defendant did not keep the said picture in a damp place or in a place open to or infested by moths. Alternatively, the defendant did not know, and had no reason to believe that the place where he kept the picture was damp or was open to or infested by moths.

3. The defendant took all reasonable care of the said picture and has not been guilty of the alleged or any negligence.

DEFENCE.

110.

BAILMENT.

DEFENCE by Gratuitous Bailee to Claim for Negligence and Failure to re-deliver Goods bailed. (m)

1. The defendant admits that the diamond ring in the plaint mentioned was left by the plaintiff in the defendant's custody, but denies that it was of the value of Rs..... It was not worth more than Rs.....

2. The defendant says that he took due and proper care of the said ring and placed it in a steel box under lock and key along with his own jewellery and, before the plaintiff demanded back the said ring, there was a burglary in his house on.....and the burglars broke open the said box and removed all the jewellery including the said ring from the said box. None of the stolen goods have been recovered.

(m) **Onus of proof:** A gratuitous bailee must shew that the loss occurred through no want of reasonable care on his part—that is to say, as much care as a prudent man would use in keeping his own property. If the defendant negatives negligence, he need not show how the loss happened: *Bullen v. Swan Electric Engraving Co.*, (1907) 23 T. L. R. 258. Cf. Sec. 152, Ind. Cont. Act; *Lakshmi Das v. Babu Megh*, (1900) Punj. Rec. no. 90.

(m) This is a defence to Form No. 101.

DEFENCE.**111.****BAILMENT.****DEFENCE by Warehouseman to Claim for Damages for wrongful Conversion. (u)**

1. Paragraphs 1 and 2 of the plaint are admitted, and each and every allegation in paragraph 4 of the plaint is denied.

2. The defendant says that on or about....., B. D. claimed that the goods in question belonged to him and demanded delivery of the same from the defendant, but the defendant refused to deliver the goods to the plaintiff except under a magistrate's order. On the same day the defendant orally informed the plaintiff about the said claim.

3. On or about.....the said B. D. caused a magistrate's summons to be issued and served upon the defendant. The next day the defendant orally informed the plaintiff about the said summons.

4. Save in so far as it is alleged that the defendant stayed away from the hearing before the magistrate the facts alleged in paragraph 5 of the plaint are denied.

5. On.....the defendant sent his clerk duly instructed to attend the hearing of the case before the magistrate and the said clerk duly placed before the magistrate all the facts concerning the bailment. Nevertheless the magistrate made the order on that day directing the defendant to forthwith deliver the goods to the said B. D.

6. The defendant acted under the compulsion of the said order and delivered the goods to the said B. D. on.....

(u) **Reference :** *Ranson v. Platt*, (1911) 2 K. B. 291 (where the defence failed because the defendant had not given notice of the adverse claim or the issue of the summons to the plaintiff and did not take steps to put the case of the plaintiff properly before the magistrate).

(u) This is a defence to Form No. 105.

DEFENCE.**112.****BAILMENT.****DEFENCE by Workman setting up Lien to Claim for Failure to re-deliver Goods bailed. (o)**

1. The defendant admits that the plaintiff delivered to him the gold watch mentioned in paragraph 2 of the plaint to repair but says that he repaired the same, and on.....demanded Rs..... for his services, but the plaintiff refused to pay and has not paid to the defendant the said sum.

2. The defendant admits that he detained and still detains the said watch but says that he is entitled to do so until he is paid for the services he has rendered in respect of the same.

DEFENCE.**113.****BAILMENT.****DEFENCE by Bailee to Claim for Conversion setting up *Jus Tertii* (p)**

1. The goods mentioned in paragraph.....of the plaint were not at any material time and are not now the property of the plaintiff.

2. The said goods were and are the property of one C.D. who made claim on him for them. The defendant is relying upon the right of the said C. D. and defends this suit on the direction and by the authority of the said C.D. and on his behalf.

(o) Sec. 170, Ind. Cont. Act.

(o) This is a defence to Form No. 106.

(p) **Reference :** *Biddle v. Bond*, (1865) 6 B. & S. 225, explained in *Blaustein v. Maltz, Mitchell & Co.*, (1937) 2 K. B. 142 ; see '*Jus Tertii*' under "Special Defences", Chap. XVII.

PLAINT.

114.

BANKERS.

CLAIM by a Depositor to recover a Fixed Deposit. (q)

1. The plaintiff had a fixed deposit of Rs. 5000/- for three years ending 19th June, 19..., with the defendant bank in its Agra Branch, upon the term that the same would be repayable on demand after the expiry of the said period with interest at 6 *per cent. per annum* from the date of the deposit.

2. By letter dated.....19..., the plaintiff requested the said Agra Branch to pay the said deposit with accrued interest to the plaintiff. Yet the defendant bank has failed to make the payment.

Particulars of claim :

Amount deposited	...	...	Rs. 5,000/-
Interest at 6 <i>per cent.</i> up to		...	"
		Total	Rs.

The plaintiff claims—

(1) Rs.....

(2) Further interest at 6 *per cent.* until payment.

-
- (q) **Place of suing :** *Allahabad Bank Ltd. v. Gulli Lal*, A. I. R. 1940 All. 243
(In a claim for the return of fixed deposit with a Bank it is essential for the plaintiff to prove the terms of the written contract governing the fixed deposit and the place of repayment. In the absence of a contract as aforesaid, the fixed deposit cannot be said to be repayable at any place where the plaintiff resides and make the demand. Therefore, where fixed deposit is made with a Bank in its Agra branch, the Court at other place where the plaintiff resides and makes a demand has no jurisdiction to entertain a claim for the return of the deposit when no contract in regard to place of repayment is shown).

PLAINT.**115.****BANKERS.****CLAIM by a Customer (non-trader) against his Bankers for dishonouring a Cheque. (r)**

1. At the time material hereto the plaintiff had a current banking account with the defendants.

2. A cheque dated.....19..., for Rs....., drawn by the plaintiff on the defendants, was duly presented for payment at the defendants' bank on.....19..., by one A. B., the payee of the said cheque.

3. The said cheque was dishonoured by the defendants although they had sufficient funds of the plaintiff in their hands to the credit of the said account wherewith to pay the amount of the cheque. By reason of the premises, the plaintiff's credit has been injured and he has suffered damage.

(Here set out particulars of special damage, if any).

The plaintiff claims—

Rs.....damages.

PLAINT.**116.****BANKERS.****CLAIM by a Customer (trader) against his Bankers for dishonouring a Cheque. (s)**

1. The plaintiff is a trader and carries on business under the name of

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- (r) **Reference :** *Gibbons v. Westminster Bank, Ltd.*, (1932) 3 All. E. R 577 (A person who is not a trader is not entitled to recover substantial damages unless the damages are alleged and proved as special damages). Cf. *Jogendra v. New Bengal Bank Ltd.*, A. I. R. 1939 Cal. 63. Cf. *Mayer, Morris & Co. v. London and Westminster Banking Co., Ltd.*, (1885) 1 T. L. R. 360 (Plaintiffs drew a cheque in favour of I. with whom they were in the habit of dealing. I. re-presented the cheque, when the mistake was satisfactorily explained and the amount paid. I. however, refused to continue dealing with the plaintiffs :—*Held* : plaintiffs could not recover damages for the loss of I.'s customers.).

- (s) **Measure of damages :** A trader is entitled to substantial, but reason-

2. In the course of his business the plaintiff used to purchase goods from the market on credit.

3. On 19..., the plaintiff drew a bearer cheque for Rs. on the defendant bank in favour of one A. B., with whom the plaintiff was in the habit of dealing, in part payment of the price of goods supplied by the said A. B. to the plaintiff on credit.

4. On 19..., he drew another bearer cheque for Rs. on the defendant bank in favour of one C. D., with whom also the plaintiff was in the habit of dealing, in payment of the price of goods supplied by him to the plaintiff on credit.

5. The said cheques were duly presented for payment by the respective payees at the defendant bank on 19..., and although the defendant bank had sufficient funds to the credit of the plaintiff's said account they wrongfully dishonoured the said cheques.

6. As a result of non-payment of the said cheques, the said A. B. and C. D. have refused to supply any further goods to the plaintiff on credit and have threatened him with criminal prose-

able and temperate, damages, without proof of special damage: *Rolin v. Steward*, (1854) 14 C. B. 495. A non-trader, however, is only entitled to nominal damage and cannot recover substantial damage without proof of special damage: *Gibbons v. Westminster Bank Ltd.*, (1930) 3 All. E. R. 577; *Per Mc Nair, J., in Jogendra v. New Bengal Bank, Ltd.*, A. I. R. 1939 Cal. 63: "If the customer be a trader the jury may properly award substantial damages, in the absence of the proof of special damage. In other cases the customer will be entitled to such damages as will reasonably compensate him for the injury which, from the nature of the case, he has sustained. All loss flowing naturally from the dishonour of a cheque may be taken account in estimating the damages", *fig. Hart's Law of Banking*, 4th Edn., Vol. I., p. 443.

- (s) **Relationship between a banker and his customer**: The relation between a banker and his customer who pays money into the bank is the ordinary relation of debtor and creditor, with the superadded obligation to honour the customer's cheques when the banker has sufficient assets of the customer available for that purpose, the money so paid into the bank being, in fact, money lent to the banker on the terms • that it should be repaid when called for by cheque: *Foley v. Hill*, (1848) 2 H. L. C. 28; *Gray v. Johnston*, (1868) L. R. 3 H. L. 1; *Bank of Dacca v. Gour Gopal Saha*, A. I. R. 1936 Cal. 409; *Dharmambal Ammal v. James Voce Pirrie Cyril Gill*, A. I. R. 1940 Mad. 98; *Official Assignee v. Natesam Pillai*, A. I. R. 1940 Mad. 441.

cution whereby the plaintiff has suffered great humiliation and his business credit has been greatly injured.

The plaintiff claims—

Rs.damages.

PLAINT.

117.

BANKERS.

Claim for Libel in Words on returned Cheque.

Form No. 18, Forms and Precedents, given in Fraser on Libel and Slander, 7th Edn., pp. 305-307. (t)

1. The plaintiff is and at all material times was a provision and general merchant and a partner in the firm M. Brothers carrying on business at ... in the County of London. The plaintiff's bankers are and at the said times were the A B Bank, Ltd., (C Branch).

The defendants are the D..... E and F Bank Ltd., who carry on their business in the City of London and elsewhere. Messrs, G. H. & Co., hereinafter mentioned, are and at the said times were export merchants carrying on business at Street in the City of London.

2. On or about the day of 1935, the plaintiff drew upon his said bankers the A B..... Bank, Ltd. (C Branch) a cheque for £ 50 payable to the order of the said Messrs. G. H. & Co., and sent the said cheque to the said Messrs. G. H. & Co. in payment of goods sold to him on or about 1935, by the said Messrs. G. H. & Co.

- (t) **Note :** In *Flach v. London and South Western Bank*, (1915) 31 T. L. R. 334 and *Allen v. London County & Westminster Bank*, (1915) 84 L. J. K. B. 1286, the defendant bank was held not liable because of a moratorium proclamation postponing the date of payment and it was also held that in the circumstances the words "Refer to Drawer" were not capable of a libelous meaning, and therefore the plaintiff was not entitled to recover. It is necessary, therefore, for the plaintiff to prove facts and circumstances leading to the conclusion that the words "Refer to Drawer" would in a given case be understood by reasonable persons in a libelous sense.

The said Messrs. G. H. & Co. endorsed the said cheque and paid it into their account at the J K Branch of the defendants.

3. Thereupon on or about 1935, the defendants falsely and maliciously wrote upon the said cheque the letters and mark "R/D", and falsely and maliciously wrote and published of and concerning the plaintiff and of and concerning him in the way of his said business and in relation to his conduct therein to the said Messrs. G. H. & Co. and to diverse persons in the employment of the defendants and Messrs. G. H. and Co. respectively (whose names the plaintiff is at present unable to give) the said cheque and the said letters and mark "R/D" so written thereon as aforesaid.

The said cheque and the letters and mark "R/D" written thereon and so published as aforesaid were in the following form :—

(Face of Cheque).

R/D	4, George Place, London, N.	April 29th, 1935.
d		Stamp
No. 895036		2d.

The A.....B.....Bank, Limited.

C.....Branch

Pay to the order of Messrs. G. H. & Co.,

Fifty Pounds.

£50 0 0.

Arthur T. Bcyd.

(Back of Cheque).

per pro G. H. & Co.,

John Smith.

4. The letters and mark "R/D" written on a cheque are understood by bankers and commercial and business men to mean "refer to drawer", and to mean further that the drawer of the cheque has not sufficient assets at his bankers to meet the cheque, that he is in serious financial difficulties and unable to satisfy his creditors, and that he is a person to whom credit ought not to be given and that no one ought to have any business dealing with him.

5. The defendants meant by the letters and mark "R/D" written on the cheque mentioned in paragraphs 2 and 3 thereof and the said G. H. & Co. and the persons to whom the said letters and mark were published as mentioned in paragraphs 2 and 3 hereof under-

stood the said letters and mark to mean (as the defendants intended they should) that the plaintiff has not sufficient assets to meet the cheque mentioned in paragraphs 2 and 3 hereof and that he was in serious financial difficulties and unable to satisfy his creditors and that no one ought to have any business dealings with him.

5. By reason of the publications hereinbefore complained of the plaintiff has been seriously injured in the way of his said business and in his character, credit, and reputation, and in consequence of the publication to the said Messrs. G. H. & Co., mentioned in paragraph 3 hereof the said Messrs. G. H. & Co., refused to send abroad certain goods ordered from them by the plaintiff and stated that they would not in future supply goods to the plaintiff on credit. The said refusal and statement were contained in a letter from the said Messrs. G. H. & Co. to the plaintiff dated....., 1935.

The plaintiff claims damages.

PLAINT.

118.

BANKERS.

CLAIM by Customer against Banker for Money paid by the latter on a Forged Cheque. (u)

1. At the time material hereto, the plaintiff had a current deposit account with the defendant bank.

2. On.....19..., the defendant bank sent to the plaintiff his pass book duly filled up. From the said pass book, the plaintiff

- (u) **Reference:** *Pirbhu Dayal v. The Jwala Bank*, I. L. R. (1938) All. 634 (In this case the defence of the bank was (a) that the signature on the forged cheque tallied with the plaintiff's admitted signature, (b) that the plaintiff himself was negligent in leaving his cheque book in an unlocked box which enabled a stranger to steal a cheque out of the cheque book. It was found as a fact that the signature on the cheque bore no resemblance to the admitted signature of the plaintiff. On the question of the plaintiff's negligence in leaving his cheque book in an unlocked box, it was held, following *Bhagwan Das v. Creet*, (1904) I.L.R. 31 Cal. 249, *Bank of Ireland v. Trustees of Evans' Charities*, (1855) 5 H. L. C. 389 and *Ahmed Moolla Dawood v. Firm S. R. P. Chetty*, A. I. R.

found that he had been debited with a sum of Rs. 200/- under date19....

3. The plaintiff did not draw the cheque for which he was debited with the said sum.

4. The said cheque was a forged one and if the defendant bank had exercised due care and caution it could have detected the forgery.

5. The defendant bank is wrongfully refusing to make good the loss caused to the plaintiff as aforesaid in spite of demand made in writing on.....19....

The plaintiff claims—

Rs.....

PLAINT.

119.

BANKERS.

CLAIM by Customer against Bankers for paying the Amount of a countermanded Cheque. (v)

1. The defendants are bankers carrying on business in the city of.

1924 Rang. 264, that "it was the duty of the employees of the bank to be able to identify the signatures of their customers and if they fail to discharge their duty and thereby suffer loss there is no reason why the plaintiff should make good that loss." "In order to make the customer liable for the loss, the neglect on his part must be in or intimately connected with the transaction itself and must have been the proximate cause of the loss." Cf. *The Punjab National Bank, Ltd. v. The Mercantile Bank of India, Ltd.*, (1912) 1 L. R. 36 Bom. 455 (Bank liable where the customer's negligence was not the proximate cause of payment.) Cf. *Lacave & Co. v. Credit Lyonnais*, (1897) 1 Q. B. 148 (The defendant bank in Paris paid a cheque which had a forged indorsement on it and sent it to their branch in London, who credited their bank in Paris with the value, and it was held that the defendant bank by paying the cheque and forwarding it to their London bank, and crediting their Paris bank with the value, were guilty of a conversion of the cheque, and that as they had paid the cheque on a forged indorsement they were not protected by any of the provisions of the Bills of Exchange Act) fd. in *Carpenters' Company v. British Mutual Banking Co.*, (1938) 1 K. B. 511, 524.

(v) Reference : *Curtice v. London City & Midland Bank*, (1908) 1 K. B. 293 (In this case the telegram was despatched on 31st October 1906 and

2. At all material times the plaintiff was a customer of the defendants and had an account with them.

3. On the.....day of.....19..., the plaintiff drew a cheque for Rs. 2,000/- on the defendants in favour of one B. D. and sent it to the said B.D.

delivered on the evening of the same day by the Post Office, and it being after office hours, was placed in the letter box of the Bank. By an oversight on the part of the defendants' servants this telegram was not brought to the notice of their manager until November 2. On November 1, the cheque was presented and paid. *Per* Farwell, L. J., "The duty and authority of a banker to pay a cheque may be countermanded on notice being given to him. In my opinion that must be actual notice brought to his attention. On the evidence here it is clear that the banker is simply put on enquiry by the receipt of a telegram, and his duty is not to pay at once but to make enquires; and, if the mere receipt of a letter or telegram was sufficient countermand the position of a banker in large business would be difficult." *Per* Fletcher-Moulton, L. J., "A banker..... is in the possession of the money of the customer, and his duty is to obey the direction of the customer as to paying that money out. If the mandate is sent in a form in which a servant acting reasonably, has no security that the mandate comes from his employer, the employer cannot grumble that he did not act upon it. I cannot hold it as part of the doctrine of agency that a principal who has sent his agent a telegram which does not, when looked at reasonably, vindicate its own authenticity, has a right to say that the agent who has on that account declined to act upon it has done so at his peril. It must be a question in each case as to whether the agent has behaved reasonably in acting or not acting upon that telegram. If it is by the negligence of the servants that the notice has not reached him he is responsible for that negligence and for the damages that naturally follow therefrom; but that he should be, as a matter of law, disentitled to prove the fact that he did not know of something, seems to me to be a doctrine which in mercantile matters, is one which the Court will give no countenance to." *Per* Cozen-Hardy, M. R., "Countermand is really a matter of fact. There is no such thing as a constructive countermand in a commercial transaction of that kind. A telegram may, reasonably and in the ordinary course of business, be acted upon by the Bank, at least to the extent of postponing of the honouring of the cheque until further enquiry can be made. But I am not satisfied that the bank is bound as a matter of law to accept an unauthorised telegram as sufficient authority for the serious step of refusing to pay a cheque."; cf. *Punjab Industrial Agency v. Mercantile Bank of India*, (1930) I. L. R. 11 Lah. 667 (Bank paying a countermanded cheque is not entitled to refund from payee.).

4. On the same day at about.....p.m., the plaintiff telegraphed to the defendants countermanding the payment of the said cheque.

5. The next day the said cheque was presented at the defendants' bank who negligently and in breach of the said instructions paid the said cheque, and debited the plaintiff's said account with the said sum.

The plaintiff claims—

Rs. 2,000/-.

PLAINT.

120.

BANKERS.

CLAIM against Collecting Bank for Negligence in receiving Payment of Cheque without Enquiry as to the Genuineness of the Endorsements thereon. (w).

1. On 19..., the plaintiff drew a crossed cheque on D. Bank Rangoon, in favour of the Corporation of Rangoon, (hereinafter referred to as 'the Corporation') or order for Rs. 2,361-12-0 in payment of municipal taxes due from the plain-

-
- (w) **Reference :** *Robinson v. Central Bank of India, Ltd.*, (1932) I. L. R. 9 Rang. 585 (The question in this case was whether the collecting bank was guilty of negligence within the meaning of Sec. 131, Neg. Inst. Act, 1881. *Per* Page C. J., 'I respectfully agree with the observations of Bailhache, J., in *Ross v. London County, Westminster and Parr's Bank, Ltd.*, (1919) 1 K. B. 678, confirmed as they were by the Court of Appeal in *A. L. Underwood, Limited v. Bank of Liverpool and Martins*, (1924) 1 K. B. 775 at p. 793, and applying the test laid down by Lord Dunedin in *Commissioners of Taxation v. English, Scottish and Australian Bank, Ltd.*, (1920) A. C. 683, I am clearly of opinion that the respondent bank was under an obligation to make inquiry as to whether the customer was entitled to receive the proceeds of this cheque, having regard to the form of the cheque and its endorsement, and the circumstances in which it was tendered for collection. I am satisfied and hold that it was paid because of the negligent conduct of the respondent bank. The simplest inquiry would have disclosed that the endorsement on this cheque, purporting to be that of the Corporation, was a forgery. If the respondent bank had sent the cheque to the officers of the Corporation of Rangoon for perusal and information as to whether the endorsement purporting to be

tiff to the Corporation, and handed the cheque to S., his clerk, with a direction to deliver it to the Corporation.

2. In 19..., the Corporation served upon the plaintiff a demand for payment of the taxes, in respect of which the plaintiff had issued the cheque aforesaid and the plaintiff came to know that the said cheque had not been delivered to the Corporation.

3. On19....., the plaintiff discovered that S. had a small Savings Bank account with the defendant bank and that he made a forged endorsement on the cheque purporting to be an endorsement on behalf of the Corporation in his favour and tendered the cheque to the defendant bank for collection and for crediting the proceeds of the cheque to the said account.

4. The cheque was returned to D. Bank and cleared the same day through L. Bank and proceeds of the cheque were duly credited to the said account.

5. The defendant bank was guilty of negligence in receiving payment of the cheque and crediting the proceeds in the manner aforesaid without inquiry as to the title of S. to the said cheque.

6. The defendant bank refused and still refuses to pay the amount of the said cheque to the plaintiff in spite of demands in writing dated and

The plaintiff claims—

(1) Rs.....

(2) Interest at 6 *per cent.* by way of damages.

that of the Chief Superintendent of the Corporation of Rangoon was genuine or not, they would have received an answer back in less than ten minutes. The answer would have been that the endorsement was a forgery, and the reasonable suspicion as to its genuineness that the respondent bank had entertained would have been justified. Or again, if the respondent bank had informed Dawsons Bank of the facts in its possession in connection with the receipt of this cheque, and the circumstances in which it had been tendered for collection by Manilal Shivchand, no one can doubt that Dawsons Bank would not have paid the cheque. Now this case turns solely upon an issue of fact, and no question of law is involved, for whether or not a collecting bank is guilty of negligence within Sec. 131, Negotiable Instruments Act, must depend upon the particular circumstances obtaining in each case. In the present case, with all due respect to the learned trial Judge, I have no doubt that the respondent bank was guilty of negligence in receiving payment of this cheque for Savitabai, and that the plaintiff is entitled to a decree". Cf. *Carpenter's Company v. British Mutual Banking Co. Ltd.*, (1938) 1 K. B. 511.

PLAINT.

121.

BANKERS.

CLAIM against Collecting Bank for Conversion. (x)

1. The plaintiffs are bankers having at all material times a branch office at Bombay.

2. At all material times one L. was the chief accountant of the plaintiffs at the Bombay branch and he had express authority to draw cheques on other bankers with whom the plaintiffs had an account. The said L. had a private account with the defendants, who were and are bankers in Bombay, and another account with the plaintiffs' Bombay branch.

3. In.....19..., L. began fraudulently drawing cheques on the plaintiffs' bankers in favour of the defendants, to whom

- (x) **Reference :** *Lloyds' Bank, Ltd. v. The Chartered Bank of India, Australia & China*, (1929) 1 K. B. 40 (In this case the defendants denied the conversion, and pleaded alternatively under Sec. 131, Ind. Neg. Inst. Act (to the same effect as Sec. 82 of the Bills of Exchange Act, 1882) that they had in good faith and without negligence received payment of the cheques for a customer :—*Held* : That the defendants had converted the cheques. *Per* Scrutton, L. J. at p. 59 "Negligence involves duty.....The legal principles found in *Morison v. London County & Westminster Bank*, (1914) 3 K. B. 356 and relevant to the present, are : (1) that the question should in strictness be determined separately with regard to each cheque ; (2) that the test of negligence is whether the transaction of paying in any given cheque "coupled with the circumstances antecedent and present" was so out of the ordinary course that it ought to have aroused doubts in the bankers' mind, and caused them to make enquiry. The learned judge finds, after careful consideration, that the defendant bank failed to prove absence of negligence. He rests his judgment on the payment by Lawson of large cheques of his bank into his private account and failure to make inquiries of the manager of the plaintiff bank as to the regularity of the transactions. I agree in this finding, and would add that I think examination of Lawson's account (and I am sure that general examination of the account of every customer-takes place from time to time in all well-managed banks) should have put the defendant bank on inquiry as to the source from which these heavy payments to stock-brokers were being made, in an account generally in low water except for these payments in, immediately reduced by payments out.). Cf. *Carpenters' Company v. British Mutual Banking Co. Ltd.*, (1938) 1 K. B. 511 (where the clerk of the plaintiff Company, made false endorsements on crossed cheques and directed the defendant bank to credit his own account).

he sent instructions to place the said cheques to the credit of his account with them.

4. The said L. committed and concealed these frauds for two years by means of false entries in the books of the plaintiffs' Bombay branch. When the amounts of these fraudulent cheques had been credited to his account by the defendants he immediately drew cheques against the balance standing to his credit in favour of whom the defendants knew to be stock-brokers.

5. The plaintiffs discovered these frauds on.....19..., from the report of their auditors, Messrs..... . Particulars of the frauds will appear from the said report a copy whereof was supplied to the defendants on.....

6. The defendants were guilty of negligence in dealing with the said cheques without making enquiries as to the regularity of the transactions.

Particulars of claim :

The plaintiffs claim—

Rs.....damages for conversion of the cheques.

PLAINT.

122.

BANKERS.

CLAIM against Collecting Bank for Conversion. (y)
(Another Form).

1. By a power of attorney dated 19..., the plaintiff authorised one T., a solicitor, to draw cheques on his banking account with the B. bank and to apply the proceeds for the purposes of the plaintiff.

(y) **Reference :** *Midland Bank v. Reckitt*, (1933) A. C. 1 (It was held by the House of Lords that the defendant bank, in presenting and receiving payment for the cheques, had converted them, and that as the bank had from the form of the cheques notice as to the money not being T.'s money, they were negligent in not making any enquiry as to T.'s authority to make these payments into his own account and therefore failed to bring these within Sec. 82 of the Bills of Exchange Act, (1882.). See *Carpenters Co. v. British Mutual Banking, Co.*, (1938) 1 K. B. 511, 524, 525; *Slingsby v. District Bank*, (1932) 1 K. B. 554, 556 (*Per Scrutton, L. J.*, "that it was negligence on the part of the bank to make inquiries only of the fraudulent person.").

2. Between and 19...., T. drew 15 cheques on the plaintiff's account with the B. bank, signing the cheques by using a rubber stamp which had on the upper line the name of the plaintiff and the word "By" and on the lower line "his attorney", and by placing his own signature between the lines. T. then paid the said cheques into his own account with the defendant bank.

Particulars of cheques :

<i>No.</i>	<i>Date.</i>	<i>Amount.</i>
------------	--------------	----------------

3. The defendant bank had from the form of the cheques notice as to the money not being T.'s money and was guilty of negligence in presenting and receiving payment for the said cheques as aforesaid.

The plaintiff claims—

Rs..... damages.

PLAINT.

123.

BANKERS.

CLAIM by Beneficiary against Banker to recover Trust Money transferred from Trust Account to Customer's Private Account. (z)

1. The defendant A. B. is the trustee, and the plaintiff the sole beneficiary, under the will dated of W. H. deceased.

- (z) **Liability of Banker :** To make the banker liable it must be proved that at the time of the appropriation he knew that it was trust money : *Taylor v. Forbes*, (1830) 7 Bli, N.S. 417 ; *Re Gross, Ex p. Kingston*, (1871) 6 Ch. App. 632 ; *cf. Foxton v. Manchester & Liverpool District Banking Co.* (1881) 44 L. T. 406 (where it was held that (1) the *cestui que trust* were entitled to recover from the bank the sums so allowed to be transferred ; (2) it was immaterial whether or not the bank knew whatever the circumstances of the trust and also whether the bank profited by the transfer from the one account to the other so long as they were aware that the money dealt with was trust money). *Cf. Union Bank of Australia, Ltd. v. Murray-Aynsley*, (1898) A. C. 639 (where upon the facts it was held that there was nothing upon the face of the account to indicate a trust, and it not being shown that the bankers had otherwise notice of the trust they were at liberty to treat such moneys

2. At all material times a sum of money was standing in the books of the defendant bank to the credit of "the account of the trustee of the late W. H."

3. At all material times the defendant A. B. had an overdrawn private account with the defendant bank.

4. The defendant bank knowing that the said A. B. was not beneficially entitled allowed him to transfer sums at different times from the aforesaid trust account to his overdrawn private account in payment of his debt. The plaintiff is not in a position to give particulars of all sums so transferred and applied. The following particulars are all the plaintiff can give before discovery :

Date.

Amount transferred.

The plaintiff claims—

(1) Inquiry as to how much of the trust money has been transferred to the private account of A. B. and has been so applied by the defendant bank.

(2) Payment of the sum to be found due upon such inquiry.

(3) Interest at 6 per cent. by way of damages.

PLAINT.

124.

BANKERS.

CLAIM against Banker to recover Amount of a mutilated Bank Note. (a)

1. The defendants are a banking corporation carrying on the business of banking in Hongkong and have banking establishments or branches, amongst others, at Calcutta.

as belonging to the customer and set them off against the overdrawn accounts.). *Cf. Nagappa v. O. R. M. O. M. S. P. Firm*, A. I. R. 1938 Mad. 999 (suit by a trustee) where Art. 120, Lim. Act was applied. *See Imperial Bank of India v. Krishnamurthi*, A. I. R. 1933 Mad. 628. (where the Bank with full notice of the fact that the administrators were intending to commit a breach of trust paid out the money to them).

- (a) **Reference:** *Hongkong and Shanghai Banking Corporation v. Lo Lee Shi*, A. I. R. 1928 P. O. 116. This case explains the effect of alteration of a bill as provided in the Bills of Exchange Ordinance, 1885, for Hongkong, which reproduces Sec. 64 of the Eng. Bills of Exchange Act, 1882, and which is substantially the same as Sec. 87 of the Ind. Neg. Inst.

2. In the course of their business the defendants issued notes in the ordinary form of bank notes, which were not legal currency, but owing to the high credit of the defendants they were used as if they were.

3. The plaintiff was given one such note for Rs.....by her husband. The said note accidentally got mutilated, but there was sufficient of the note remaining, for example, the name of the bank, the amount of the note stated in words, the promise to pay the bearer on demand and the signatures of the chief accountant and the chief manager, to establish its identity as a note of the bank.

4. On...19..., the plaintiff presented for payment the said note at the Calcutta branch of the defendant bank but the said branch refused payment on the pretext that the number of the note was missing.

The plaintiff claims—

Rs.

Act, 1881. *Per* Lord Buckmaster, "The alteration contemplated is one to which all parties might assent. It is not reasonable to assume parties assenting to a part of the document being effaced by the operations of a mouse, by the hot end of a cigarette, or by any of the other means by which accidental disfigurement can be effected. Again, the provision which excepts from the category of persons against whom the bill is avoided, a party who has 'himself made, authorized, or assented,' to the alteration cannot reasonably apply to the ravages of a rat, a white ant, or any other animal pest. The fact that the change is accidental in itself negatives the possibility of assent.The right of party to sue on the note, in the event of its being defaced by fire or attacked by a mouse, cannot depend upon whether it had been placed in a fire-proof or a mouse-proof safe or left in an ordinary box. When once honest accident is accepted as the cause of damage, the only remaining question is whether the extent of the damage is such as to prevent the note being sued upon, and it may be also whether the missing material parts can be supplied by verbal evidence, though that question does not now arise. In the first instance, therefore, it is essential to investigate whether there is sufficient of the note remaining to establish its identity as a note of the bank, and to contain all the necessary elements that render it valid and effectual as a negotiable document. To some extent this must depend upon verbal evidence as well as upon the pieces of the document. These pieces must be identified, their condition must be explained, and they must of course be shown to be parts of one and the same instrument. In this case every one of these conditions has been satisfied.In their Lordships' opinion the contract here has never been altered and is sufficiently evidenced by the mutilated document and the verbal testimony."

PLAINT.**125.****BANKERS.****CLAIM by Banker to recover Amount of Cheque drawn on one of its Branches and cashed by another, upon Dishonour of such Cheque. (b)**

1. At all material times the plaintiff bank had banking establishments or branches, amongst others, at G. and B.

2. One H. kept an account with the establishment at G. and drew a cheque dated.....on the G. establishment, in favour of the defendant.

3. The defendant presented the said cheque on.....19....., at the B. establishment, and as he was known to the officers there, they gave him on his credit cash for it.

- (b) **Reference :** *Woodland v. Fear*, (1857) 7 E. & B. 519 (*Per* Cambell C. J., ".....The cheque was not drawn on the Banking Company generally, but on the Banking Company at Glastonbury ; and this coupled with the fact that Helyar kept his account and his balance only there, shows that the Bridgewater establishment was not bound to honour his cheque (even supposing he had assets at Glastonbury), as a banker, under the same circumstances as to assets, is bound to honour the cheque of his customer. To hold that the customer of one branch keeping his cash and account there, has a right to have his cheque paid at all or any of the branches, is to suppose a state of circumstances so inconsistent with any safe dealing on the part of the banker, that it cannot be presumed without direct evidence of such an agreement, and the giving on the one hand, and accepting on the other, of a limited cheque book, seems intended to guard against such an inference."), *consd.* in *Prince v. Oriental Bank Corporation*, (1878) 3 A. C. 325, P. C. (In the case of *Woodland v. Fear*, it was held that a joint stock bank was bound to pay the cheques of a customer at that branch only at which he kept his account, and had not violated its engagement with the customer by refusing to pay his cheque at another branch. The reason of this decision is obvious. It would be difficult for a bank to carry on its business by means of various branches if a customer who kept his account at one branch might draw cheques upon another branch, however distant from that at which he kept his account and demand they should be cashed there. The latter branch could not possibly know the state of his account. The case decides no more than this, that the bank came under no engagement or promise to their customer to honour his cheque at any branch except that at which he kept his account.). See *Jyoti Prasad Singh Deo Bahadur v. Chota Nagpur Banking Association*, (1929) I.L.R. 8 Pat. 413, which has followed the above two cases.

4. The cheque was sent by the first post the same day to the G. establishment, where it was delivered in the course of the..... On the morning of that day H. had a balance there in his favour, which had been drawn out before the cheque arrived and the cheque was refused payment.

The plaintiff claims —

Rs..... ..as money had and received.

PLAINT.

126.

BANKERS.

CLAIM by Bankers against Surety of a Customer. (c)

1. The plaintiffs are and at all material times were bankers carrying on business in the city of and elsewhere.

2. By a guarantee in writing dated 19..., the defendant, in consideration of the plaintiffs' agreeing to advance to one C. D. of.....any sum of money that he might require during the following twelve months not exceeding in the aggregate Rs. 10,000/- inclusive of interest at 6 *per cent.*, guaranteed the payment within the limits aforesaid of any such sums as might be owing to the plaintiffs for principal and interest from the said C.D. at the expiration of the said period.

-
- (c) **Liability of surety, extent of**—Sec. 128, Ind. Cont. Act. The surety cannot be made liable for more than he has undertaken: *Maqsudul v. Collector of Farukhabad*, A. I. R. 1931 Oudh 430. Upon default of the principal debtor every surety is, apart from special stipulation, immediately liable to the full extent of his obligation, without being entitled to require either notice of default or previous recourse against the principal or simultaneous recourse against the co-sureties: *Bagumane Deragowda v. Sitaramaiya*, 10 Mys. L. J. 175. The liability of a surety is co-extensive with that of the principal debtor unless otherwise provided by the contract: *Swaminatha Pillai v. Lakshmana*, A. I. R. 1935 Mad. 748. Unless it is otherwise provided for by the contract a right of action against a surety will generally arise at the same time as a right of action against the principal debtor: *Diyalu Mal v. Nandu Shah*, (1931) I. L. R. 13 Lah. 240. The burden of proof of limited liability is upon the surety: *Bharat National Bank, Ltd. v. Thakar Das*, (1935) I. L. R. 16 Lah. 757.

3. During the said twelve months the plaintiffs advanced to C. D. the total sum of Rs. 9,000.

Particulars of claim :

To amount of advances made to C. D. between			
..... and .....	...	...	Rs. 9,000/-
To Interest	...	...	,, 900/-
		Total	Rs. 9,900/-

4. A statement containing particulars of the plaintiffs' dues aforesaid was supplied to the defendant on.....19...

The plaintiff claims—

Rs. 9,900/-

DEFENCE.

127.

BANKERS.

**DEFENCE to Claim by Customer for Money paid
on a Forged Cheque. (d).**

1. Paragraphs 1 and 2 of the plaint are admitted.
2. Paragraph 3 of the plaint is not admitted.
3. If the cheque was in fact a forged one (which is not admitted), the signature on the cheque bore such resemblance to the plaintiff's specimen signature that the defendant bank could not by the exercise of any amount of care have detected the forgery.
4. The defendant bank paid the said cheque according to its tenor and in the honest belief that it was a genuine one.

(d) **Reference:** *Bhagwandas v. Greet*, (1904) I. L. R. 31 Cal. 249, fd. in *Pirbhu Dayal, v. The Jwala Bank*, I. L. R. (1938) All. 634. Cf. *London & River Plate Bank v. The Bank of Liverpool*, (1896) 1 Q. B. 7. (If the forgery was cleverly executed the banker may not be able by any amount of care to ascertain whether the signature was a forgery or not, and in that case he cannot possibly be made liable on the ground of negligence.).

(d) **This is a defence to Form No. 118.**

DEFENCE.**128.****BANKERS.****DEFENCE to Claim by Customer for paying the Amount of a countermanded Cheque. (e).**

1. Paragraphs 1, 2 and 3 are admitted.
2. The telegram referred to in paragraph 4 of the plaint was delivered on the evening of by the Post Office, and, it being after office hours, was placed in the letter box of the defendants and was opened the next day but after the cheque had been presented and paid.
3. The defendants paid the said cheque according to its tenor and without, in fact, having notice of any countermand.
4. Further, or, in the alternative, the said telegram was unauthenticated.
5. The defendants deny that at any material time they acted negligently or in breach of the plaintiff's instructions as alleged or at all.
6. The defendants were entitled to debit the plaintiff's accounts with the amount of the said cheque.

DEFENCE.**129.****BANKERS.****DEFENCE to Claim by Customer for Dishonouring of Cheque and for Libel. (f).**

1. Paragraphs 1 & 2 of the plaint are admitted.
2. The defendants have no knowledge of and do not admit that

(e) See, *Curtice v. London City and Midland Bank*, (1908) 1 K. B. 293.

(e) This is a defence to Form No. 119.

(f) This is a defence to Form No. 117.

(f) The plea taken is one of qualified privilege. *Per* Lord Esher, M. R, in *Hunt v. G. N. Rail. Co.*, (1891) 2 Q. B. 189 at 191: "If the communi-

the cheque mentioned in paragraph 3 of the plaint was drawn by the plaintiff in favour of C. D. & Co. in payment of goods sold to the plaintiff by the said C. D. & Co.

3. The defendants admit that the said cheque was presented and dishonoured. They deny there were sufficient funds of the plaintiff in their hands out of which to pay the said cheque or that they acted wrongfully (or in breach of their duty) in dishonouring the cheque as alleged or at all.

4. The defendants admit that they wrote and published the words "Refer to drawer" but deny that they did so falsely or maliciously.

5. Save that they admit that the said words "Refer to drawer" meant that the plaintiff had not sufficient funds standing to the credit of his account with the defendants to meet the said cheque the defendants deny that they wrote and/or published the said words with any of the meanings in paragraphs 7 and 8 of the plaint alleged or with any defamatory meaning.

6. The said words are in their natural and ordinary meaning true in substance and in fact.

7. Further, or, in the alternative, the defendants owed a duty to write and/or to publish the said words to the said C. D. & Co. and the Lloyds Bank Ltd., who had a common interest with the defendants in the matter therein referred to, and the defendants wrote and/or published the said words without any malice towards the plaintiff and in the honest belief that they were true.

8. The facts alleged in paragraph 9 of the plaint are not admitted.

cation was of such a nature that it could be fairly said that those who made it had an interest in making such a communication, and those to whom it was made had a corresponding interest in having it made to them—when those two things co-exist, the occasion is a privileged one." *Per* Lord Atkinson in *Adam v. Ward*, (1917) A. C. 309, 334: "It was not disputed, in this case on either side, that a privileged occasion is, in reference to qualified privilege, an occasion where the person who makes the communication has an interest or a duty legal, social or moral to make it to the person to whom it is made, and the person to whom it is so made had a corresponding interest or duty to receive it. This reciprocity is essential"; approved in *Watt v. Longsdon*, (1930) 1 K. B. 130 (C. A.).

PLAINT.

130.

BILLS OF EXCHANGE.

1. Inland Bills of Exchange.

CLAIM by Drawer against Acceptor on a Bill payable to Drawer. (g)

1. The plaintiff by his bill of exchange dated.....19...., and directed to the defendant, required the defendant to pay to the plaintiff Rs....., 30 days after date (or on demand, or at sight or on presentation or,days after sight).

2. On.....19...., the defendant accepted the said bill, but has not paid the same, (or, which was duly presented for payment and was dishonoured).

- (g) **Inland Bill of Exchange—what is :** See Sec. 11, Neg. Inst. Act and cf. *Kidston v. Seth Bros.*, (1930) I. L. R. 57 Cal. 730.
- (g) **Bill of Exchange when payable :** In a bill of exchange the expressions “at sight, and “on presentment”, mean “on demand.” The expression “after sight” means “after acceptance or noting for nonacceptance” : Sec. 21, Neg. Inst. Act, 1881.
- (g) **Maturity of a bill of exchange :** The maturity of a bill of exchange is the date at which it falls due. Every bill of exchange which is not expressed to be payable on demand, at sight or on presentment is at maturity the third day on which it is expressed to be payable : See Sec. 22, and for calculating maturity, Secs. 23, 24 and 25, Neg. Inst. Act, 1881.
- (g) **Liability of acceptor :** Sec. 32, Neg. Inst. Act, 1881. The acceptor in the absence of a contract to the contrary is liable on the bill as principal debtor : Sec. 37 of the said Act. Acceptance must be in writing and must be on the note itself : *Surajmal v. Kashiprasad*, A. I. R. 1933 Nag. 389.
- (g) **Notice of dishonour :** It is not necessary to give notice to the acceptor of a dishonoured bill of exchange : Sec. 93, Neg. Inst. Act 1881.
- (g) **Presumption of consideration :** Sec. 118, Neg. Inst. Act, 1881. Cf. *Narasamma v. Veeraju*, (1935) I. L. R. 58 Mad. 841 ; *Latafat Husain v. Onkar Mal*, (1935) I. L. R. 10 Luck. 423.
- (g) **Presentation for payment :** Sec. 64, Neg. Inst. Act, 1881. Section 64 is undoubtedly ambiguous and in order to get over the apparent contradiction between the section and the exception it is necessary that the section should be given its plain meaning and the

Particulars of claim :

.....19., Principal due	...	...	Rs.
Interest thereon at 6 <i>per cent. per annum</i> up to..... (date of suit)	...	..	„
Notarial expenses	...	...	„
<hr/>			
Amount due ...			Rs.
<hr/>			

The plaintiff claims—

(1) Rs.....

(2) Further interest at 6 *per cent.* until payment or judgment.

exception to it must be read more or less as an independent rule of law and not as controlling the plain language of the section. Hence the non-presentation of hundis for payment on the due dates does not affect the liability of the maker, acceptor or drawee : *Devi Ditta Mal v. Partap Singh*, A. I. R. 1933 Lah. 176. Under Sec. 64 the result of non-presentment of hundis for payment is not exemption of the acceptor from liability but the exemption of other parties to the hundis only. The word "other" has been used to show that there is a difference between Sec. 64 and Secs. 61 and 62 where the words used are "no party". The section therefore means that the parties who are mentioned in the section may be liable but other parties to the documents are not to be liable. The exception to Sec. 64 cannot be read as controlling the plain language of the main section, but must be read as more or less an independent rule of law. The acceptor of a hundi therefore remains liable under it inspite of the fact that it was not presented for payment : *Benares Bank Ltd. v. Hormusji Pestonji*, (1930) I. L. R. 52 All. 696. Where the drawer and the drawee is the same person no presentation on the due date is necessary : *Pachkauri Lal v. Mul Chand*, (1922) I. L. R. 44 All. 554, fd. in *Chandra Dat Bajpai v. Chander Sen*, A. I. R. 1934 Oudh 254. Cf. Secs. 68-70 of the Act.

(g) **Noting** : Noting is optional : Sec. 99, Neg. Inst. Act, 1881.

(g) **Interest** : When no rate specified, 6 *per cent.* : Sec. 80, Neg. Inst. Act, 1881. The date from which such interest should be calculated is the date on which the principal amount ought to have been paid, that is, it becomes payable. The word 'same' in the section should be understood to refer to the amount due on the instrument and not to the interest on that amount : *Nath Sah v. Durga Sah*, (1936) I. L. R. 58 All. 382.

PLAINT.

131.

BILLS OF EXCHANGE.

1. Inland Bills of Exchange.

CLAIM by Drawer against Acceptor on Bill payable at a particular Place and not elsewhere. (h)

1. On.....19..., the plaintiff drew upon the defendant a bill of exchange for Rs....., payable to the plaintiff ninety days after date.

2. The defendant accepted the said bill, payable at..... only.

3. On.....19..., the said bill was duly presented for payment at the said place and was dishonoured.

Particulars of claim :

.....19...Principal due	...	...	Rs.
Interest at 6 per cent. per annum up			
to.....(date of suit)	...		„
	Amount due	...	Rs.

The plaintiff claims—

(1) Rs.....

(2) Further interest at 6 per cent. until payment or judgment.

-
- (h) **Presentment :** A bill of exchange payable at a specified place and not elsewhere must, in order to charge any party thereto, be presented for payment at that place : Sec. 68, Neg. Inst. Act, 1831. Cf. Sec. 69. A bill of exchange not made payable as mentioned in Sections 68 and 69, must be presented for payment at the place of business (if any), or at the usual residence, of the maker, drawer or acceptor thereof, as the case may be : Sec. 70, Neg. Inst. Act. Cf. *Mohammad Ismail Maula Bakhsh v. Abdul Majid*, I. L. R. (1937) Lah. 580 (for necessity of presentation where the maker of a note has no residence in specified city). No presentation is necessary where the drawer and the drawee are the same person : *Chandra Datt Bajpai v. Chander Sen*, A. I. R. 1934 Oudh 254.

PLAINT.**132.****BILLS OF EXCHANGE.****1. Inland Bills of Exchange.-****CLAIM by Drawer against Acceptor on a Bill Payable on a Future Event which is certain to happen. (i)**

1. The plaintiff, by his bill of exchange dated....., and directed to the defendant, required the defendant to pay to the plaintiff Rs....., one month after the death of G. H. who died on.....

2. The defendant has not paid the same.

Particulars of claim :

.....19...	Principal due	...	...	Rs.
	Interest thereon at 6 per cent.	up to date of		
suit	...	...	...	"
	Expenses of noting	...	...	"
Amount due				Rs.

The plaintiff claims—

(1) Rs.....

(2) Further interest on.....up to date of realisation.

PLAINT.**133.****BILLS OF EXCHANGE.****1. Inland Bills of Exchange.****CLAIM by Drawer against Acceptor upon the Bill, alternatively upon the Debt. (j)**

1. On the 5th July, 19..., an account was stated in writing between the plaintiff and the defendant in respect of certain dealings

- (i) **Bill of Exchange payable on a future event which is certain to happen :** Sec. 5, Neg. Inst. Act, 1881 ; *Colehan v. Cooke*, (1742) Willes 393 (where it was held that a promissory note payable to A. or order, 10 days after the death of B, is assignable under 3 & 4 Anne, c. 9, & the indorsee may maintain an action upon it against the maker).

- (i) See foot-note under Form No. 130.

- (j) **Note:** Wherever there is any doubt as to the validity of the bill, the safer course is to sue on the bill and alternatively on the original

and transactions between them and it was thereby agreed that the defendant was indebted to the plaintiff in the sum of Rs. 1500/.

2. On the same day the defendant agreed in writing to pay interest on the said sum at the rate of 6 *per cent. per annum*.

3. On the 10th July, 19..., the defendant accepted by way of security a bill of exchange for Rs. 1540/- drawn by the plaintiff upon the defendant and payable to the plaintiff's order three months after date, which said bill was duly presented for payment and was dishonoured.

Particulars :

.....19..., Principal due	...	...	Rs. 1540.
Interest at 6 <i>per cent.</i> from.....to date of			
suit	...	...	...

			Total Rs.

The plaintiff claims—

(1) Rs.....upon the bill, alternatively, upon the debt.

(2) Interest at 6 *per cent.* until payment or judgment.

PLAINT.

134.

BILLS OF EXCHANGE.

1. Inland Bills of Exchange.

CLAIM by Indorsee against Acceptor. (k)

1. On.....19..., the defendant accepted a bill of exchange for Rs. 2500/- drawn by one J. K. upon the defendant and payable three months after date to the order of one L. T.

2. The said L. T. indorsed the said bill to one K. T. and the said K. T. to the plaintiff, which said bill was duly presented for payment and was dishonoured.

3. The defendant has not paid the said bill.

(Particulars and Prayer as in Form No. 130.)

consideration or the debt. Care should be taken in the drafting of the plaint so as to avoid the operation of Sec. 91 (b) of the Ind. Evid. Act. Cf. *Duggempudi Nagamma v. Tirumala Reddi*, (1920) 59 I. C. 363 (case of a promissory note).

(k) **Right to sue :** Sec. 50, Neg. Inst. Act, 1881.

PLAINT.**135.****BILLS OF EXCHANGE.****1. Inland Bills of Exchange.****CLAIM by Indorsee against Acceptor upon the bill, alternatively, upon the Debt. (1).**

1. On.....19..., the plaintiffs entered into a c. i. f. contract with the defendants, cloth-dealers in Cawnpore.

2. The said contract provided as follows :

(a) The buyer would place order for goods.

(b) The seller, after accepting the order, would despatch the goods, and draw bills of exchange upon the buyer directing the buyer to pay the C. Bank of Cawnpore the amount of the bill, representing the cost of goods, freight and insurance, at 60 days' sight.

(c) The said C. Bank would tender to the buyer the bills of exchange, invoices, bills of lading and other documents and the buyer would accept the bills of exchange and give the necessary instructions for the clearance of the goods.

(d) The bills of exchange would be presented on maturity to the purchaser who would make the payment and receive delivery of the goods.

3. In pursuance of the said contract several orders for dhoties were placed with the plaintiffs by the defendants and the said C. Bank duly tendered to the defendants the bills of exchange, invoices, bills of lading and other documents.

4. The defendants accepted the bills of exchange and gave the necessary instructions for the clearance of the goods.

5. Each of said bills was duly presented on maturity to the defendants but in each case the defendants refused to pay the same and to take delivery of the goods.

(1) **Reference:** See *Dhiraj Lal-Ram Prasad v. Sir Jacob Behrens*, A. I. R. 1933 All. 74.

6. On.....19..., the C. Bank indorsed the said bills of exchange to the plaintiffs.

Particulars of claim :

The plaintiffs claim :—

- (1) Rs.....upon the bills, alternatively, upon the debt.
- (2) Interest of 6 *per cent.* until payment or judgment.

PLAINT.

136.

BILLS OF EXCHANGE.

1. Inland Bills of Exchange.

CLAIM by Indorsee against Drawer for Non-acceptance. (m)

1. On.....19..., the defendant at Gwalior drew a bill of exchange for Rs.....on his firm at Bombay in favour of D. S., payable forty five days after date.

1. The said D. S. indorsed the said bill atto the plaintiff which said bill was presented at the defendant's firm at Bombay for acceptance on..... and was dishonoured by non-acceptance, whereof the defendant had notice in writing dated19...

3. The defendant has not paid the said bill.

(Particulars and Prayer as in Form No. 130.)

- (m) **Presentment for acceptance :** Secs. 61 and 75, Neg. Inst. Act, 1881.
- (m) **Dishonour by non-acceptance :** Sec. 91, Neg. Inst. Act, 1881.
- (m) **Excuse for non-presentment for acceptance :** Sec. 61, Neg. Inst. Act, 1881.
- (m) **Notice of dishonour — When necessary :** Sec. 93, Neg. Inst. Act, 1881.
- (m) **Right to sue :** The dishonour by non-acceptance of a bill payable at a fixed date gives an immediate cause of action against the drawer, and there is no need to wait until the maturity of the bill or to present it for payment: *Ram Ranji Jambhekar v. Pralhaddas Subkarn*, (1896) I. L. R. 20 Bom. 133 (case of a hundi).

PLAINT.**137.****BILLS OF EXCHANGE.****1. Inland Bills of Exchange.****CLAIM by Indorsee against Acceptor on a Bill accepted payable at a particular Place and not elsewhere.**

1. On January 1st, 19..., the defendant accepted a bill of exchange for Rs. 5000/- drawn by one A. B. and payable 3 months after date to the said A. B. or his order at..... and not elsewhere.

2. The said A. B. indorsed the said bill of exchange to the plaintiff which said bill was duly presented for payment at and was dishonoured.

(Particulars and Prayer as in Form No. 130.)

PLAINT.**138.****BILLS OF EXCHANGE.****1. Inland Bills of Exchange.****CLAIM by Indorsee against Drawer, Acceptor and Indorser. (n)**

1. On.....19..., the defendant A. B. drew a bill of exchange for Rs..... upon the defendant C. D. requiring him to pay to the order of the defendant E. F. the said sum 30 days after sight.

(n) **Notice of dishonour** : Sec. 93, Neg. Inst. Act, 1881. The liability of the drawer under Sec. 30, and the indorser under Sec. 35 of the Act, arises only on notice of dishonour being given to them unless such notice is excused under Sec. 98. Dishonour by the drawee is a condition precedent under Sec. 35 for the coming into existence of the liability of the indorser. *Kadappa Chetti v. Thirupathi Chetti*, A.I.R. 1925 Mad. 444. In the absence of contract to the contrary, the indorser is liable to the indorsee as surety for the amount of the instrument in case of dishonour : *Sattamuthu Chettiar v. Abdul Kareem*, A.I.R. 1933 Mad. 61.

(n) **Presentment for payment** : When a note payable on demand has been endorsed it must be presented for payment within a reasonable time of

2. On.....19..., the defendant C. D. accepted the said bill.

3. On.....19..., the defendant E. F. indorsed the same to the plaintiff.

4. The said bill was duly presented for payment to the defendant C. D. and was dishonoured, of which each of the defendants had written notice in writing dated.....

(Particulars and Payer as in Form No. 130.)

PLAINT.

139.

BILLS OF EXCHANGE.

1. Inland Bills of Exchange.

CLAIM by Indorser who has paid Bill against Drawer and Acceptor. (o)

1. On the.....19..., the defendant A. B. drew upon the defendant C. D. a bill of exchange for Rs.....payable to the said A. B. or order, three months after date.

2. The said bill was accepted by the defendant C. D.

3. On the.....19..., the defendant A. B. indorsed the said bill to the plaintiff, and on the.....19..., the plaintiff indorsed it to one E. F.

4. The said bill was duly presented for payment by the said E. F. to the defendant C. D. but was dishonoured. E. F. duly gave notice of such dishonour to the plaintiff and the defendant A. B.

5. The defendants or either of them did not pay the said bill or any portion thereof and, therefore, the plaintiff was on the.....19..., obliged to pay the same.

(Particulars of claim and Prayer as in Form No. 130.)

endorsement. If it is not presented, the indorser is discharged : *Jaganadha v. Lakshmana*, A.J.R. 1925 Mad. 132.

(n) **Liability of prior parties to holder in due course :** Sec. 36, Neg. Inst. Act, 1881 ; O 1, r. 6, C. P. Code. Cf. *Bank of Bengal v. Kartick Chunder*, (1889) I. L. R. 16 Cal. 804.

(o) Cf. Sec. 36, Neg. Inst. Act, 1881.

PLAINT.**140.****BILLS OF EXCHANGE.****1. Inland Bills of Exchange.****CLAIM by Payee against Drawer for Non-acceptance.**

1. On.....19..., the defendant drew a bill of exchange for Rs....., dated.....19..., upon C. D., payable to the plaintiff 30 days after date.

2. The said bill was duly presented for acceptance on..... 19..., and was dishonoured by non-acceptance, of which the defendant had due notice in writing dated.....19...

3. The defendant has not paid the said bill.

(Particulars and Prayer as in Form No. 130.)

PLAINT.**141.****BILLS OF EXCHANGE.****1. Inland Bills of Exchange.****CLAIM by Payee against Drawer for Default of Payment.**

1. On 19..., the defendant drew a bill of exchange for Rs. 6,000/- upon one E. G., payable to the plaintiff 60 days after date.

2. The said bill was duly presented for payment and dishonoured whereof the defendant had due notice by letter dated 19...,

3. The defendant has not paid the said bill.

(Particulars and Prayer as in Form No. 130.)

PLAINT.

142.

BILLS OF EXCHANGE.

1. Inland Bills of Exchange.

CLAIM by Payee against Drawer for Default of Payment with an Excuse for not giving Notice of Dishonour. (p).

1. On 19..., the defendant drew a bill of exchange for Rs. 5,000/- dated 19..., upon C. D., payable to the plaintiff 60 days after date.

2. The said bill was on 19..., duly presented for payment and dishonoured.

3. After the dishonour of the bill aforesaid, the defendant repeatedly promised to pay the bill but has not done so.

(Particulars and Prayer as in Form No. 130.)

PLAINT.

143.

BILLS OF EXCHANGE.

1. Inland Bills of Exchange.

CLAIM by Payee against Drawer for Non-acceptance of a Duplicate Bill of Exchange. (q).

1. On 19..., the defendant drew at Baluchur a bill of exchange for Rs. 1,000/- upon his firm at Calcutta, payable to the plaintiff 60 days after date.

(p) **When Notice of dishonour is dispensed with :** Sec. 93, Neg. Inst. Act, 1881. Where it is alleged that no notice of dishonour was necessary as the party charged could not suffer damages for want of it the onus of proving that the other party could not suffer damage is on the party who wants to excuse himself for the non-presentation : *Shridhar v. Baziram*, A. I. R. 1932 Nag. 55.

(q) **Holder's right to duplicate of lost bill :** Sec. 45-A, Neg. Inst. Act, 1881 ; cf. *Indur Chunder Doogur v. Luckmee Bibee*, (1885) 15 Suth. W. R. 501. Where a hundi is payable at sight, the holder is not as of right entitled to demand a duplicate under Sec. 45-A. Moreover, as it is payable at sight it cannot be said that it was lost before it was overdue. But a duplicate cheque may be demanded on equitable principles where a bill is lost whether before or after maturity as the right to

2. The said bill was lost before it could be presented for acceptance.

3. On 19..., the defendant, at the plaintiff's oral request, granted to the plaintiff a duplicate bill for Rs 1,000/- drawn by him at Baluchor upon his said firm at Calcutta.

4. On 19..., the said duplicate bill was presented to the defendant's firm at Calcutta for acceptance and was dishonoured for non-acceptance, notice whereof was duly given to the defendant.

(Particulars and Prayer as in Form No. 130.)

PLAINT.

144.

BILLS OF EXCHANGE.

1. Inland Bills of Exchange.

CLAIM by Payee against Drawer for Refusal to supply Duplicate of a lost Bill. (r).

1. On, the defendant drew at Benares, a bill of exchange for Rs. 2,000/- on his firm at Calcutta, payable to the plaintiff 45 days after sight.

2. The said bill was accepted by the defendant's Calcutta firm, on

3. The said bill was lost before maturity and the plaintiff verbally requested the defendant at Benares to give him a duplicate bill and at the same time the plaintiff offered to give security to the defendant, if required, to indemnify him against all persons whatever in case the lost bill should be found again. But the defendant refused to give any duplicate bill upon any conditions whatsoever.

demand duplicate is a part of the mercantile laws of the countries :
Udho Ram—Chandi Ram v. Hem Raj—Tej Bhan A. I. R. 4924 Lah.
 198.

(r) Cf. Sec. 45-A, Neg. Inst. Act ; O. VII, r. 16, C. P. Code. See *Baldeo Prasad v. Grish Chandar*, (1879) I. L. R. 2 All. 754 ; *Durga Das v. Kanshi Ram*, (1912) 16 I. C. 769.

The plaintiff claims —

- (1) A duplicate bill from the defendant, or
- (2) Rs. 2,000 the amount of the lost bill,
- (3) Interest at 6 *per cent.* from to the date of payment or judgment.

PLAINT.

145.

BILLS OF EXCHANGE.

1. Inland Bills of Exchange.

**CLAIM by Acceptor of Bill, who has paid Bill accepted
for the Accommodation of Drawer, against
Drawer for Indemnity. (s)**

1. The defendant drew a bill of exchange for Rs., dated, upon the plaintiff payable to X. Y. three months after date.

2. The said bill was accepted by the plaintiff at the request in writing of the defendant dated and for his accommodation and the plaintiff did not receive any consideration from the defendant therefor.

3. At the time of such acceptance it was impliedly agreed between the defendant and the plaintiff that the defendant would provide funds to the plaintiff to meet the said bill at maturity or, in default thereof, indemnify the plaintiff against any loss which he might be put to by having to pay the said bill (or, against the consequences of non-payment).

4. The said bill was duly presented for payment by the said X. Y. on but the defendant failed to provide the plaintiff with funds to pay the same and, accordingly, the plaintiff was obliged to pay the amount of the said bill on

5. The defendant has failed to indemnify the plaintiff against the said payment.

(Particulars of claim and Prayer as in Form No. 130.)

- (s) **Reference :** *Nand Ram v. Silla Prasad*, (1883) I. L. R. 5 All. 484. *Cf. Asprey v. Levy*, (1847) 16 M. & W. 851 (where it was held that there was an implied contract to indemnify plaintiff for lending the accommodated party his, plaintiff's, acceptance).

PLAINT.**146.****BILLS OF EXCHANGE.****1. Inland Bills of Exchange.****CLAIM by Executor of Drawer against Acceptor.**

1. The plaintiff is the executor of the will of A. B., deceased, who died January 5th, 19...

2. On, the defendant accepted a bill of exchange for Rs. 3000, dated the 19..., drawn by the said A. B. upon the defendant payable to the said A. B. on demand, which said bill has not been paid.

(Particulars of claim and Prayer as in Form No. 130.)

PLAINT.**147.****BILLS OF EXCHANGE.****1. Inland Bills of Exchange.**

**CLAIM by Acceptor induced by Fraud of Drawer to
accept Bill, against Drawer, for Cancellation
and Delivery up of the Bill. (t)**

1. At all material times the defendant was the manager of the plaintiff's hardware business at

- (t) **Reference :** *Jones v. Lane*, (1839) 3 Y. & C. Ex. 281 (The cases of fraud where the bill has been ordered to be given up are confined to those where the possession, but for the fraud, would be that of plaintiff in equity.).
- (t) **Cause of action :** Under Sec. 39, Spec. Rel. Act, (I of 1877), a reasonable apprehension that an instrument if left outstanding may cause the plaintiff serious injury is a part of the plaintiff's cause of action and must be pleaded.
- (t) **Reliefs to be claimed :** A plaintiff need only ask for the instrument to be adjudged void and voidable, and need not in express terms ask for it to be delivered up and cancelled. Even though no relief or cancellation is asked for, a Court may grant cancellation also. But this does not prevent a plaintiff from also asking in express terms a relief for its being delivered up and cancelled, if he feels that having it

2. On 19..., the plaintiff was induced by the fraud of the defendant to accept a bill of exchange hereinafter mentioned.

Particulars :

(a) By his letter dated 19..., the defendant represented to the plaintiff that he as the agent for the plaintiff had discharged a debt in respect of the said business due to one K. D., and by the said letter he requested the plaintiff to accept the enclosed bill of exchange for Rs. 5000/-, dated, drawn by himself upon the plaintiff and payable on demand.

(b) Relying upon the said representation and induced thereby the plaintiff accepted the said bill of exchange on and sent it to the defendant by post.

(c) On 19..., the plaintiff discovered that defendant did not discharge the alleged or any debt as the agent for the plaintiff and that the said representation was false to the knowledge of the plaintiff and was made with the intention of inducing the plaintiff to accept the said bill.

3. On 19..., the plaintiff demanded the said bill to be delivered up to him but the defendant has failed and neglected to do so.

4. The plaintiff apprehends that the instrument, if left outstanding, may cause him serious injury.

The plaintiff claims--

(1) A declaration that he was induced to accept the said bill of exchange by the fraudulent misrepresentation of the defendant.

(2) Injunction restraining the defendant, his servants and agents and each one of them from parting or otherwise dealing with the said bill of exchange.

(3) An order directing the defendant to deliver up the said bill to be cancelled.

merely adjudged void or voidable would not be adequate for his purpose : *Kalu Ram v. Babu Lal*, A. I. R. 1932 All. 485.

- (t) **Limitation :** Art. 91 of the second schedule to the Limitation Act. The suit must be brought within three years from the time when the facts entitling the plaintiff to have the instrument cancelled or set aside became known to him : *Janaki Kunwar v. Ajit Singh*, (1911) 15 I. C. 58 P. C.

PLAINT.**148.****BILLS OF EXCHANGE.****1. Inland Bills of Exchange.****CLAIM by Payee against Executor of Drawer on Bill payable on a Future Event which is certain to happen.**

1. One E. F. drew a bill of exchange for Rs. 6000, dated, upon K. G. payable to the plaintiff one month after the death of the said E.F.

2. The said E. F. died on the.....19..., having made and published his will dated....., and appointed the plaintiff, his executor.

3. The plaintiff duly presented the said bill for payment but it was dishonoured.

4. The defendant has not paid the said bill.

(Particulars of claim and Prayer as in Form No. 130.)

PLAINT.**149.****BILLS OF EXCHANGE.****1. Inland Bills of Exchange.****CLAIM by Administrator of Indorsee against Drawer for Default of Acceptance.**

1. The defendant drew a bill of exchange for Rs.....dated the.....19..., upon A. C. payable sixty days after date to the order of the defendant who indorsed the same to G. H.

2. The said G. H. presented the said bill for acceptance onbut the same was dishonoured by non-acceptance, of which the said G. H. gave notice to the defendant in writing dated..... 19...

3. The said G. H. died June 19th, 19..., intestate.

4. On.....the plaintiff obtained a grant of letters of administration to the estate of G. H., deceased.

5. The defendant has not paid the said bill.

(Particulars of claim and Prayer as in Form No. 130.)

DEFENCE.**150.****BILLS OF EXCHANGE.****1. Inland Bills of Exchange.****DEFENCE of Denial of Acceptance. (u)**

1. The defendant denies that he accepted the bill of exchange sued upon.

DEFENCE.**151.****BILLS OF EXCHANGE.****1. Inland Bills of Exchange.****DEFENCE of Denial of Presentment for Acceptance. (v)**

1. The defendant denies that the bill sued on was presented for acceptance as alleged or at all.

- (u) **Denial of acceptance :** When a bill is accepted by a partner in the name of the firm, in fraud of the partnership and not for the partnership purposes, whether the plea of non-acceptance of the bill is available to the other partners has been canvassed in a number of cases. Thus, in a suit by indorsee against acceptors of a bill of exchange, some defendants pleaded that they did not accept. It was proved that all the defendants were partners and that one of them who had suffered judgment by default, had accepted the bill in the name of the firm, in fraud of the partnership and not for the partnership purposes :—*Held* : such proof, without evidence of knowledge on the part of plaintiff, did not under the issue, oblige plaintiff, to prove the circumstances in which the bill was indorsed to him : *Musgrave v. Drake*, (1843) 5 Q. B. 185. Cf. *Hogg v. Skeen*, (1865) 18 C. B. N. S. 426 (Where it was proved that B., one of the partners accepted the bill without the knowledge of his co-partner and for his own private purposes :—*Held* : that cast upon plaintiff the burden of showing that he gave value for the bill.).
- (v) **Presentment for acceptance :** If the bill is directed to the drawee at a particular place it must be presented at that place : Sec. 61, Neg. Inst. Act, 1881.
- (v) **Drawee's time for deliberation :** The holder must, if so required by the drawee of a bill of exchange presented to him for acceptance, allow the drawee forty-eight hours (exclusive of public holidays) to consider whether he will accept it : Sec. 63, Neg. Inst. Act, 1881.

Or,

The defendant says that the bill sued on was payable at H. & Co.'s office at It was not presented at that place.

Or,

The defendant says that the bill sued on was presented for acceptance on which was a Saturday and the defendant wanted time till the following Monday to consider whether he would accept it or not. The plaintiff did not assent to the said request and did not re-present the bill for acceptance.

DEFENCE.

152.

BILLS OF EXCHANGE.

1. Inland Bills of Exchange.

DEFENCE that the Defendant accepted the Bill for Accommodation of the Plaintiff. (w)

1. The bill of exchange sued upon was accepted by the defendant for the accommodation of the plaintiff and the defendant received no consideration therefor.

(w) **Liability of acceptor of a bill :** Sec. 32, Neg. Inst. Act, 1881.

(w) **Absence of consideration :** Sec. 43, Neg. Inst. Act, 1881. Defence of absence of consideration is available between immediate parties : Sec. 44 (Explanation), Neg. Inst. Act, 1881. As between parties who do not stand in such immediate relation it is no defence that the defendant drew, accepted or endorsed for no consideration ; he must further prove that neither he nor any of the intermediate parties through whom the plaintiff derives his title paid any consideration. To a suit by indorsee against acceptor it is no defence that the bill was accepted without consideration : *Low v. Chifney*, (1834) 1 Bing. N. C. 267. Such a plea does not exclude the case of plaintiff's having given a valuable consideration for the indorsement to him, and the indorsement is a *prima facie* evidence that he had : *Reynolds v. Iremey*, (1835) 3 Dowl. 453. It is no answer to an indorsee for valuable consideration, without notice, that the bills were drawn merely for the accommodation of the drawers : *Ex. p. Lambert*, (1606) 13 Ves. 179.

DEFENCE.

153.

BILLS OF EXCHANGE.

1. Inland Bills of Exchange.

DEFENCE that Acceptance was dependent upon Condition not fulfilled. (x)

1. The defendant admits the bill of exchange in the plaint mentioned, but says that the bill was accepted subject to the condition expressed on the bill itself that it would be renewed until November 28, 19...

2. The said bill was not renewed until November 28, 19...

or

1. The defendant admits the bill of exchange in the plaint mentioned but says that the bill was accepted subject to the condition expressed on the bill itself that it was payable at U. Bank and not otherwise or elsewhere.

2. The bill was not presented at the U. Bank.

(x) Instances of qualified or limited acceptance: Expl. to Sec. 86, Neg.

Inst. Act, 1881: An acceptance is qualified—(a) where it is conditional, declaring the payment to be dependent on the happening of an event therein stated; (b) where it undertakes the payment of part only of the sum ordered to be paid; (c) where, no place of payment being specified on the order, it undertakes the payment at a specified place, and not otherwise or elsewhere; or where, a place of payment being specified in the order, it undertakes the payment at some other place and not otherwise or elsewhere; (d) where it undertakes the payment at a time other than that at which under the order it would be legally due.

(x) Form of qualified acceptance: If the acceptor of a bill of exchange desires to qualify his acceptance, he must do so on the face of the bill in clear and unequivocal terms, and so that any person taking the bill could not if he acted reasonably fail to understand that it was accepted subject to an expressed qualification: *Meyer & Co. v. De Croix*, (1891) A. C. 520. For qualification as to time, see *Russell v. Phillips*, (1850) 14 Q. B. 891; *Fanshawe v. Peet*, (1857) 2 H. & N. 1. For partial acceptance, see *Wegersloffe v. Keene*, (1719) 1 Stra. 214. For qualification as to place, see *Higgins v. Nichols*, (1839) 7 Dowl. 551; *Halstead v. Skelton*, (1843) 5 Q. B. 86.

DEFENCE.**154.****BILLS OF EXCHANGE.****1. Inland Bills of Exchange.****DEFENCE of Denial or Invalidity of Notice of Dishonour. (y)**

1. The defendant denies that he received the alleged or any notice of dishonour of the bill of exchange sued upon.

Or,

2. The defendant says that the bill of exchange sued upon was dishonoured on the 5th of September 19..., and the only notice of dishonour received by the defendant was by a letter dated the 15th of October 19..., which said notice not having been given within a reasonable time after dishonour was invalid.

DEFENCE.**155.****BILLS OF EXCHANGE.****1. Inland Bills of Exchange.****DEFENCE by Acceptor, setting up an Illegal Consideration. (z)**

1. The defendant says that he accepted the bill of exchange sued on at the request of one A. B. of....., to whom he had

- (y) **Reasonable time of giving notice of dishonour:** Sec. 103, Neg. Inst. Act, 1881. Cf. *Bahadur Chand v. Gulab Rai*, (1929) I. L. R. 11 Lah. 34. (In considering the question of reasonable time facts such as the distance at which persons live from each other, the course of dealings with respect to similar instruments, the nature of the instrument and all such other circumstances applicable to the case ought to be considered. But when these facts have been ascertained, the reasonableness of the time becomes a mixed question of law and fact. It is provided by Sec. 30 that the drawer of a bill of exchange is bound, in case of dishonour by the drawee or acceptor thereof, to compensate the holder, provided due notice of dishonour has been given to, or received by the drawer as hereinafter provided. A perusal of Sec. 106 of the Act leaves no doubt that the notice of dishonour should be given as soon as the bill is dishonoured. It is the duty of the holder to prove that due

lost Rs. 1500/- by gaming, and in consideration of the sum so lost, and that there was no other consideration.

2. At all material times the plaintiff had notice of the gaming consideration.

DEFENCE.

156.

BILLS OF EXCHANGE.

1. Inland Bills of Exchange.

DEFENCE by Drawer to Claim of Payee for Non-acceptance of a duplicate Bill of Exchange. (a)

1. The defendant admits the bill of exchange mentioned in paragraph 1 of the plaint and also the duplicate bill mentioned in paragraph 2 thereof, but says that in the body of the duplicate bill it was stated that if the original be found accepted, the duplicate should become null and void.

2. The defendant admits the statements in paragraph 4 of the plaint but says that when the duplicate bill was presented to the defendant's firm at Calcutta, the original had already been presented by one H. R. and accepted by the defendant's said firm, which, in the circumstances, declined to accept the duplicate.

notice was given, and if not given, he was excused from doing so for any of the reasons specified in Sec. 98. The omission to give due notice of dishonour has the effect of discharging the persons who are entitled to such notice.).

- (z) **Reference :** *Hay v. Ayling*, (1851) 16 Q. B. 423 ; consd. in *Woolf v. Hamilton*, (1898) 2 Q. B. 337 (where a cheque was given by defendant in payment of bets upon horse races lost by him, and indorsed by the payee to plaintiff for value with notice of the consideration for which it was given).
- (z) **Illegality of Consideration :** See Secs. 24 and 25, Ind. Cont. Act. Cf. *Balgobind v. Bhaggu Mal*, (1913) I. L. R. 35 All. 558 (where the consideration was partly on account of a gambling debt).
- (z) **Pleading Illegality :** See "Illegality" under 'Special Defences', Chap. XVII.
- (a) This is a defence to Form No. 143.
- (a) **Reference :** *Indur Ohunder Doogur v. Luchmee Bibee*, (1835) 15 Suth. W. R. 501.

DEFENCE.**157.****BILLS OF EXCHANGE.****1. Inland Bills of Exchange.****DEFENCE by Drawer to Claim by Indorsee, setting up total Failure of Consideration. (b)**

1. The bill of exchange sued on was given in payment of price of seventeen packets of hops sold by the plaintiff to the defendant as hops of a certain grower, and answering certain samples, to be delivered by the plaintiff to the defendant within a reasonable time.

2. Although a reasonable time had elapsed, the plaintiff did not deliver to the defendant any hops answering the samples or any hops whatsoever.

PLAINT.**158.****BILLS OF EXCHANGE.****2. Foreign Bills of Exchange.****CLAIM by Drawer against Acceptor. (c)**

1. The defendant accepted a bill of exchange for..... marks, dated19..., drawn by the plaintiff at Berlin upon the defendant payable to the plaintiff..... months after date.

(b) **Reference:** *Wells v. Hopkins*, (1839) 5 M. & W. 7; cf. *McLeod & Co. v. Jean Jones & Co.*, A. I. R. 1926 Cal. 189; *Marshal & Co. v. Naginchand Fulchand*, (1918) I. L. R. 42 Bom. 473.

(c) **Foreign bill of exchange—what is:** Sec. 12, Neg. Inst. Act, 1881.

(c) **Protest on foreign bill of exchange:** Sec. 104, Neg. Inst. Act, 1881.

(c) **Noting for protest:** Sec. 104A, Neg. Inst. Act, 1881.

(c) **Liability of maker, acceptor, or indorser of foreign bills:** "In the absence of contract to the contrary, the liability of the maker or drawer of a foreign promissory note, bill of exchange or cheque is regulated in all essential matters by the law of the place where he made the instrument, and the respective liabilities of the acceptor and indorser by the law of the place where the instrument is made payable": Sec. 134, Neg. Inst. Act, 1881.

2. The said bill was duly presented to the defendant for payment and was dishonoured, and was duly protested for non-payment.

Particulars of claim :

.....19..., principal due (being the equivalent of.....marks)	...	...	Rs.
Interest thereon at 6 per cent. up to.....			"
Expenses of protest	...	...	"
Amount due ...			Rs.

The plaintiff claims—

- (1) Rs.....
- (2) Further interest at 6 per cent. until payment or judgment.

PLAINT.

159.

BILLS OF EXCHANGE.

2. Foreign Bills of Exchange.

CLAIM by Indorsee against Acceptor for Default in Payment. (d)

1. On.....19..., the defendant accepted a foreign bill of exchange dated the.....19..., drawn by A. B. at Paris, in France, upon the defendant.

2. The said bill required the defendant to pay that his first of exchange (second not paid) to the order of A. B. for..... francs, 3 months after the date of the said bill, which said bill was indorsed by the said A. B. to the plaintiff.

3. The defendant has not paid the said bill.

(Particulars and Prayer as in Form No. 130.)

- (c) **Presentment, if necessary :** Presentment is not necessary to charge the acceptor; *Ardesbir Sorabsha v. Khushaldas*, (1903) I. L. R. 32 Bom. 247.
- (e) **Stamp duty on foreign instrument :** Secs. 3, 18 & 19, Ind. Stamp Act (II of 1899). Cf. *Mahomed Rowthan v. Mahomed Husin*, (1899) I. L. R. 22 Mad. 337; *Dhondiram v. Sadasuk*, (1918) I. L. R. 42 Bom. 522 (case of a promissory note executed outside British India on British Indian Stamp).
- (d) See notes under Form No. 130.

PLAINT.**160.****BOND.****CLAIM based on a Single Bond. (e)**

1. On.....19..., the defendant borrowed Rs. 1000/- from the plaintiff and executed a bond by which he bound himself to pay to the plaintiff the said sum on the.....day of.....19..., (or on demand) with interest for the same at the rate of 9 per cent. *per annum*.

2. The defendant has not made any payment towards the said loan.

Particulars of claim :

Principal sum	...	...	...	Rs.
Interest at 9 per cent. <i>per annum</i> from				
..... up to	...	...	...	"

Total Rs.

The plaintiff claims—

Rs.....

- (e) **Definition of Bond :** For definition, see Sec. 2 (5) of the Indian Stamp Act (II of 1899), and Sec. 2 (3) of the Ind. Lim. Act, 1908 : "Bond" includes any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed, or is not performed, as the case may be.

The definition of the term 'bond' in the above Acts is not exhaustive : *Wadhawa Mul v. Karim Bakhsh*, (1925) I. L. R. 6 Lah. 276 (A contract to repay a loan of wheat with interest in kind, is a bond). An instrument not payable to order or bearer and attested by a witness is a bond, not a promissory note : *D. Roxario v. Hariballabh*, A. I. R. 1927 Nag. 195 ; *Barisal Rindan v. Sital Chunder*, (1929-30) 34 C. W. N. 911. The essential feature for constituting a document a bond is express obligation to pay : *Ohagan Lal v. Emperor*, A. I. R. 1934 Nag. 261. A document written on a hundi paper attested by witnesses and not payable to order or bearer is not a hundi but a bond : *Mohindar Singh v. Firza Nagina Mal Bhuna Ram*, (1930) 32 P. L. R. 753.

- (c) **Limitation :** On a single bond, where a day is specified for payment, Art. 66 ; on a single bond where no such day is specified, Art. 67, Ind. Lim. Act.

PLAINT.

161.

BOND.

CLAIM based on an Instalment Bond with a
Default Clause. (f)

1. The defendant was indebted to the plaintiff in the sum of Rs. 2000/- for the price of goods sold and delivered to the defendant by the plaintiff and, in consideration of the plaintiff, at the

- (f) **Limitation :** Art. 75, Ind. Lim. Act, 1908 : *Jawahar Lal v. Mathura Prasad*, (1935) I. L. R. 57 All. 108 F. B. (The starting point of limitation mentioned in article 75 of the Limitation Act, is the date of the first default, and, in case of waiver, a fresh default ; this is quite irrespective of whether the creditor is given an option to wait or not. The fact that an option is given to the creditor either to sue immediately on the occurrence of the default or to wait does not make article 75 inapplicable. The use of the word "shall" in this article does not imply that it must be obligatory on the creditor to sue for the whole amount without any option of waiting before article 75 can apply to the case.). Cf. *Jadab Chandra v. Bhairab Chandra*, (1901) I. L. R. 31 Cal. 297 : *Probhat Chandra v. Moh's Chandra*, (1931) I. L. R. 58 Cal. 615. Where money due under an instalment bond was made payable in ten instalments, and the first two instalments were paid but thereafter nothing was paid, and the plaintiff sued for the fourth and the subsequent instalments more than three years after the first default but less than three years after the date on which the fourth instalment was payable, it was held that the suit was not time-barred : *Shahzade Singh v. Bhoja*, A. I. R. 1937 Oudh 288. Cf. *Ram Sahai-Chuni Lal v. Moti Ram*, A. I. R. 1937 Lah. 863 ; *Godar Shah v. Fazl Ilahi*, A. I. R. 1936 Lah. 570. ...
- (f) **Distinction between Art. 74 and Art. 75, Lim. Act, 1908 :** There is a well-defined distinction between Arts. 74 and 75 of the Limitation Act. The former applies to an instalment bond which does not contain any default clause, and in such a case, therefore, the plaintiff is entitled by the very terms of the bond to sue only for such instalment as remains unpaid. No question of waiver or default can ever arise in such a case. But where the document provides that in the case of default the obligee has the right to sue for the whole of the sum then remaining due, Art. 75 applies : *Gokhul Mahton v. Sheoprasad* (1939) I. L. R. 18 Pat. 453.
- (f) **Waiver :** Ordinarily a condition in a bond that the whole amount shall become payable on default in the payment of any instalment by the debtor is for the benefit of the creditor, and it is open to him to waive any default and take advantage of a subsequent default : *Kundal Lal v. Indar Singh*, (1936) 38 P. L. R. 286. What amounts to waiver must depend

defendant's request, forbearing to sue the defendant for the time being, the defendant executed a bond on.....19..., whereby he became bound to the plaintiff in the said sum of Rs. 2000/- subject to the condition—

(a) that the said bond should be void in case the defendant paid to the plaintiff on the.....day of..... and day of in every year commencing with theday of19... the sum of Rs..... together with interest on the said sum of Rs. 2000/- or such part thereof as should not have been paid at the rate of Rs..... per cent. per annum until the whole of the said sum of Rs. 2000/- should be fully paid, but

(b) in case any of the said payments should from any cause whatever, not be paid upon the days hereinbefore mentioned then the whole balance then remaining unpaid, of the said sum of Rs. 2000/- with interest should forthwith become due and payable.

2. The defendant paid the first instalment on the due date, but paid the 2nd and the 3rd instalments after they became due, that is, on.....19... and19... respectively, and the plaintiff accepted the said payments at the verbal request of the defendant and upon the understanding that the plaintiff was not waiving thereby the right to claim the entire balance in case of default in payment of any of the subsequent instalments.

upon the circumstances of each case. A creditor need not adduce affirmative evidence in support of waiver : *Jagatjit Singh v. Manodut*, A. I. R. 1926 Oudh 384. Mere failure to sue or inaction by the creditor is not a waiver of the default. Some overt act must be established from which the Court of fact can draw the inference that the obligee has waived the default. Where the promisee has accepted an overdue instalment it must be held that he has waived the default and limitation would run only from the next default, if not waived. But acceptance of a portion of an instalment which was overdue or acceptance of the interest only on the overdue instalment cannot be held to be a waiver of the default : *Gokhul Mahlon v. Sheoprasad*, (1939) I. L. R. 18 Pat. 459. Cf. *Kanhai v. Amrit*, (1925) I. L. R. 47 All. 552. A payment towards reduction generally can on no account be considered a waiver because it is not an acceptance of a specified instalment : *Gopi-Chand v. Mohammad Umar Khan*, A. I. R. 1935 Pesh. 179.

(f) **Stipulation—not penalty** : See *Illus. (f)* to Sec. 74, Ind. Contract Act ; cf. *Sheo Prasad v. Sinaullah*, A. I. R. 1929 All. 558.

4. The defendant has not paid any other instalment.

Particulars of claim :

Principal amount of instalments unpaid	...	Rs.
Interest up to	... ..	"

Net amount due	...	Rs.
----------------	-----	-----

The plaintiff claims—

Rs.

PLAINT.

162.

BOND.

Instalment Bond.

CLAIM based on an Instalment Bond without a Default Clause. (g)

1. In consideration of Rs. 3000/- lent to the defendant by the plaintiff, the defendant on19....., executed a bond binding himself to the plaintiff for the payment to him of the said sum of Rs. 3000/- subject to the condition that the said bond should be void if the defendant paid the said sum to

(g) **Right to sue :** Where in a bond it is stipulated that it will be paid back within a fixed period, and the principal amount of the bond is divided into annual instalments, provisions being also made for the payment of interest, and there are no express words in the bond which affirmatively give the creditor a right to sue for the entire amount after the date fixed for the last instalment and there is nothing which precludes the creditor from suing for a defaulted instalment, the bond is one payable by instalments and the proper article applicable to such a bond is art. 74 of the Limitation Act: *Sohnlal Bararia v. Lakshmichand*, (1937-38) 42 C. W. N. 545. Cf. *Gokhul Mahton v. Sheoprasad*, (1939) I. L. R. 18 Pat. 459; *Jawahar Lal v. Mathura Prasad*, (1936) I. L. R. 57 All. 108.

(g) **Limitation :** If a decree does not make the entire decretal amount payable at once after default about the first instalment, the decree should be executed for recovery of the instalments that are within time : *Gwala Prasad Khanna v. Mathura Prasad*, A. I. R. 1937 Oudh 379.

the plaintiff with interest thereon from the.....day of.....19... at the rate of Rs..... *per cent. per annum* in the manner following, namely, the sum of Rs. 1500/- together with interest on the said sum of Rs. 3000/- from the date last mentioned on the.....day of.....19..., and the sum of Rs. 1000/- together with interest on the sum of Rs. 1500/- from the date last mentioned on.....day of....., and the sum of Rs. 500/- together with interest thereon from the date last mentioned on the.....day of.....

2. The defendant has made default in the payment of the first instalment. The remaining instalments have not become due.

Particulars of claim :

Instalment due	...	...	...	Rs. 1500.
Interest from	...	to ...	...	„
Net amount due				Rs.

The plaintiff claims—

(1) Rs.....

(2) Further interest at 6 *per cent. per annum* up to the date of payment or judgment.

PLAINT.

163.

BOND.

Fidelity Bond.

CLAIM by Employer against Guarantor on a Fidelity Bond. (h)

1. On July 5th, 19..., the plaintiff, at the request of the defendant, took one G. H. into his service and employment as his managing clerk upon certain terms and conditions contained in an agreement in writing dated.....and made between the plaintiff and the said G. H., in consideration whereof the defendant executed a bond dated.....for the payment to the plaintiff of the sum of Rs. 2000/-.

2. The condition of the bond was to the effect :—

(a) That the said G. H. at all times during the continuance of his service and employment as aforesaid should honestly, diligently and faithfully discharge his duties as the managing clerk to the plaintiff.

(b) That the defendant will indemnify the plaintiff against all losses, damages and expenses which the plaintiff may sustain or incur by reason of any dishonesty, want of diligence or of faithlessness on the part of the said G. H. towards the plaintiff during the course of his service and employment.

(c) That the guarantee shall be a continuing guarantee to the plaintiff up to but not exceeding altogether the sum of Rs. 2000 for the whole ultimate balance that shall be due to the plaintiff from the said G. H. in respect of any of the losses, damages and expenses aforesaid with interest thereon at 6 per cent. per annum.

3. The said G. H. did not during the continuance of his service and employment, honestly, diligently and faithfully discharge the duties of the managing clerk to the plaintiff and did not honestly account for, nor pay over to the plaintiff all moneys received by him for and on behalf of the plaintiff.

Particulars :

(a) On....., the said G. H. received Rs. 750 from one K. D. for and on behalf of the plaintiff and dishonestly appropriated the same to his own use.

(b) The said G. H. colluded with one B. D., who owed the plaintiff Rs. 500, and did not take any steps to realise the said amount from the said B. D., which it was his duty to do, with the result that the said debt became time-barred on....., and the plaintiff has lost the said sum.

Particulars of Claim :

.....19...	Amount misappropriated	...	Rs. 750
	Interest at 6 per cent.		
	from.....to ...	...	Rs. 55
.....19...	Amount allowed to be		
	time-barred	...	Rs. 500
	Interest at 6 per cent.		
	from.....to ...	...	Rs. 50
	Total	...	Rs. 1355

The plaintiff claims—

(1) Rs. 1355.

(2) Further interest at 6 per cent. until payment or judgment.

PLAINT.**164.****BOND.**

Fidelity Bond.

CLAIM by an Employer against Guarantor on a Fidelity Bond. (i)

(Another Form).

A. B., the abovo-named plaintiff, states as follows —

1. On the day of 19..., the plaintiff took B. F. into his employment as a clerk.

2. In consideration thereof, on the day of 19..., the defendant agreed with the plaintiff that if E. F. should not faithfully perform his duties as a clerk to the plaintiff, or should fail to account to the plaintiff for all moneys, evidences of debt or other property received by him for the use of the plaintiff the defendant would pay to the plaintiff whatever loss he might sustain by reason thereof, not exceeding rupees.

(Or, 2. In consideration thereof, the defendant by his bond of the same date bound himself to pay the plaintiff the penal sum of rupees, subject to the condition that if E. F. should faithfully perform his duties as clerk and cashier to the plaintiff and should justly account to the plaintiff for all moneys, evidence of debt or other property which should be at any time held by him in trust for the plaintiff, the bond should be void.)

(Or, 2. In consideration thereof, on the same date, the defendant executed a bond in favour of the plaintiff, and the original document is hereto annexed.)

3. Between the day of 19..., and the day of 19..., E. F. received money and other property, amounting to the value of rupees for the use of the plaintiff, for which sum he has not accounted to him and the same still remains due and unpaid.

The plaintiff claims—

Rs....., with interest at per cent. from the day of 19...

PLAINT.

165.

BOND.

**CLAIM by Employer against Employee for Breach of
Condition of a Bond not to engage in Business in
Competition with the Employer. (j)**

1. The plaintiff carries on business as at

2. On 19..., the plaintiff took the defendant into his employment as a travelling agent and agreed in writing to continue to employ him in connection with the said business at a salary of Rs. 200/- per month, for a period of 5 years.

3. In consideration thereof the defendant by his bond of even date bound himself to pay to the plaintiff the sum of Rs. 1000/- as and for liquidated damages, subject to the condition that the said bond should be void if the defendant should not during the term of his employment, whether in his present or any other capacity, carry on or be engaged or concern or take part in the business of within the city of except on behalf or with the consent of the plaintiff in writing.

4. The plaintiff discovered on....., that since 19..., the defendant had been carrying on or taking part in the said business of within the said city of on his own account and without the knowledge or consent of the plaintiff.

The plaintiff claims—

Rs. 1000 as and for liquidated damages.

- (j) **Agreement not to engage in business in competition with the employer :** An agreement of service by which an employee binds himself during the term of his employment not to engage in business in competition with employer is not in restraint of trade and therefore not void under Sec. 27 of the Ind. Cont. Act. See Spec. Rel. Act, 1877, Sec. 57, illus. (d) which provides that the employer although not entitled to a decree for specific performance of the contract is entitled to an injunction.
- (i) **Penalty and liquidated damage :** Under Sec. 74 of the Cont. Act, it is open to the Court to award as compensation a sum equal to the agreed penalty provided it does not appear to the Court to exceed what is reasonable : *Abbakke Heggadthi v. Kinhiamma Shetty*, (1906) 1. L. R. 29 Mad. 491, 496. *Of. Bhai Panna Singh v. Firm Bhai Arjan Singh*, (1928 29) 33 C. W. N. 949 (P. C.). The right of a party complaining of a breach of contract to reasonable compensation under Sec. 74 of the Contract Act is not dependent on proof of actual loss or damage : *Munna Lal v. Rahmatullah*, 1937 A. L. J. 1985.

PLAINT.**166.****BOND.**

**CLAIM by Executors of a deceased Partner against surviving
Partners on a Bond to secure Payment by Instalments
of the Share of the deceased Partner and for
Indemnity against the Partnership
Liabilities.**

1. One A. B., late of....., deceased, and the defendants carried on business in partnership under the style of.....

2. The said A. B. died on the.....day of.....during the subsistence of the said partnership having by his will dated..... appointed the plaintiffs his executors who duly proved the said will on.....day of.....

3. On....., the accounts of the said partnership were examined by the parties and the amount then owing to the plaintiffs as such executors on account of the share and interest of the said A. B. deceased, was ascertained and agreed to be the sum of Rs. 5,000.

4. The defendants were unable to pay the said sum and executed a bond on the.....day of....., whereby they became bound to the plaintiffs in the said sum of Rs. 5000 subject to the condition that the said bond should be void in case the defendants or either of them should pay to the plaintiffs on the.....day of.....and.....day of.....in every year commencing with the.....day of.....the sum of Rs..... together with interest on the said sum of Rs. 5000 or such part thereof as would for the time being remain unpaid, at the rate of Rs. 6 *per cent. per annum*, until the whole of the said sum of Rs. 5000 should be fully paid.

5. By the said bond the defendants also agreed to save harmless and keep fully and effectually indemnified the legal representatives of the said A.B. deceased, his estate and effects from all debts, liabilities, claims and demands which then were or might at any time thereafter be or become due to or be made by any person or persons, from or against the said legal representatives of the said A.B., his

estate and effects, by reason of the said A.B. having been a member of the said partnership.

6. The defendants paid the first instalment of Rs.....on the due date and have not paid any other instalment.

7. On....., one J. D., a creditor of the partnership, executed his decree dated.....for Rs.....made in Suit No.....of..... of this Court, in respect of partnership debts incurred before the death of A. B. and on..... the plaintiffs were obliged to pay to the said J. D. the said sum in satisfaction of his decree.

Particulars of claim :

Balance of instalments due	...	...	Rs.....
Interest at 6 <i>per cent. per annum</i>	...	...	Rs.....
Amount paid to J. D.	...	...	Rs.....
Interest on the said sum at 6 <i>per cent. per annum</i> by way of damages		...	Rs.....
			<hr/>
Total Amount			... Rs.....

The plaintiffs claim—

(1) Rs.....

(2) Further interest at 6 *per cent.*

DEFENCE.

167.

BOND.

DEFENCE of non est factum.

The defendant did not execute the bond sued on as alleged or at all.

Or,

The bond sued on is not the defendant's bond.

DEFENCE.**168.****BOND.****DEFENCE to Claim on Bond, setting up Absence of
Consideration. (k)**

The defendant received no consideration for the bond sued on.

Or,

The bond sued on was obtained from the defendant upon a representation by the plaintiff that a sum of money was owing from the defendant to the plaintiff by virtue of an indenture dated.....19..., whereas no sum was owing as alleged or at all.

DEFENCE.**169.****BOND.****DEFENCE to Claim on Bond, setting up partial Absence or
Failure of Consideration. (l)**

The principal sum advanced by the plaintiff to the defendant was Rs. 500/- and not Rs. 1000/- as alleged in the plaint or stated in the bond sued on.

(k) See 'Consideration' under "Special Defences", Chap. XVII, p. 395. *Southall v Rigg, Forman v. Wright*, (1851) 11 C. B. 481.

(l) Partial absence or failure of consideration is not a defence to the whole amount of consideration. It is a defence affecting the instrument *protanto* : *Munshi Bajrangi v. Udit Narain*, (1905-06) 10 C. W. N. 932. See 'Partial absence or partial failure of consideration', under "Special Defences", pp. 396, 397.

DEFENCE.**170.****BOND.****DEFENCE to Claim on Bond, setting up Alteration of the Bond in a material Particular. (m)**

1. The said bond as executed by the defendant provided for payment of the principal sum with interest at 6 *per cent. per annum*.

2. The said rate of interest was, whilst the bond was in the possession and custody of the plaintiffs, and without the knowledge or consent of the defendant, altered to 9 *per cent. per annum*, and the said bond is no longer binding on the defendant.

DEFENCE.**171.****BOND.****DEFENCE to Claim on Bond, setting up Illegality of Consideration. (n)**

1. On.....19..., the plaintiff prosecuted the defendant in the Criminal Court for embezzlement under Sec. 408, Indian Penal Code.

2. The consideration of the bond sued on was the abandonment by the plaintiff of the said criminal proceedings then pending and the said bond is accordingly void and unenforceable.

Or,

The bond sued on was executed and delivered by the defendant to the plaintiff in consideration of the plaintiff agreeing to withdraw the criminal proceedings he had instituted against the defendant for embezzlement under Sec. 408, Indian Penal Code.

(m) See 'Alteration' under "Special Defences", Chap. XVII, pp. 385, 1

(n) Reference: *Banu Mal v. Ratan Deo*, A. I. R. 1937 All. 370.

DEFENCE.**172.****BOND.****DEFENCE to Claim based on an Instalment Bond with Default Clause, setting up Waiver. (o)**

1. The defendant admits the bond sued on and the terms thereof as mentioned in paragraph 1 of the plaint.

2. The defendant states with reference to paragraph 2 of the plaint that he made default in the payment of the second and third instalments on the respective due dates, and, on.....19..., the defendant wrote to the plaintiff to stay his hands and not to proceed to demand the entire balance in terms of the bond and the plaintiff verbally agreed to such request and thereafter accepted the overdue instalments on19..., and.....19...

3. The plaintiff has accordingly waived his right to claim the entire balance remaining unpaid.

PLAINT.**173.****CARRIERS**

Of Goods by Land under the Carriers Act (III of 1865).

CLAIM against Common Carriers for Refusal to carry Goods. (p)

1. The defendants are common carriers and carry on a motor transport service from.....to.....

(o) **Reference:** *Gokhul Mahton v. Sheoprasad*, (1939) I.L.R. 18 Pat. 459 (Mere failure to sue or inaction by the creditor is not a waiver of the default, something else must be established to show that the promisee has waived his rights. For instance, his acceptance of an overdue instalment or his communicating to the promisor for a consideration that he will not insist upon his rights which have already accrued to him on the default which has taken place, or, it may be that the promisor himself approaches the promisee or writes to him to stay his hand and not to proceed to demand the full amount and if the promisee agrees to such request, these will ordinarily amount to a waiver. In such cases it is clear that some overt act has been established from which the Court of fact can draw the conclusion that the obligee has waived the default.).

(p) **Carriers Act III of 1865—application of—**Carriers Act (III of 1865) applies to carriers of goods (other than Government) by land or inland naviga-

2. On the..... 19..., the plaintiffs tendered to the defendants as such common carriers at.....twelve cases of sundry goods to be conveyed for them from.....to..... .

3. The plaintiffs were ready and willing and offered to pay to the defendants Rs....., being reasonable reward or hire for so doing.

4. The defendants refused to receive or carry the said goods or any portion thereof, although they had then ample room in their vehicles and sufficient means and convenience to carry the said goods as aforesaid.

5. By reason of the premises the plaintiffs were obliged to engage a lorry the same day for conveying the said goods to the place aforesaid at greater expense.

Particulars of damage :

Difference between the cost of carriage if the goods had been conveyed by the defendants and the cost of carriage actually incurred as aforesaid	...	Rs.....
---	-----	---------

The plaintiffs claim —

Rs.....damages.

PLAINT.

174.

CARRIERS

Of Goods by Land under the Carriers Act (III of 1865).

**CLAIM against Common Carriers for not carrying and
delivering Goods.**

1. The defendants carry on business in (Bombay) and are common carriers for reward.

tion. It has no application to carriage by railways to which the Ind. Railways Act (IX of 1890) applies. See 'Carriers' under 'Classes of Persons', Part II, Chap. IX pp. 94, 95.

A carrier is obliged for a reasonable reward to carry any goods that are offered him to the place to which he professes to carry goods. if his carriage will hold them and he is informed of their quality and value :
" *Macklin v. Waterhouse*, (1828) 5 Bing. 212.

- (p) **Whether tender necessary :** Common carriers are bound to convey goods only on being paid for the carriage in ready money, but a strict legal tender is not necessary : *Pickford v. Grand Junction Ry. Co.*, (1841) 8 M. & W. 372.

2. On.....19..., the plaintiff by his agent one C. D. delivered to the defendants, and the defendants accepted and received 5 cases of tea, the property of the plaintiff, at....., and it was agreed between them that the defendants should carry for the plaintiff the said goods from.....to.....and there deliver them for reward to the plaintiff.

3. The defendants failed to carry the said goods and wholly failed to deliver the same.

4. By reason of the premises the plaintiff has been deprived of the said goods and has lost their value.

Particulars of damage :

The plaintiff claims—

Rs.....

PLAINT.

175.

CARRIERS

Of Goods by Inland Navigation under the Carriers
Act (III of 1865).

**CLAIM against Common Carriers for Loss of Goods
caused by Fire. (q)**

1. The defendants at all material times were and are common carriers of goods for reward.

2. By an agreement in writing dated the.....19..., made between the plaintiffs and the defendants contained in a shipping note, signed by the plaintiffs' agent on behalf of the plaintiffs,

-
- (q) **Cause of action:** Under Sec. 9 of the Indian Carriers Act, 1865, in a suit brought against a common carrier for the loss, damage or non-delivery of goods entrusted to him for carriage, it is not necessary for the plaintiff to prove that such loss, damage or non-delivery was owing to the negligence or criminal act of the carrier, his servants or agents. *The burden of proof of absence of negligence is thus thrown upon the common carrier, on the theory that the loss or damage to the goods is prima facie proof of negligence: Per Mookerjee J., in India General Navigation & Railway Co. Ltd. v. The Eastern Assam Co. Ltd., (1920) I. L. R. 47 Cal. 1027, 1033, fg. The Rivers Steam Navigation Co. v. Choutmull Doogar, (1899) I. L. R. 26 Cal. 598 P.C. ; India General Steam Navigation Co. v. Bhagwan Chandra Pal, (1913) I. L. R. 40 Cal. 786;*

which was made subject to the conditions contained in the bill of lading granted by the defendants, the defendants agreed to transport by their steamer.....250 chests of tea, the property of the plaintiffs, from Dibrugarh to.....ghat, Calcutta, and to deliver the said goods to the plaintiffs at the said destination.

3. During the course of transporation the said goods were destroyed by fire and were lost.

4. By reason of the premises the plaintiffs have suffered damage,

Particulars of claim :

Value of the goods-	...	...	Rs.....
The plaintiffs claims—			
Rs.....damages.			

Akhil Chandra Shaha v. India General Navigation & Railway Co., (1915) 21 C. L. J. 565.

- (q) **Notice of loss or injury :** Under Sec. 10 of the Carriers Act, "no suit shall be instituted against a common carrier for the loss of, or injury to, goods entrusted to him for carriage, unless notice in writing of the loss or injury has been given to him before the institution of the suit and within six months of the time when the loss or injury first came to the knowledge of the plaintiff." Such notice is a 'condition precedent' and need not be pleaded : (O. VI, r. 6, C. P. Code. See 'Condition Precedent' under "Special Defences," Part II, Ch. XVII, p. 390. See *Mela Ram Gorwara v. Secy. of State*, A. I. R. 1932 All. 381 ; *U Ba Tin v. U. Tun On*, A. I. R. 1938 Rang. 437.
- (q) **Limitation :** A suit against a carrier for compensation for losing or injuring goods must be brought within one year from the date when the loss or injury occurs (Art. 30, Ind. Lim. Act). A suit against a carrier for compensation for non-delivery of, or delay in delivering, goods must be brought within one year from the date when the goods ought to be delivered. (Art. 31, Ind. Lim. Act). Cf. *Jaidu Venkatasubba Rao v. The Asiatic Steam Navigation Co. of Calcutta*, (1916) 39 Mad. 1, 12, F. B. (Art. 31 should apply to a claim against a carrier for compensation for non-delivery of goods irrespective of the question whether the suit was laid in contract or in tort.); *Ohiranjilal Ramlal v. B. N. Ry. Co. Ltd.*, (1925) I. L. R. 52 Cal. 372. Where no time is fixed for delivery, a suit brought within one year from the expiry of a reasonable time within which they should have been delivered is within time: *Jugal Kishore v. G. I. P. Railway.*, (1923) I. L. R. 45 All. 43. Cf. *Secretary of State v. Dunlop Rubber Co. Ltd.*, (1925) I. L. R. 6 Lah. 301.
- (q) **Measure of damage :** The ordinary measure of damage is the full value of goods: *Crouch v. London & N. W. Ry.*, (1849) 2 Car. & Kir 789; *British Columbia Co. v. Nettleship*, (1868) L. R. 3 C. P. 499. See Chitty on Contracts, 19th Edn., p. 680.

PLAINT.**176.****CARRIERS**

Of Goods by Inland Navigation under the Carriers Act (III of 1865).

**CLAIM by Owners against Common Carriers for Loss of Goods
caused by Fire (where there was no Privity of Contract
between the Owners and the Carriers). (r)**

1. The defendant company at all material times were and are common carriers engaged in the business of transporting for hire goods from place to place by inland navigation.

2. In.....19..., the plaintiffs delivered to the..... Railway Company, hereinafter referred to as 'the Railway Company', and the Railway Company received from the plaintiffs 200 packages of Assam Tea for carrying safely from Assam to Chittagong for hire.

3. The said goods were conveyed over the Railway Company's line from Assam to Gauhati. But in as much as a section of the Railway Company's line south of.....had broken down, the Railway Company on or about.....arranged with the defendant company, upon certain terms as to division of freight, for carriage by the defendant company of the said goods in ships or flats from Gauhati on the Brahmaputra river down to Chandpur on the Meghna river. At the latter point the goods were again to be put on rail and carried over the Railway Company's line to Chittagong.

4. On or about.....the said goods were put on board the defendant company's flat.....for carriage by river to Chandpur.

- (r) **Reference :** *India General Navigation & Ry. Co. v. Dekhari Tea Co.*, (1924) L. R. 51 I. A. 28. (The defendants were common carriers within the meaning of the Carriers Act (III of 1865) and were bound to transport the goods as clearly as if there had been a special contract which purported to bind them, and they are answerable to the owners for safe and sound delivery. The fact that this was a through route does not decategorise the defendants from being common carriers under the Statute or relieve them from their legal obligation, as under Sec. 9 of the Carriers Act, the defendants were liable to the owners of goods, without proof of negligence, for loss of the goods by fire). *Id.* in *K. C. Dhar v. Ahmed Bux*, (1933) I. L. R. 60 Cal. 879. (In an action for recovery of loss from a common carrier the plaintiff has not to rely on

5. On.....while the vessel was still lying at Gauhati, a fire broke out and 60 out of the aforesaid 200 packages were destroyed.

6. By reason of the premises the plaintiffs have suffered damage. .

Particulars of damage :

Value of 60 packages	...	Rs.....
The plaintiffs claim—		
Rs.....	damage.	

PLAINT.

177.

CARRIERS

Of Goods by Inland Navigation under the Carriers Act (III of 1865).

**CLAIM againt Common Carrier for Loss of Goods
due to Negligence. (s)**

1. The defendant is the owner of a licensed cargo boat plying for hire in the river Hoogly from.....to.....and is a common carrier.

any privity of contract or allege any want of or negligence on the part of the defendant, but it is enough to plead that he has failed to carry safely. In other words, an action lies against him not in any way dependent upon privity of contract between himself and the plaintiff), follg. *Irrawaddy Flotilla Co. v. Bugwandass*, (1890-91) L. R. 18 I. A. 121. Cf. *Madura Co. v. Xavier*, A. I. R. 1931 Mad. 115 (Where there is a general contract between a Railway Company and another company that the latter company has to take the goods delivered at the out agencies of the Railway Company, carry the goods by their boats and hand them over to the railway station of the Railway Company and in return for this service to get a certain percentage of the charges, such an agreement does not make the company working the boats a railway company and it does not cease to be a common carrier of goods. The liability of common carriers must be regulated under the Carriers Act. They cannot claim to have their liabilities determined on the basis of Risk Note).

(r) **Measure of damages :** See Notes under Form No. 175.

(s) **Reference :** *K. O. Dhar v. Ahmed Bux*, (1933) I. L. R. 60 Cal. 879. (*Per Rankin C. J.*—"In order to describe the extent of the liability of a common carrier, it is often said that he has the liability of an insurer.

2. On, the plaintiff delivered to the defendant as such common carrier for reward, 50 bales of piece goods, the property of the plaintiff, to be carried by the defendant's boat on the river Hooghly, and the defendant agreed as such carrier to carry the said goods safely and to deliver them for shipment in the steamer..... lying in mid-stream in the port of Calcutta.

3. The defendant took the said goods up to the said ship, but very soon after their arrival alongside of the ship and before they could be delivered into the ship the contents of the boat were upset in the river and the plaintiff's goods were lost.

4. The plaintiff has suffered damage by reason of the defendant's failure to carry the goods safely.

Particulars of damage :

The plaintiff claims—

Rs..... damage.

PLAINT.

178.

CARRIERS

Of Goods by Land under the Carriers Act (III of 1865).

CLAIM by Carrier against Consignee for Charges for Carriage.

1. The plaintiff is a common carrier engaged in carrying goods for reward from.....to..... .

2. On the.....19..., the defendant, by his agent one A. B., delivered to the plaintiff, and the plaintiff accepted and received, 10

That is a simile. It is not a question of any contract to insure and no contract of insurance has to be made out. The position is that a common carrier exercising a public employment has committed a breach of the law by failing to carry safely. An action lies against him not in any way dependent upon privity of contract between himself and the plaintiff..... It is not necessary to show that the defendant has not carefully carried. The plaintiffs have to proceed solely upon the footing that the defendant has not safely carried. The principle was explained by Lord Macnaghten in *The Irrawaddy Flotilla Co. v. Bugwandass*, (1890-91) L. R. 18 I. A. 121 thus : The obligation imposed by law on common carriers has nothing to do with contract in its origin. It is a duty cast upon common carriers by reason of their exercising a public employment for reward.") follg. *Bretherton v. Wood*, (1821) 3 B. & B. 82 ; *Dekhari Tea Co. v. Assam Bengal Rly. Co.*, (1920) I. L. R. 47 Cal. 6 ; *L. & N. W. Ry. Co. v. Hudson (Richard) & Sons*, (1920) A. C. 324 ; *Forward v. Pittard*, (1785) 1 Terms Rep. 27.

drums of mustard oil at.....to be conveyed from.....to
 It was verbally agreed between the said A. B. and the
 plaintiff at the time that the plaintiff would receive reasonable
 reward in respect of such carriage. Alternatively, it was an implied
 term of the said contract that the defendant would pay the plaintiff
 reasonable reward for the carriage of the goods.

3. The plaintiff safely carried the said drums to.....and
 duly delivered the same to the defendant, and verbally demanded
 from the defendant Rs..... which was a reasonable reward
 for the carriage of the said goods, but the defendant has failed and
 neglected to pay the said sum or any reward in respect of the said
 carriage.

The plaintiff claims—

Rs.....

DEFENCE.

179.

CARRIERS

Of Goods by Land under the Carriers Act (III of 1865).

GENERAL DEFENCES to Claim against Common Carriers for refusing to carry. (t)

The defendants deny that they are common carriers as alleged in
 the plaint or at all.

or

At the time the said goods were tendered by the plaintiff there
 was no room in any of the defendants' vehicles for their carriage.

or

The plaintiffs tendered the goods for the purpose of carriage at
 an unreasonable time, namely, at 7 p.m., when the defendants'
 office was closed, whereupon the defendants refused to accept the
 said goods for the purpose of carriage.

or

The defendants required the plaintiffs to pay Rs.....in
 advance in respect of the carriage of the said goods but the plaintiff

(t) Information as to nature and value of goods : *Macklin v. Waterhouse*,
 (1823) 5 Bing. 212.

refused to do so whereupon the defendants refused to accept the said goods for the purpose of carriage.

or

The said goods consisted of By a notice in writing prominently exhibited over the door of their office the defendants informed the public and the plaintiff that no goods of that description were accepted for carriage.

or

The defendants did not accept the said goods for the purpose of carriage because they were to be carried to....., a destination to which the defendants did not profess to carry (or, along the route along which the defendants did not profess to carry).

or

The route along which the said goods were to be carried was so disturbed by a riot at the time as to render it unsafe for the carriage of the said goods.

or

The said goods consisted of and were dangerous and hazardous to carry and the defendants had no proper facilities for the safe carriage of the same.

or

The said goods consisted of and were loosely and not properly or securely packed and the defendants, as they lawfully might, refused to carry the said goods.

or

The plaintiff refused to inform the defendants although requested to do so of the quality of the said goods or their value and the defendants, as they lawfully might, refused to carry the said goods.

DEFENCE.

180.

CARRIERS

Of Goods by Land under the Carrier Act (III of 1865).

DEFENCE to Claim against Common Carriers for not Carrying and Delivering Goods. (u).

1. The goods which the plaintiff offered to the defendants for the purpose of carriage as mentioned in paragraph 2 of the

(u) This is a defence to Form No. 174,

plaint were received by the defendants in ignorance of their contents.

2. After receiving the said goods the defendants discovered that the contents of the 5 cases which the plaintiff had verbally represented to the defendants as cases containing tea, consisted of which is a dangerous substance and the defendants had in fact no proper facilities for the safe carriage of the same.

3. Since the defendants discovered the said fact, they refused, as they lawfully might do, to carry the said goods and, by letter dated 19..., they gave notice of their refusal to carry the said goods to the plaintiff and requested him to remove the said goods from their premises. Yet the plaintiff has not removed the said goods.

DEFENCE.

181.

CARRIERS

Of Goods by Inland Navigation under the
Carriers Act (III of 1865).

DEFENCE by Common Carrier to Claim for Loss of Goods, setting up Act of God. (v).

1. The loss complained of is a loss by the act of God occasioned by a blizzard which upturned the boat carrying the said goods, which the defendants could not prevent and which by no reasonable precaution and care under the circumstances they could have prevented.

(v) Reference : *Nugent v. Smith*, (1876) 1 C. P. D. 423. (A loss is a loss by the act of God if it is occasioned by the elementary forces of nature unconnected with the agency of man or other cause ; and a common carrier is entitled to immunity in respect of loss so occasioned if he can show that it could not have been prevented by any amount of foresight, pains and care reasonably to be required of him.) ; *Amies v. Stevens*, (1718) 1 Stra. 127, (A carrier is not answerable for goods lost by tempest) ; *K. O. Dhar v. Ahmed Bux*, (1933) I. L. R. 60 Cal. 879 : *Chokka Dhanamma v. Coromandal Co.* A. I. R. 1939 Mad, 401.

DEFENCE.**182.****CARRIERS**

Of Goods by Land under the Carriers Act (III of 1865).

**DEFENCE by Common Carriers to Claim for Loss of Goods,
setting up a Special Contract. (w).**

1. Before accepting the said goods from the plaintiff for carriage the defendants had given notice to the plaintiff (or, it was agreed between the plaintiff and the defendants) that the defendants would not be answerable for any loss beyond the amount of Rs. 50/- unless the subject-matter be booked and paid for in proportion to its value. The plaintiff gave no notice as to the value of the goods to the defendants.

2. By reason of the premises, the defendants are not liable for the loss of the said goods above the value of Rs. 50/-.

DEFENCE.**183.****CARRIERS**

Of Goods by Land under the Carriers Act (III of 1865).

**DEFENCE by Common Carriers to Claim for Loss of Goods
caused by Fire, setting up Inherent Vice in the Goods. (x).**

1. The defendants received the said parcels from the plaintiff in ignorance of their contents.

(w) **Reference :** *Bignold v. Waterhouse*, (1813) 1 M. & S. 255, consd. in *Batson v. Donoran*, (1820) 4 B. & Ald. 21. Cf. *Bradley v. Waterhouse*, (1828) 3 C. & P. 318 (case of theft where the party sending a parcel had given no notice of its value but had attempted to disguise it and had done so to a degree sufficient to prevent the carrier from taking particular care of the parcel); cf also *Lowe v. Booth*, (1824) 13 Price 329. (where under the circumstances it was held that the plaintiff must establish a case of gross negligence.).

(x) **Inherent vice : General rule :** A common carrier is not liable for an injury to goods caused by an inherent, latent defect in the goods themselves, the existence of which was unknown both to the sender and the carrier : *Lister v. Lancashire & Yorkshire Ry.*, (1903) 1 K. B. 878 ;

2. The contents of the parcels consisted of, which is a highly combustible substance, and during the journey they took fire and were burnt.

3. The loss complained of was not due to any negligence or breach of duty on the part of the defendants.

PLAINT.

184.

CARRIERS.

Private Carriers.

CLAIM against a Private Carrier for Damage to Goods. (y)

1. By a contract in writing dated.....19..., and made between the plaintiff and the defendants, the defendants agreed for reward to pack and remove the household furniture and effects of the plaintiff from premises no.....and carry the same to.....and there unpack and deliver the same to the plaintiff's servants.

Gould v. South Eastern & Chatham Ry. (1920) 2 K. B. 186 (Where goods are delivered to a common carrier for carriage insufficiently packed, and are damaged in the course of transit, the carrier's knowledge of their condition at the time of their receipt will not preclude him from setting up as a defence that the damage was due to the insufficient packing.) ; *Barbour v. South Eastern Ry.*, (1876) 34 L. T. 67, D. C. (It was found as a fact that the damage was occasioned by improper packing :—*Held* : It was plaintiff's duty to pack the furniture, and as the damage was occasioned by his neglect to do so, he was not entitled to recover compensation from defendants). *K. C. Dhar v. Ahmed Bux*, (1933) I. L. R. 60 Cal. 879. ("A consignor of goods warrants that goods are not dangerous. In every case he must give notice to the carrier of their dangerous character, irrespectively of his own knowledge or means of knowledge, except where the carrier himself knows, or ought to know, that the goods are dangerous").—Chitty on Contracts, 19th edn., p. 674.

- (y) **Pleading negligence** : If particulars of negligence are known they may be stated by the plaintiff. But where they are not known it is sufficient to allege that the goods were lost or damaged while in the sole custody of the defendant, because where goods are given into the sole custody of a person and accepted by him as bailee, and they are lost while in his custody, the onus lies upon him to show circumstances negating negligence on his part : *Phipps v. New Claridge's Hotel*, (1905) 22 T. L. R. 49.

2. It was an implied term of the said contract that the defendants would use reasonable care and skill in and about the removal of the said goods as aforesaid.

3. In breach of the said contract the defendants so carelessly and negligently handled the said goods while they were in their custody and control that the following items were delivered in a damaged condition and were greatly lessened in value :

Particulars :

The plaintiff claims—

Rs.....damages.

PLAINT.

185.

CARRIERS.

Private Carriers.

CLAIM against a Private Carrier for Loss of Luggage. (z)

1. The defendant was the proprietor of a taxi-cab no..... which, on the.....19..., was plying for hire at the Howrah station.

-
- (z) **Private carrier—definition of.**—One who does not exercise the public employment of a common carrier, but carries goods on occasion, or only under a special agreement, has been called a private carrier : Hals., 2nd Ed., Vol. IV, p. 6.
- (z) **Liabilities of a private carrier :** He is a bailee of the goods, and the general law as to the responsibility of a bailee for goods entrusted to him applies to the private carrier. Whether he carries gratuitously or for reward, the carrier is bound to use due and proper care of the goods : Hals., 2nd Ed., Vol. IV, p. 6. As to the standard of care to be taken by the bailee under sec. 151 of the Contract Act, the Indian law makes no difference between gratuitous bailees and bailees for hire and omitting all reference to skill, lays down for both one standard, namely, as much care as a man of ordinary prudence would take of his goods in similar circumstances. Such standard cannot be formulated by an inflexible practical rule applicable to all cases. The responsibility of the bailee does not end with employing men in his service with reasonable care. As under the English law, so under the Indian, he is responsible for the negligence of his servants or agents, committed in the course of their employment : *Secretary of State v. Ramdhan Das Dwarka Das*, (1932-33) 37 C. W. N. 1109.

2. On the said day the plaintiff hired the said taxi-cab to carry the plaintiff and his luggage from the Howrah station to Kidderpore.

3. The defendant's servant one E. G., who was then driving the taxi-cab, in the course of his employment as the defendant's servant or agent, received the plaintiff's luggages and placed them on the luggage-carrier behind the car without taking proper care to fasten them securely with ropes, whereby the luggages slipped off during transit and were lost to the plaintiff.

4. By reason of the premises the plaintiff has suffered damage.

Particulars of damage :

The plaintiff claims—

Rs.....damage.

PLAINT.

186.

CARRIERS

Of Goods by Railway.

**CLAIM by Consignor of Goods against a State Railway for
Loss of Goods consigned under Risk Note, Form A. (a).**

A. B., merchant residing at.....
..... —Plaintiff

vs.

Governor General in Council,
..... —Defendant.

The plaintiff states :—

1. Railway at all material times was and is a State Railway.

2. By an agreement in writing dated the19..., and made between the plaintiff and the defendant, contained in Receipt

- (a) **Parties to Suit :** Before the passing of the Govt. of Ind Act, 1935, a suit against a State Railway could only be instituted against the Secretary of State for India in Council. Under Sec. 79 of the C. P. Code as substituted by the Govt. of India (Adaptation of Indian Laws) Order, 1937, "Subject to the provisions of Secs. 179 and 185 of the Govt. of Ind. Act, 1935, in a suit by or against the Crown, the authority to be named as the plaintiff or defendant, as the case may be, shall be in the case of a suit by or against the Central Government, the Governor General in Council before the establishment of the Federation of India, and thereafter, the Federation. By the combined

no..... granted to the plaintiff by one C. D., the defendant's agent, in that behalf, and which incorporated and was made subject to Risk Note, Form A, the defendant agreed to carry for reward 210 bags of tobacco, the property of the plaintiff, from Howrah Station to Patna Station and to deliver the same to the plaintiff at the last named station.

operation of the Secs. 181 and 185 of the Govt. of Ind. Act, 1935, suits against a State Railway after the establishment of the Federation, must have to be brought against the Federal Railway Authority".

- (a) **Risk Note, Form A :** By the New Risk Note, Form A, the goods being delivered in a bad condition, liable to damage, leakage or wastage in transit, the consignor agrees and undertakes to hold the railway administration harmless and free from all the responsibility for the condition in which the goods may be delivered to the consignee at the destination and for any loss arising from the same, except upon proof that such loss arose from misconduct on the part of the railway administration's servants. This Risk Note contemplates short delivery of goods due to leakage or wastage or delivery of goods in a damaged condition. It does not cover a case of total loss of goods, which is *prima facie* evidence of negligence and as such it is not necessary to allege or give particulars of negligence. The cause of action is the breach of contract to carry. Read the observations of Dalal J. in *Secretary of State v. Rup Ram*, A. I. R. 1931 All. 135.
- (a) **Measure of damages :** The measure of damages is the value of the goods at the place of destination, in the condition in which the carrier undertook to deliver them, at the time when they should have been delivered, less the proper charges of transportation and delivery, if these have not been paid by the consignor : *Per Mookerjee J. in India General Navigation & Railway Co. v. The Eastern Assam Co.*, (1920) I. L. R. 47 Cal. 1027, 1040.
- (a) **Notice under Sec. 77, Ind. Railways Act :** Non-delivery of goods amounts to loss within the meaning of Sec. 77 of Ind. Railways Act and a notice under Sec. 77 is necessary in that case : *Firm Dunichand Ram Saran Das Chopra v. E. I. Ry.*, (1930-31) 35 C. W. N. 338 ; *Assam Bengal Ry. Co. v. Radhica Mohan Nath*, (1923-24) 28 C. W. N. 438 ; *Agent of the Bengal Nagpur Ry. Co. v. Hamir Mull Chagan Mull*, (1927) I. L. R. 5 Pat. 106 ; *Firm Balakram-Atna Ram v. Secy. of State*, A. I. R. 1935 All. 900 ; *Thakur Das v. E. I. Ry. Co.*, A. I. R. 1926 All. 686. In a recent case of the Allahabad High Court, Sulaiman, C. J. and Bennett J. have held that where a suit is brought against a railway company for compensation for non-delivery or mis-delivery of certain goods consigned to it, a notice as required under Sec. 77, Railways Act, is not necessary, as the suit is not one for loss, destruction or deterioration : *Secretary of State v. Firm Daulat Ram-Makhan Lal*, A. I. R. 1937 All. 632. The Patna High Court and the Oudh Chief Court have added a rider to the last proposition thus : "Non-delivery is not co-extensive with loss as it

3. In breach of the said agreement the defendant failed to deliver the said goods to the plaintiff and has lost the said goods during transit.

4. By reason of the premises the plaintiff has suffered damage.

Particulars of claim :

Value of 210 bags of tobacco on	<i>i. e.,</i>	
when they should have been delivered ...	...	Rs.
Railway freight paid by the plaintiff ...	..	"

Net amount due ...	Rs.	_____

includes much more than loss, which is only one of several possible cases. Non-delivery may be due to misdelivery or to wilful detention by the railway company as well as to loss. When compensation is asked by a person from a railway company for non-delivery and nothing more than mere non-delivery is pleaded, no notice under Sec. 77 is required, though it may turn out that the suit will fail for want of notice if it be established by the railway company that it is in fact a case of loss : *G. I. P. Ry. Co. v. Gopi Ram Gouri Sankar*, (1928) I. L. R. 7 Pat. 192, *referred to in Jaisram v. G. I. P. Ry.*, A. I. R. 1929 Pat. 109 ; *East Indian Ry. Co. v. Firm Moea Ram Gaja Nand*, A. I. R. 1925 Oudh 615. In any case notice under Sec. 77 need not be pleaded, it being a 'condition precedent', although it must be proved in a proper case.

- (a) **Notice under Sec. 80, C. P. Code :** Such notice must be given and alleged, by the very terms of the Sec. 80, C. P. Code. Notices under Sec. 77, Ind. Rail. Act and under Sec. 80, C. P. Code, are independent of each other. Notice under Sec. 77 does not dispense with notice under Sec. 80 : *Firm Balakram-Atma Ram v. Secy. of State*, A. I. R. 1935 All. 900.
- (a) **Limitation :** Cf. Arts. 30 and 31, Ind. Lim. Act. Under Arts. 30 and 31, the word 'carrier' is of a wider meaning than the expression 'common carrier' and it is wide enough to cover the case of a railway owned or controlled by the Government, which takes upon itself to carry goods belonging to the public from one place to another : *Per Costello and McNair, JJ.*, in *Secretary of State v. Golabrai Paliram*, I. L. R. (1937) 2 Cal. 614.
- (a) **Place of suing :** It was held in the case of a suit against the Secretary of State that the Secretary of State does not dwell or carry on business or personally work for gain within the meaning of the Clause 12 of the Letters Patent. He cannot, therefore, be sued in a Chartered High Court unless the cause of action has arisen either wholly or

5. On.....19..., the plaintiff caused a notice in writing dated.....19..., to be served on....., a secretary to the Central Government, claiming Rs..... as the damage suffered by the plaintiff as aforesaid.

The plaintiff claims—

Rs.

PLAINT.

187.

CARRIERS

Of Goods by Railway.

CLAIM by Consignor for Loss of Goods consigned under Risk Note, Forms A and B. (b)

1. On July 6, 19..., the plaintiff's agent, one C. D., delivered to the servants of the defendant Railway Company, hereinafter referred to as 'the Company', 21 casks of mustard oil, at the Burdwan Railway station, and by an agreement in writing of the same date

in part within jurisdiction : *Rodricks v. Secy. of State*, (1913) I. L. R. 40 Cal. 308 ; *Gorindarajulu v. Secy. of State*, (1927) I. L. R. 50 Mad. 449. 'The same rule shall apply in the case of the Governor-General in Council.

- (b) **Reference :** *Secretary of State v. Dhokalmal Mahaditlal*, (1930-31) 35 C. W. N. 1250 (*Per Mitter and Patterson JJ.*, at p 1255, "There was clearly deliberate omission to padlock the wagon and this is sufficient to constitute misconduct on the part of the Railway Administration. The consignor having proved misconduct on the part of the Railway Administration has discharged the onus of showing misconduct on the part of the Railway Administration's servants").
- (b) **'Misconduct'—meaning of—**As to this there is a divergence of opinion : *Of. Bengal Nagpur Railway Co. v. Moolji Sika*, (1930-31) 35 C. W. N. 133 ("Misconduct" in the Risk Note Form B (as amended in 1924) which omits the term "wilful" is wide enough to include wrongful omission or commission, intentional or unintentional, that is to say, cases of the Railway Company doing what they should not have done or not doing what they should have done. It denotes any unbusiness-like conduct and includes even ordinary negligence or want of such proper care as is cast upon a bailee under the Contract Act. The comparative immunity of a Railway Company depends upon the onus lying upon the owner of goods to prove misconduct.); *The Madras and Southern Marhatta Railway Co. v. Sundarjee Kalidas*, (1933) 57 C. L. J. 281. (The onus

contained in Receipt no..... granted to the plaintiff by one of the Company's servants in that behalf and which incorporated and was made subject to Risk Notes, Forms A and B, signed by the said C. D., for and on behalf of the plaintiff, the Company agreed to carry the said goods on the railway line of the Company from Burdwan station to Barakar station and to deliver the same to the plaintiff at the last named station, on receiving the freight.

2. On.....19..., the Company only delivered 15 casks of oil and failed to deliver the remaining 6 casks.

3. The non-delivery of the said 6 casks was due to the misconduct on the part of the Company's servants.

of proving misconduct is on the party alleging it. Where misconduct on the part of the servants of the Railway Administration is alleged, it must be shown that the servants were actually responsible for the guilty or wrongful act; knowledge on the part of the Railway Administration, or of their servants that an act was likely to cause injury is not sufficient. Misconduct is not necessarily established by proving even culpable negligence. Misconduct is something opposed to accident or negligence. It is the intentional doing of something which the doer knows to be wrong, or which he does recklessly, not caring what the result may be; *Manilal Anandji v. Bengal Nagpur Railway, Ltd.*, (1934-35) 39 C. W. N. 114 (*Per R. C. Mitter J.*,—"The term 'misconduct' in Risk Note, Form B., whatever it may imply, implies something more than negligence."). Cf. *B. N. Ry. Co. Ltd. v. Mohommad Ishaq Ahmad Miya*, A. I. R. 1940 Nag. 238.

- (b) **Pleading misconduct**: Misconduct must be alleged and the plaintiff must set forth in his plaint in as full a detail as possible the nature of the misconduct: *Per Edgley J.*, in *Bengal Nagpur Railway Co. Ltd. v. Balabux Narasaria*, A. I. R. 1939 Cal. 377. But if the plaintiff is unable to give particulars of misconduct he should state that he is unable to do so until after disclosure by the Railway Company as to how the consignment was dealt with throughout the time it was in its possession or control. If it is found upon the evidence adduced by the Railway Company that there was misconduct on the part of its servants the Railway Company would be liable in damages without any further evidence on behalf of the consignor. If it is found, however, that the evidence produced on behalf of the Railway Company does not fairly lead to the inference that there was misconduct on the part of its servants, the burden of proving such misconduct shall then shift on to the consignor: *Secretary of State v. Sadho Lal Jaiswal* A. I. R. 1939 All. 748. Cf. *Secretary of State v. Ramdhan Das Dwarka Das*, (1932-33) 37 C. W. N. 1109. But in no case, a plaintiff is absolved from the duty of proving that a Railway Administration is liable for causing the loss or deterioration of goods: *Secretary of State v. Firm Narain Das Shyam Lal*, A. I. R. 1935 All. 525. Cf. *Secretary of State v. Tulsī Das Krishan*

4. The plaintiff is unable to give full particulars of misconduct until after disclosure by the Company as to how the consignment was dealt with throughout the time it was in the possession and control of the Company, and the following particulars are all that the plaintiff can give :

Particulars of misconduct :

The consignment was loaded in a wagon which was not padlocked, and the servants of the Company did not at any material time take the usual and/or reasonable precaution of padlocking the said wagon, and, as a result, the said six casks either dropped out of the wagon or were stolen.

4. By reason of the premises the plaintiff has suffered damage.

Particulars of claim :

Value of six casks of mustard oil when the same should have been delivered, that is, on.....

19...

... Rs.....

The plaintiff claims—

Rs.....damage.

PLAINT.

188.

CARRIERS

Of Goods by Railway.

CLAIM against a Railway Company for unreasonable Delay in Delivery of Goods consigned under Risk Note, Form A. (c)

1. The defendants are a railway company and are carriers of goods by railway for reward.

Dial, A. I. R. 1928 Lah. 56 (where the Railway Company does not give satisfactory evidence as to how the consignment was dealt with it is open to the Court to decree the plaintiff's suit on the ground that the Railway Company has failed to discharge the statutory obligation or it may still require the plaintiff to prove misconduct before saddling the Railway Company with responsibility). If the Railway Company makes full disclosure of its dealings with the consignment and the Court is satisfied that it has done so it will then be entitled to call upon the plaintiff to give full particulars of misconduct. Cf. *Surat Cotton Spinning and Weaving Mills v. Secy. of State*, (1936-37) L. R. 64 I. A. 176.

(c) **Reference :** *Bengal North-Western Railway v. Firm Munna Lal Bishambhar Nath*, A. I. R. 1924 All. 760 (Per Neave J., "The learned Munsif

2. On.....19..., the plaintiff booked 50 bags of chillies weighing 20 maunds at.....station and the said goods were accepted by the defendants for such carriage upon payment by the plaintiff of the railway freight at the rate of Re. 1/4/- per maund. The said goods were despatched on the 5th May, 19..., and were not delivered till the 25th June, 19..., that is, one month after they should have been delivered in the normal course.

3. During the interval between the time when the goods should have been delivered and the time when they were actually delivered there was a fall in the market price of chillies from Rs. 24/8/- a maund to Rs. 21/8/- a maund.

4. By reason of the premises the plaintiff has suffered damage.

Particulars :

Difference between the price of 20 maunds of chillies on the date they should have been delivered and the date on which they were actually delivered Rs.....

The plaintiff claims—

Rs.....damages.

PLAINT.

189.

CARRIERS

Of Goods by Railway.

CLAIM against a Railway Company for Deterioration by Over-carriage of Goods consigned under Risk Notes,

Forms A and B. (d)

1. The defendants are a railway company (hereinafter referred to as 'the company') and are carriers of goods for reward.

has held that this language clearly shows that the risk-note in Form A has no concern whatever with the case of delay. In this view I concur. It is obvious that the special contract contained in this document is merely intended to protect the Railway from responsibility for any loss or damage which will result to the goods from defective packing and consequent leakage or wastage in transit.....It is true that in the present case there was a risk-note, but it was of a character which did not protect the Company against the consequences of delay").

(d) **Reference :** *B. B. and C. I. Ry. v. Ganu Daji Mirmahamad*, A. I. R. 1929 Bom. 421, (Per Martin C. J., "By carrying the goods from A. to V.

2. On the.....19..., the plaintiff's agent, one E. F., delivered to the company's servants at M. station 10 baskets of mangoes and by an agreement in writing of the same date contained in Receipt no.....granted to the plaintiff by one of the company's servants in that behalf and which incorporated and was made subject to Risk Notes, Forms A and B, signed by the said E. F., for and on behalf of the plaintiff, the company undertook to carry the said goods on the railway line of the company from M. station to A. station.

3. The company carried the goods from M. to A. and, without delivering the goods at A., carried the goods further to V. station contrary to the terms of the contract, and next sent them back to A. where they were delivered to the plaintiff's agent on.....

4. This overcarriage caused a delay of some three days whereby the mangoes were badly damaged and were of no value to the plaintiff.

Particulars of claim :

Cost of mangoes	...	...	...	Rs.....
Freight paid	...	...	...	,, .....
Net amount due				<u>Rs.....</u>

The plaintiff claims—

Rs.....damages.

PLAINT.

190.

CARRIERS

Of Goods by Railway.

CLAIM by Consignor against a Railway Company for Damage to Goods consigned under Risk Note, Form H. (e).

1. On August 6, 19..., C. D., an agent of the plaintiff, delivered to the servants of the defendant Railway Company (hereinafter

the company was not acting within the terms of the contract. In my judgment this was never within the contemplation of the parties and accordingly the company is not protected by either risk notes A or B.")

(e) Reference : *Bengal Nagpur Railway Co. v. Janki Das Marwary*, A. I. R.

referred to as 'the Company') 20 bags of flour at Ramkristopur station, and by an agreement in writing of the same date contained in Receipt no..... granted to the plaintiff by one of the Company's servants in that behalf and which incorporated and was made subject to Risk Note, Form H, the Company agreed to carry the said goods from Ramkristopur station to Joychandpur station on its own line and deliver the same to the plaintiff at the last named station, on his paying the freight.

2. Owing to the misconduct of the Company's servants, the said goods were damaged in transit by rainwater entering into the wagon. The plaintiff is unable to give full particulars of misconduct until after disclosure by the Company as to how the consignment was dealt with throughout the time it was in the possession and control of the Company, and the following particulars, are all that the plaintiff can give :

Particulars of misconduct :

Contrary to the Standing Order of the Company issued in June, 19..., regarding carriage of damageable traffic during monsoons, the said goods, which were of a damageable nature, were loaded in a 'C' type wagon with flap doors and windows, and the Company's servants did not take any proper care to see that the doors and windows of the said wagon were securely fastened so that no rain water could penetrate into it.

3. By reason of the premises the plaintiff has suffered damage.

Particulars of damage :

The plaintiff claims—

Rs.....

1936 Pat. 70 : The word "misconduct" in these Risk Notes is wide enough to include wrongful commission and omission, intentionally or unintentionally of any act which it wrongfully did or which it wrongfully neglected to do, or to put it in another way, did what it should not have done and did not do what it should have done or any unbusiness-like conduct including negligence or want of proper care. Cf. *Bengal Nagpur Railway Co. v. Moolji Sicka & Co.*, (1931) 54 C. L. J. 314 : *Per D. N. Mitter J.* at p. 316. Misconduct of the Railway Company consisted in the violation of the Standing Order. See foot-note under Form No. 187.

(e) **Pleading Misconduct :** See Notes under Form No. 187, p. 808.

PLAINT.

191.

CARRIERS

Of Goods by Railway.

CLAIM against a Railway Company for Damages for Conversion by wrongful Sale. (f)

1. The plaintiff through Messrs. V. Ltd., colliery proprietors of....., ordered certain consignments of coal to be sent to his customers, S. Brothers of Adampur.

2. In.....19..., Messrs. V. Ltd., made arrangements with the defendant Railway Company (hereinafter referred to as 'the Company') for despatch of a truckload of coal weighing.....tons by the said Company on their own line to the said S. Brothers, but owing to some mistake on the part of the plaintiff in directing Messrs. V. Ltd. as to where the coal was to be sent it was sent to....., which was a wrong destination.

3. On.....19..., the Company communicated with Messrs. V. Ltd. demanding Rs. 1100/- as the wharfage and freight in respect of the coal.

(f) **Reference :** *Sundarji v. Secy. of State*, (1934) I. L. R. 13 Pat. 752 (Per Courtney-Terrel C. J., "The object of a public notice of auction under Sec. 55, Rlys. Act, and the provision that the notice is to be inserted in local newspapers is an indication that it was the intention of the legislature that the local public shall be informed of a particular auction in order that persons may be attracted to bid at the auction. In order to attract bidders to the auction the notice should contain adequate materials so that possible bidders may be informed of the class of the goods and the time and place where the sale is to be held. A notice that does not state when the sales would take place or the nature of the goods or the places at which they would be sold or the condition of the goods or indeed any particulars which would be calculated to attract purchasers to the sale is not "notice of the intended sale" as prescribed by Sec. 55. Unless the sale is conducted with the formality provided by Sec. 55, the Railway Company is not protected from what is, but for the section, a tortious act notwithstanding that they have a right to detain goods, and a person whose goods are lawfully detained can justly claim damages if the goods are wrongfully sold.

(f) **Limitation :** Art. 48, Lim. Act : *Sundarji v. Secy. of State*, (1934) I. L. R. 13 Pat. 752.

(f) **Notice under Sec. 77, Railways Act :** The section has no application to the broad liability of the Railway Company in the case of tortfeasors quite apart from the position of railway carriers. Therefore no notice is necessary in bringing such a suit : *Sundarji v. Secy. of State, supra.*

4. On.....19..., the District Traffic Superintendant of the Company informed Messrs. V. Ltd. by letter that the consignment of coal had actually been sold under Sec. 55, Railways Act, realising a sum of Rs. 205/- and that the Company would forego the wharfage if prompt payment of Rs. 122/- was made for balance of freight. Messrs. V. Ltd. promptly paid the said sum of Rs. 122/- to the Company and informed the plaintiff about it and the plaintiff thereupon re-imbursed Messrs. V. Ltd. in the sum of Rs. 122/-.

5. On.....19..., the plaintiff discovered that the advertisements of the intended auction which appeared in the local newspapers on.....19..., did not state when the sale should take place or the nature of the goods to be sold or the place at which they would be sold or the condition of the goods or indeed any particulars which would attract purchasers to the sale.

6. By reason of the premises very few bidders attended the sale and the coal was knocked down at less than its proper value whereby the plaintiff has suffered damage.

Particulars :

Price at which the coal was contracted to be sold...Rs.

Less—

Cost of coal at the pithead.....Rs.

Freight

Balance ... Rs.

The plaintiff claims—

Rs....damages.

PLAINT.

192.

CARRIERS

Of Goods by Railway.

CLAIM by Indorsee of a Railway Receipt against Railway Company for short Delivery. (g)

1. On the.....19..., one S. R. consigned 115 bags of wheat weighing 115 maunds from.....to be carried by the defendant Railway Company to Ahmedabad.

(g) **Right to sue :—**A Railway Receipt is a mercantile document of title and indorsee of a Railway Receipt has sufficient interest in the goods to

2. The said goods were consigned by the said S. R. to self, but he made an endorsement on the Railway Receipt stating that the goods should be delivered to one N. L.

3. On.....the said Receipt was endorsed by the said N. L. in favour of the plaintiff.

4. The plaintiff paid the freight at Ahmedabad on.....but was given delivery of 96 bags only.

5. By reason of the premises the plaintiff has suffered damage.

Particulars of damage :

Value of 19 maunds of wheat	...	Rs.....
Value of 19 empty bags	...	Rs.....
Excess freight paid	... ..	Rs.....
Total Amount		Rs.....

The plaintiff claims—

Rs.....

CLAIM.

193.

CARRIERS

Of Goods by Railway.

CLAIM by Consignor against a Railway Company to recover Overcharges paid. (h)

1. The defendants are a railway company and are carriers of goods by railway for reward.

maintain an action in respect of the goods : *Amerchand & Co. v. Ramdas Vithaldas*, (1914) I. L. R. 38 Bom. 255, fd. in *Dolatram Dwarkadas v. B. B. & C. I. Ry. Co.*, (1914) I. L. R. 38 Bom. 659 ; cf. *Sail Madan Gopal Trading v. Upadhyaya Kameshwara Rao*, A. I. R. 1936 Mad. 25 (case of misdelivery) ; *Firm Peare Lal v. E. I. R. Co.*, (1924) I. L. R. 46 All. 691 (case of short delivery).

(h) **Reference :** *Chhogalal v. Secy. of State*, A. I. R. 1933 Nag. 261. (In this case two consignments were booked, one on the 28th of January, 1929 and the other on the 30th of January, 1929. The railway receipts were not given until 1st February, 1929. The rate at which the goods were booked was Re. -/13/5 per maund. On 1st February, however, a new rate came into force, namely Re. 1/-/3 per maund and on arrival at Hissar, a higher rate was levied and a recovery of Rs. 135/6/- was made on each consignment. It was argued on behalf of the Railway Com-

2. On.....19..., the plaintiff tendered to the defendants at.....10 bags of cotton seeds weighing 12 maunds to be carried by the defendants to.....and the said goods were accepted by the defendants for such carriage upon payment by the plaintiff of freight at the rate of 12 annas *per* maund.

3. On arrival of the said goods at.....station a higher rate, namely, Re. 1/-/3 per maund, was levied and the plaintiff was obliged to pay the excess charges before the goods were delivered to him.

The plaintiff claims—

Rs....., the amount of the overcharge.

PLAINT.

194.

CARRIERS

Of Goods by Railway.

CLAIM by Consignee against a Railway Company to recover Demurrage extorted. (i)

1. On..... 250 bags of Tooria seed were delivered by one J. N. to the defendant Railway Company at.....station, to be carried on the defendant Company's line to Karachi.

2. The Railway Receipt no.....dated.....19... was made out in the name of the plaintiff both as the consignor and as the consignee of the goods.

pany that under the rules framed under Sec. 47 of the Indian Railways Act, the Railway Company will not be responsible until the railway receipt is given. *Held*: that such rules being inconsistent with the Indian Railways Act are *ultra vires*. The contract for despatch of the goods was complete at the latest on the 31st of January when the goods were actually loaded and therefore the charge of the enhanced rate which came into force on the 1st February was unauthorised and must be refunded.)

- (i) **Reference:** *Santidas Gobindram v. Secy. of State*, A. I. R. 1929 Sind 220 (The rule that upon a consignor informing a carrier that he is an unpaid vendor and requesting him to stop the goods in transit, the latter is bound to do so, is modified by Sec. 57, which gives to the railway administration the right to ignore the notice and to make delivery to the consignee of goods. A railway administration may accept notice from the consignor of goods to stop the goods delivered in transit, or it may act under Sec. 57, Rail. Act, in which case there

3. On.....19..., the goods arrived at Karachi and, although the plaintiff tendered the freight, they were not delivered to the plaintiff on the ground that the said J. N. claiming to be an unpaid vendor of the goods had requested the Company to stop the goods in transit.

4. After some correspondence between the plaintiff and the District Traffic Superintendent, the goods were at last delivered to the plaintiff on.....19..., upon payment of Rs. 406/- as demurrage, which he paid under protest, and which was wrongfully claimed to have accrued between.....19... and.....19... .

The plaintiff claims—

(1) Rs....

(2) Interest.

PLAINT.

195.

CARRIERS

Of Passengers' Luggages by Railway.

CLAIM against Railway Company for Loss of Passenger's Luggage. (j)

1. On.....19..., the plaintiff purchased a ticket for travelling by the.....Express upon the defendants' railway, between

is no stoppage in transit as defined in the Contract Act, Sec. 99. But, if the railway administration fail to act under the provisions of the Contract Act in giving effect to the notice of stoppage in transit and likewise fail to act under the special provisions of Sec. 57, they will have to take the consequences upon themselves and are not entitled to claim any demurrage from the consignee.)

- (j) **Liability of Railway administration as carrier of luggage:** Sec. 74, Ind. Rail. Act—A railway administration shall not be responsible for the loss, destruction, or deterioration of any luggage belonging to or in charge of a passenger unless a railway servant has booked and given a receipt therefor.

Sec. 76, Ind. Rail., Act (IX of 1890) provides : "In any suit against a railway administration for compensation for loss, destruction or deterioration of animals or goods delivered to a railway administration for carriage by railway, it shall not be necessary for the plaintiff to prove how the loss, destruction or deterioration was caused." Cf. *Phipps v. New Claridge's Hotel*, (1905) 22 T. L. R. 49; *Secretary of State v. Ramdhan Das Dwarka Das*, (1933) 58 C. L. J. 98.

..... station and station, and also booked his luggage, a large steel trunk containing articles of clothing, to be carried in the luggage van of the said train, by paying the freight and obtaining a receipt therefor.

2. In breach of their duty the defendants did not carry the said luggage to....., but lost it upon the said journey, whereby the plaintiff has suffered damage.

3. The steel trunk and its contents were of the value of Rs....., particulars whereof were supplied to the defendants in writing on..... 19..., and are also set forth in Annexure 'A' hereto.

The plaintiff claims—

Rs....., damages.

PLAINT.

196.

CARRIERS

Of Passengers by Railway.

CLAIM by a Passenger against a Railway Company for Personal Injuries sustained in a Collision. (k).

1. The defendant railway company are carriers of passengers for reward.

(k) **Liability of a railway company:** Although a railway company does not insure the safety of persons whom it undertakes to carry, the duty which it owes to such persons is of a highly onerous nature : *Jewan Ram v. E. I. Ry. Co.*, (1924) I. L. R. 51 Cal. 861.

(k) **Onus of proof :** Generally speaking, it is for the plaintiff in an action for negligence to establish (a) that the defendant was under a duty to take care towards the complaining party to avoid the damage complained of, (b) that there was a breach of that duty on the part of the defendant and (c) that the breach was the direct and proximate cause of the damage complained of. The onus of proving negligence is on the plaintiff and the mere proof of the happening of an accident is not as a general rule sufficient evidence to support the action. An exception to the general rule, however, occurs wherever the facts established are such that the proper and natural inference arising from them is that the injury complained of was caused by the defend-

2. On the 19..., the defendant company received the plaintiff in the train as a passenger for reward fromto

3. At about 10 P. M. on the said date at a point 2 miles south of, the said train, while driven carelessly and negligently by the defendant company's servants, collided with a Goods train which was upon the said railway, whereby the carriage in which the plaintiff was seated was thrown off the line and the plaintiff sustained severe personal injuries.

Particulars of negligence :

(Here state)

Particulars of injuries :

(Here state)

4. By reason of the premises the plaintiff has suffered damage.

Particulars of special damage :

Loss of salary for two months as

..... at Rs.....	per month	...	Rs.....
Fees paid to Dr.	...	...	Rs.....
Cost of medicine	...	...	Rs.....

Total amount ... Rs.....

The plaintiff claims—

- (1) Rs..... as special damage.
- (2) Rs. 1,000 for bodily pain and suffering.

ant's negligence. Whenever there is a duty cast upon the defendant to exercise care and the circumstances under which the injury happened are such that with the exercise of requisite care no risk would have been caused in the ordinary course of events the burden is shifted to the defendant to disprove his liability : *Pauline D'Souza v. Cassamalli*, A. I. R. 1933 Bom. 465 ; cf. *East Indian Railway v. Kirkwood*, (1921) I. L. R. 48 Cal. 757 ; *East Indian Railway v. Kalidas Mukerjee*, (1900-01) L. R. 28 I. A. 144 (Case of injury to a passenger by fireworks carried by a fellow passenger : *Held*—As it was not the duty of the company to search every parcel carried by a passenger, the onus is on the plaintiff to show that the parcel containing the fireworks suggested danger).

DEFENCE.**197.****CARRIERS.****Private Carriers.****DEFENCE by Private Carrier to a Claim
for Loss of Luggage.**

1. The said goods were lost by theft at some time and by some person unknown to the defendant and without any fault or neglect on the part of the defendant.

2. Further, or in the alternative, there was a special contract in writing dated between the plaintiff and the defendant which provided that the defendant would not be liable for any loss or damage to the goods howsoever caused.

DEFENCE.**198.****CARRIERS****Of Goods by Railway.****DEFENCE by Railway Company to Claim for Non-delivery of
Goods consigned under Risk Note, Form A. (1)**

1. The said goods were delivered in a bad condition and were liable to damage, leakage and wastage in transit and the defendant company accepted the said goods upon the terms of a special contract contained in Risk Note, Form A, signed on behalf of the

-
- (1) **Onus of proof :** Where the plaintiff's claim is based on non-delivery, it does not amount to an allegation of loss within the meaning of Sec. 77, Railways Act. Therefore when the plaintiff sues on the allegation of the "non-delivery" only, and has not admitted loss of the goods, the Railway Administration, must first of all prove that there has been "loss" of the goods, so as to bring their case within the scope of the special contract embodied in the risk note and when this is done the onus will shift to the plaintiff to prove that the loss was due to "wilful neglect" on the part of the railway or its servants, etc. according to the terms of the risk note. The burden as regards the proof of loss will, of course, usually be light and formal evidence on the point may be sufficient to shift the onus to the plaintiff. At the same time the matter is of some importance from the plaintiff's standpoint as he will be able to cross-examine the witnesses produced

plaintiff, the consignor of the said goods, whereby the consignor agreed and undertook to hold the railway administration harmless and free from all responsibilities for the condition in which the goods might be delivered to the consignor at the destination and for any loss arising from the same, except upon proof that such loss arose from misconduct on the part of the railway administration's servants.

2. The said goods were lost by fire without any fault or neglect on the part of the defendant company's servants.

3. No notice in respect of the plaintiff's claim was preferred in writing by or on behalf of the plaintiff to the defendant railway administration as required by Section 77 of the Indian Railways Act.

Or,

No notice in respect of the plaintiff's claim was preferred in writing by the plaintiff or on his behalf, to the defendant railway administration within 6 months from the date of the delivery of the goods for carriage by the defendant company's railway, as required by Section 77 of the Indian Railways Act.

Or,

No notice under Section 77 of the Indian Railways Act in respect of the plaintiff's claim was preferred in writing by the plaintiff or on his behalf, to the defendant railway administration as required by Sec. 140 of the said Act.

4. The suit is not brought within one year from the date when the goods ought to have been delivered and the plaintiff's claim, if any, is therefore barred by the Statute of Limitation.

by the railway and may be able to elicit facts showing "wilful neglect" on the part of the railway or its servants: *E. I. Ry. v. Piyara Lal*, A. I. R. 1928 Lah. 774. A Railway Company is not entitled to rely upon the provisions of the risk note which *pro tanto* exempts it from liability, unless the plaintiff admits, or evidence has been adduced which satisfies the Court, that a loss has occurred. The term "loss" as used in the "risk note", and in section 72 of the Railways Act, does not mean pecuniary or other loss suffered by the owner of the goods through being wrongfully deprived of the possession, use, or enjoyment thereof, but means loss of the goods while in transit, and such loss occurs whenever the Railway Company to which the goods have been consigned for conveyance involuntarily or through inadvertence loses possession of the goods, and for the time being is unable to trace them: *East Indian Railway Co. v. Jogpat Singh*, (1924) I. L. R. 51 Cal. 615. *Of. Gopiram v. Agents, E. I. Ry.*, A. I. R. 1926 Cal. 612.

DEFENCE.**199.****CARRIERS**

Of Goods by Railway.

**DEFENCE by Railway Company to Claim for Loss of Goods,
setting up Non-declaration of Value of Scheduled
Articles. (m)**

1. The said goods were booked at the ordinary railway parcel rate and were lost by theft and the defendant Company have not been able to recover the same.

2. The parcel delivered by the plaintiff to the defendant Company consisted of....., which were articles mentioned in the second schedule to the Indian Railways Act, 1890, and exceeded 100 rupees in value and the plaintiff did not declare its contents and/or their value at the time of the delivery of the parcel for carriage by the defendant Company.

- (m) **Reference :** Section 75 plainly says that, when any articles mentioned in the second schedule are contained in any parcel or package delivered to a railway administration for carriage by railway and the value of such articles in the parcel or package exceeds one hundred rupees, the railway administration shall not be responsible for the loss, destruction and deterioration of the parcel or package unless the person sending or delivering the parcel or package to the administration caused its value and contents to be declared or declared them at the time of the delivery of the parcel or packages for carriage by railway.....In the case of valuable goods declaration of value is a matter of importance to the railway administration as it would put the responsible officers of the railway on their guard and they would take special care to guard the said parcel. Under section 75, the railway administration may require the consignor to pay a percentage on the value of the parcel by way of compensation for increased risk. Though they are not compelled to require such additional payment, yet the declaration would put responsible officers of the railways on their guard and for lack of such a declaration the plaintiff would stand to suffer in the case of loss of his goods : *Secretary of State v. Suriyama*, (1934) I. L. R. 61 Cal. 599. When a person claims damages as the value of goods sent at the ordinary railway parcel rate and lost, it lies on him to prove that the parcel did not contain any of the excepted articles mentioned in the Second Schedule to the Railways Act, exceeding Rs. 100 in value. It is not for the railway administration to prove that the parcel did contain such an article of such value : *Secretary of State v. Gopalma*, (1930-31) 35 C. W. N. 452.

PLAINT.

200.

CARRIERS

Of Goods by Sea.

CLAIM by Shipowner against Charterer for Failure to load. (n)

1. By a charterparty dated..... it was mutually agreed between the plaintiffs, owners of the screw steamer called the..... of..... tons gross and..... tons net register, and the defendant, charterer, that the said steamer should after arrival at..... and after discharge of her inward cargo, if any, proceed under steam to Karachi via Suez Canal and there receive from the defendant or his agents a full and complete cargo of cotton in full pressed bales, seed and/or wheat in bags and/or maize and/or other lawful merchandise and being so loaded should with all reasonable speed therewith proceed under steam via Suez Canal to..... or so near thereto as she could safely get and there deliver the cargo in accordance with the custom of the port for steamers on being paid freight at the rate of..... per ton, English weight. It was also thereby agreed that the defendant should have..... working days to be computed from 24 hours (if berthed alongside the wharf otherwise 48 hours) after receipt by the charterer a written

- (n) **Charterparty—nature of :** It is a contract by which the whole or substantially the whole of the services of a ship are let by shipowners to a person or persons in consideration of money paid as freight.
- (n) **Parties to contract :** The parties to contract are primarily the shipowner and the shipper ; but in practice this contract is often made by shipbrokers or agents or master on behalf of the shipowner, and brokers or agents on behalf of the shipper. To determine whether the principal or agent may be sued, it is necessary to look to custom or express agreement, intention of the parties as gathered from the charter, and the conduct of the parties in the transaction : *Universal Steam Navigation Co. Ltd. v. James McKelvie & Co.*, (1923) A. C. 492. See 'Agents' under "Classes of Persons", Chap. XI, pp. 73-76. The undisclosed principal of a party described as charterer may sue by giving evidence of his position : *Drughorn v. Rederiakt. Trans-Atlantic*, (1919) A. C. 203.
- (n) **Measure of damages for failure to load :** The measure of damages for failure to load is the amount of freight which would have been earned under the charter after deducting the expenses of earning it : *Capper v. Forster*, (1837) 3 Bing. N. C. 938 ; *Cockburn v. Alexander*, (1848) 6 C. P. 791 ; *Smith v. M'Guire*, (1858) 3 H. & N. 554 ; *Beyls, Craig & Co. v. Otto Martin*, (1892) 1 L. R. 16 Bom. 389.

notice from the master or agents that the vessel was clear of her inward cargo, in seaworthy condition and ready to load, and should the steamer be detained beyond the time stipulated for loading and discharging, demurrage should be paid at..... *per day and pro rata* for any part thereof.

2. The said steamer arrived at Karachi on.....and the next day the master gave notice in writing to the defendant that the vessel was clear of her inward cargo, in seaworthy condition and ready to load and was lying alongside the wharf.

3. No reply was received to the said letter until.....when the defendant by letter wrongfully repudiated the said agreement.

4. By reason of the premises the plaintiffs have suffered damage.

Particulars :

Freight payable on a full and complete cargo (.....tons) at..... <i>per ton</i>	...	Rs.
Demurrage for 4½ days from.....to..... at..... <i>per day</i>	... ..	"
		Rs.
Less expenses of voyage	... ..	"
		Rs.
Net amount due	...	Rs.

The plaintiffs claim—

Rs.....

PLAINT.

201.

CARRIERS

Of Goods by Sea.

**CLAIM by Shipowner against Cargo-owner for Freight,
Demurrage, and Expenses. (o)**

1. The plaintiffs at all material times were and are the owners of the steamer.....which traded between the ports of L. and H.

(o) Reference : *Argos, Cargo ex*, (1873) L. R. 5 P. C. 134. Freight is the reward payable to the carrier for the safe carriage and delivery of the

2. On....., the defendant, a merchant dealing in petroleum, oils and chemicals, delivered 150 barrels of petroleum (hereinafter referred to as 'the goods'), on board the said steamer in port L. to be sent to port H, and the Captain gave the defendant a bill of lading, the material terms whereof were the following :—

- (a) The defendant to take out the goods within 24 hours of the steamer's arrival, or pay.....a day demurrage.
- (b) The goods to be delivered in good order and condition at port H, on payment of freight at the rate of.....in accordance with the charterparty dated.....

3. The steamer, with a general cargo, sailed from L. on and arrived in the port of H. at.....p.m. on.....

4. On the following morning, the authorities of the port of H. compelled the master of the steamer to take her away in consequence of the petroleum being on board.

5. Thereafter the master took the said steamer to the neighbouring ports of.....and.....but was compelled by the authorities, for the same reason, to leave those ports.

6. On.....the steamer returned to H. and obtained permission to enter the outer harbour and discharge the goods into a lighter there. The goods remained in the harbour under the master's control until.....when the steamer discharged the rest of her cargo at the quay and was ready to sail on her return voyage. During this time the bill of lading had not been presented, nor had any request been made by the defendant or any holder of it for the delivery of the goods.

7. The master under those circumstances, reshipped the goods which had been lying in the harbour between.....and..... and brought them back to L., giving notice in writing to the defendant of its arrival.

Particulars of claim :

Outward freight.....

Back freight.....

Demurrage.....

Expenses for storage at H.....

goods : *Kirchner v. Venus*, (1859) 12 Moore P. C. 361, 390. But safe carriage in the sense of delivery of goods in good condition is not necessary : *Dakin v. Oxley*, (1864) 15 C. B. (N. S.) 646, 665. The case of *Argos, Cargo ex, supra*, shows that actual delivery of goods is not necessary, readiness to deliver will suffice.

- (c) **Right to sue :** See 'Carriers' under "Classes of Persons", Chap IX, at pp. 101, 102.

8. The defendant has not paid the aforesaid sum or any portion thereof in spite of demand made in writing on.....

The plaintiff claims—

Rs.....for freight, demurrage and expenses.

PLAINT.

202.

CARRIERS

Of Goods by Sea.

CLAIM by Indorsee of a Bill of Lading against Shipowner. for Short Delivery and Damage to Cargo. (p)

1. The defendants are owners of the steamship

2. On.....19..., the defendants received on board the said steamship from one A. B. at....., upon receipt of Rs.....
.....lump freight, 500 cases of tea weighing.....in good order and condition for carriage to.....upon terms and conditions stated in a bill of lading dated.....19..., signed by the master of the said steamship for and on behalf of the defendants, whereby the defendants agreed to deliver the said goods in good order and condition at.....to the order of the shippers or

- (p) **Indorsement of a bill of lading :** A bill of lading is not a negotiable instrument in the sense that a bill of exchange is, and that the transferee of a bill of lading does not get a better title than the transferor : *Nippon Yusen Kaisha v. Ramjiban Serowgee*, (1937-38) L. R. 65 I. A. 263. The effect of indorsement of bills of lading is stated by Bowen, L. J., in *Sanders v. Maclean*, (1893) 11 Q. B. D. 327, 341, thus : "A cargo at sea while in the hands of the carrier is necessarily incapable of physical delivery. During this period of transit and voyage, the bill of lading by the law merchant is universally recognised as its symbol, and the indorsement and delivery of the bill of lading operates as a symbolical delivery of the cargo. Property in the goods passes by such indorsement and delivery of the bill of lading, whenever it is the intention of the parties that the property should pass ; just as under similar circumstances the property would pass by an actual delivery of the goods. And for the purpose of passing such property in the goods and completing the title of the indorsee to full possession thereof, the bill of lading, until complete delivery of the cargo has been made on shore to some one rightfully claiming under it, remains in force as a symbol, and car-

their assigns. The plaintiff will refer to the said bill of lading for its terms.

3. On.....19..., the said bill of lading was indorsed by the said A. B. to the plaintiff to whom the property in the goods passed by such indorsement.

4. 200 cases were delivered in a wet and damaged condition on.....and 300 cases were not delivered at all, whereby the plaintiff has suffered damage.

5. The said damage was caused by the negligence of the defendants, their servants or agents.

Particulars :

Sound value of 500 cases of tea ... Rs.

Less value of 200 cases of damaged tea

Total Rs.

The plaintiff claims—

Rs.....damages.

PLAINT.

203.

CARRIERS

Of Goods by Sea.

CLAIM by Vendors of Goods against Shipowners for Conversion by wrongful Issue of Bills of Lading to Buyers after Notice of Vendor's Lien and without the Master's Receipts. (q)

1. The plaintiffs are brokers and merchants of Calcutta.

ries with it not only the full ownership of the goods, but also all rights created by the contract of carriage between the shipper and the shipowner. It is a key which in the hands of a rightful owner is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be. The above effect and power belong to any one of the set of original bills of lading which is first dealt with by the shipper. Except in furtherance of the title so created of the indorsee, the other originals of the set are, as against it, perfectly ineffectual and have no efficacy whatever, unless they are fraudulently used for the purpose of deceit."

(q) **Reference :** *Nippon Yusen Kaisha v. Ramjiban Serowgee*, (1937-38) 1. R. 65 I. A. 263. (In this case express notice was received by the ship-owners after the bills of lading had been issued to the Export Company.

2. The defendant Shipping Company at all material times were and are owners of the steamer.....and are hereinafter referred to as 'the Shipping Company'.

3. By a contract in writing dated....., the plaintiffs bought 250 bales of jute gunny bags from the L. Mills (hereinafter referred to as 'the Mills'), and by another contract of even date they sold the same quantity of 250 bales to the defendants I. E. Company, Ltd., hereinafter referred to as 'the Export Company'.

4. Both the above contracts stipulated for delivery free alongside the said steamer then lying in the port of Calcutta, and contained the following clauses :

(a) Payments to be made in cash in exchange for Delivery order on sellers, or for Railway receipts, or for Dock receipts, or for Mate's receipts, which are to be handed by a dock's ship's officer to the sellers' representatives.

(b) The buyers hereby acknowledge that so long as such Railway receipts or Mate's receipts whether in sellers' or buyer's name, are in the possession of the sellers, the lien of the sellers as unpaid vendors, subsists both on such Railway receipts or Dock or Mate's receipts and the goods they represent until payment is made in full.

5. Onthe Export Company issued shipping instructions to the plaintiffs who conveyed them to the Mills.

6. On.....the Mills sent the goods alongside the steamer in lighters, and, the Shipping Company received the goods on board and issued Mate's receipts and handed the same over to..... the Mills' sarcar.

"Not only was there no timeous notice to the appellants, but there is no ground for imputing implied notice". "No doubt if the shipowner, before he issues the bill of lading, is given express notice that he is not to issue the bill of lading without the Mate's receipt or to any one but the person who delivered the goods, he cannot disregard that notice. Even without express notice, he may be affected by notice to the same effect by knowledge of the actual circumstances of the case. But in the absence of any such notice the shipowner is bound to deliver bills of lading for the goods to the Export Company, who engaged the freight, who are owners of the goods, who are described in the document presented by the Mills as the persons in whose names shipping documents have been taken out and whose names appeared in the Mate's receipts as the persons from whom the goods were received").

7. The plaintiffs obtained the Mate's receipts from the Mills on.....against payment and on.....they tendered them to the Export Company who defaulted in payment.

8. Thereupon the plaintiffs on.....19..., gave notice in writing to the Shipping Company that they had an unsatisfied claim against the Export Company for the price of goods and that the Shipping Company must not issue the bills of lading to the Export Company without the Mate's receipts or to any one but the persons who delivered the goods. At all material times the Shipping Company had also knowledge of the terms of contract between the plaintiffs and the Export Company and of the circumstances under which the Mate's receipts did not come into the hands of the Export Company. Yet the Shipping Company issued the Bills of Lading to the Export Company on.....19..., on their own letter of guarantee.

9. On.....19..., the said steamer proceeded to its destination and the goods were delivered at.....on presentation of the bills of lading by.....to whom the Export Company had indorsed the same.

10. The defendants are in the premises liable for wrongful conversion of the bales.

Particulars of claim :

Value of 250 bales Rs.

The plaintiffs claim—

Rs....., against the Export Company as the price of goods, and against the Shipping Company as damages for conversion of the goods.

PLAINT.

204.

CARRIERS

Of Goods by Sea.

CLAIM by Charterer against Shipowner for Failure to carry Cargo

1. The defendants at all material times were and are the owners of the steamship Mary.

2. By charterparty dated.....19..., and made between the defendants as the owners of the said steamship and the plaintiffs as charterers, it was agreed that the said steamship should forthwith proceed to.....and there load a full and complete cargo of

coal weighing 1500 tons upon terms and conditions therein set forth and thence proceed to..... and there deliver the same to the plaintiffs or their agents, on being paid freight at the rate of.....per ton.

3. By a contract in writing dated.....19..., the plaintiffs had agreed to sell and one G & Co. had agreed to purchase 1500 tons of coal at the price of.....per ton subject to the condition that the said coal should be delivered to them or their agents at..... by.....19... The defendants at all material times had notice of the said contract and of the fact that the plaintiffs entered into the said charterparty in order to fulfil their obligations under the said contract.

4. In breach of the said charterparty the said steamship did not proceed forthwith or at all to.....and on.....the said G. & Co. repudiated the said contract (as they were entitled to do), by reason whereof the plaintiffs have suffered damage.

Particulars :

Loss of profit under the said contract ... Rs.....

The plaintiffs claim—

Rs.....damages.

DEFENCE.

205.

CARRIERS

Of Goods by Sea.

**DEFENCES to Claim on a Bill of Lading or Charterparty for
Damage and Short Delivery. (r)**

1. The defendants deny that any of the said goods were delivered in a damaged condition, or that they failed safely or securely to carry the same, as alleged or at all.

2. The said bill of lading incorporated and was made subject to the terms provisions and conditions of the Carriage of Goods by Sea Act XXVI of 1925 and the Schedule thereto.

(r) Exemptions from Liability :

- (i) for damage arising from act, neglect or default of the master, mariner or the servants of the ship : Art. IV rule 2 (a) of the Schedule to the Carriage of Goods by Sea Act XXVI of 1925 ;
- (ii) for damage arising from latent defects : Art. IV rule 2 (p) of the Schedule to the said Act ;

3. If any of the said goods were delivered in a damaged condition (which is not admitted) such damage occurred by reason of act, neglect or default of the master, mariner or the servants of the defendants in the navigation and/or management of the ship, namely, in not.....and in not.....

4. Further, or in the alternative, the damage arose from latent defects of the goods not discoverable by due diligence and/or arose from insufficiency of packing, the boxes containing the goods not having been tin-lined or protected sufficiently or at all against damage.

5. The damage claimed exceeds the equivalent of £100 in rupees and the nature and value of the goods were not declared by the shipper before shipment or inserted in the bill of lading. (Or, The goods are of the value of.....but the shipper knowingly mis-stated the value of the goods as).

6. The suit is not brought within one year after delivery of the goods or the date when the goods should have been delivered.

PLAINT.

206.

CARRIERS

Of Goods by Air.

CLAIM by Consignor against Carriers for Damage for Loss of Goods. (s)

1. By an air consignment note dated....., duly signed, the defendants for consideration therein stated, agreed to carry in their air craft..... certain packets containing....., the property of the plaintiff, then delivered to the defendants and accepted by them, from.....to....., subject to the rules

(iii) for damage arising from insufficiency of packing : Art. IV, rule 2 (o) of the Schedule to the said Act ;

(iv) where the nature or value of the goods were not declared by the shipper : Art. IV, rule 5 of the Schedule to the said Act ;

(v) where the shipper knowingly mis-stated the value of the goods : Art. IV, rule 5 of the Schedule to the said Act ;

(vi) where the suit is not brought within one year after delivery of the goods, etc. : Art. III, rule 6 of the Schedule to the said Act ; *Haji Shakoore Gany Firm v. Volkart Bros.*, A. I. R. 1931 Sind 124.

(s) **Air Consignment Note, what is :** See Rules 5 to 8, Chap. II, Part III, First Schedule of the Carriage by Air Act, XX of 1934.

(s) **Parties to suits :** Under Rule 14 of the above Schedule, Part III, the

relating to liability contained in the First Schedule to the Carriage by Air Act, XX of 1934.

2. During the carriage, some of the packets dropped into the sea and were lost.

Particulars of Goods lost and their value :

The plaintiff claims—

Rs.....damages.

PLAINT.

207.

CARRIERS

Of Goods by Air.

**CLAIM against Carriers by Air for Damage occasioned
by Delay in carrying Goods. (t)**

1. By an air consignment note dated....., the defendants, for consideration therein stated, agreed to carry by their aircraft

consignor and the consignee can respectively enforce all the rights given them by rules 12 and 13, each in his own name, whether he is acting in his own interest or in the interest of another, provided that he carries out the obligations imposed by the contract.

- (s) **Liability of the carrier :** Under Rule 18, Part II, Chap. III of the First Schedule to the Act, the carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to, any registered luggage or any goods, if the occurrence which caused the damage so sustained took place during the carriage by air. Under Rule 20, the carrier is not liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures. Cf. Rule 20 (2) and Rules 21 and 25.
- (s) **Extent of liability :** Rule 22 (2), Part II, Chap. III of the First Schedule to the Act.
- (s) **Jurisdiction :** An action for damages must be brought at the option of the plaintiff before the Court having jurisdiction where the carrier is ordinarily resident, or has his principal place of business, or has an establishment by which the contract has been made or before the Court having jurisdiction at the place of destination: Rule 23, Part II, Chap. III of the First Schedule to the Act.
- (s) **Limitation :** The right of damages shall be extinguished if an action is not brought within two years, reckoned from the date of arrival at the destination, or from the date on which the carriage stopped.
- (t) **Liability of Carrier :** Under Rule 19 of Schedule I of the Ind. Carriage by Air Act, XX of 1934, the carrier is liable for damage occasioned by

..... certain goods (here specify) received by them from the plaintiff and to deliver them to A. B., the consignee, at.....on the.....day of..... Alternatively, the said goods were to be delivered within a reasonable time which expired on that day.

2. The said goods were not delivered until fifteen days after the said date, and in consequence the goods were deteriorated and the plaintiff has suffered damage.

Particulars of damage :

The plaintiff claims—

Rs..... damage.

PLAINT.

208.

CARRIERS

Of Passengers by Air.

CLAIM by Executor against Carriers by Air for the Benefit of Dependents of a deceased Passenger. (u)

1. The plaintiff is the executor of the will of A. B., deceased, and brings this suit for the benefit of the widow, and the children of the said A. B.

delay in the carriage by air of passengers, luggage or goods. Under Rule 20 the carrier is not liable if he proves that he and his agents have taken all necessary measure to avoid the damage or that it was impossible for him or them to take such measures. Cf. Rule 25. Under Rule 13 (3), Chap. II, Part III, Schedule I, if the carrier admits the loss of the goods, or if the goods have not arrived at the expiration of seven days after the date on which they ought to have arrived, the consignee is entitled to put into force against the carrier the rights which flow from the contract of carriage.

- (t) **Who may sue :** Either the consignor or the consignee : Rule 14, Part III, Chap. II, Sch. I of the Act.
- (t) **Place of suing :** Rule 28, Chap III, Part III, Sch. I of the Act.
- (t) **Air Consignment Note, requirements of :** See Part III, First Schedule to the Ind. Carriage by Air Act, XX of 1934.
- (u) **Liability of carriers in the event of the death of a passenger :** Under Rule 1, Second Schedule of the Indian Carriage by Air Act, XX of 1934, the liability shall be enforceable for the benefit of such of the members of the passenger's family as sustained damage by reason

*Particulars of the persons on whose
behalf the suit is brought :*

C. D.	...	...	Widow.
E. F.	...	...	Son aged
G. H.	...	...	Daughter aged

2. At all material times the defendants were carriers of passengers by air.

3. On or about.....the defendants received the said A. B. on board the aircraft.....as a passenger for reward fromto.....

4. On.....at about....., while the said A. B. was on board the said aircraft as such passenger, an accident occurred to the said aircraft in consequence of which the said A. B. was killed.

Particulars of the accident :

5. The said A. B. was forty years of age and was employed in.....at a salary of Rs.....a month. By his death his widow and children have been deprived of all means of living.

Particulars of damage :

The plaintiff claims—

Rs.....damage.

of his death. In this rule the expression "member of a family" means wife or husband, parent, step-parent, brother, sister, half-brother, half-sister, child, step-child, grandchild : Provided that, in deducing any such relationship as aforesaid, any illegitimate person and any adopted person shall be treated as being, or as having been the illegitimate child of his mother and reputed father or, as the case may be, of his adopters. Under Sec. 2 (4) of the said Act : "Notwithstanding anything contained in the Indian Fatal Accidents Act, XIII of 1855, or any other enactment or rule of law in force in any part of British India, the rules contained in the First Schedule shall in all cases to which those rules apply, determine the liability of a carrier in respect of the death of a passenger, and the rules contained in the Second Schedule shall determine the persons by whom and for whose benefit and the manner in which such liability may be enforced."

- (u) **Who may sue :** The action may be brought by the personal representative of the passenger or by any person for whose benefit the liability under Rule 1 is enforceable : Rule 2 of Second Schedule.
- (u) **Extent of damage :** Maximum limit, 125000 francs : Rule 22 (1) Chap. III, Sch. I of the Act, "Any sum in francs mentioned in rule

PLAINT.

209.

CARRIERS

Of Postal Articles and Telegrams.

CLAIM by Sender for Failure on the Part of Postal Authorities to collect Value of a Value Payable Parcel. (v)

A. B. residing at.....

Plaintiff

vs.

Governor General in Council.....

Defendant

The plaintiff states :—

1. On....., the plaintiff delivered a parcel containing silver jewellery of the value of Rs. 500 to the Postmaster of the.....
Post Office, for transmission to one K. C. at Colombo, Ceylon,

22 of the First Schedule shall, for the purpose of any action against a carrier, be converted into rupees at the rate of exchange prevailing on the date on which the amount of damages to be paid by the carrier is ascertained by the Court.” : Sec. 2 (5), Ind. Carriage by Air Act, 1934.

- (u) **Place of suing :** Rule 28, Chap. III, Sch. I of the Act.
- (v) **Suits by or against Post and Telegraph Authorities as Carriers :** See “Carriers” under “Classes of Persons”, Chap. IX, pp. 107, 108.
- (v) **Who to be sued :** The suit is to be brought against the Governor-General in Council, under sec. 79 of the C. P. Code as substituted by the Government of India (Adaptation of Indian Laws) Order 1937.
- (v) **Liability of Central Government :** The Proviso to sec. 34 of the Ind. Post Office Act, 1898, as substituted by the Government of India (Adaptation of Indian Laws) Order, 1937 runs as follows—“Provided that neither the Central Government nor the Secretary of State shall incur any liability in respect of the sum specified for recovery, unless and until that sum has been received from the addressee”. See *Mothi Rungaya Chetty v. Secy. of State*, (1905) I. L. R. 28 Mad 213. (The effect of the proviso is that the Post Office does not guarantee the collection of the money, but it does not absolve it from the common law liability to pay damages for delivering the parcel without collecting the money. The Post Office, in order to meet the requirements of traders and others who wish to recover the value of articles supplied by them, undertakes, on the payment of certain fees, to act as their agents for the collection of the money (see rule 130, Indian Postal Guide) so that the Post Office is bound by contract to collect the money when it delivers the article. If the Post Office for any reason neglects to collect the money as

as a value payable article. The plaintiff also registered and insured the parcel for Rs. 500 and duly paid the fees and obtained a receipt, and the said Post Office took charge of the said parcel.

2. The Post Office delivered the said parcel to the said addressee without collecting its value from him and failed to pay the money or return the article to the plaintiff inspite of demands in writing made on.....and.....

3. On.....the plaintiff caused a notice in writing under Section 80 of the Civil Prodedure Code to be served on....., a Secretary to the Central Government, claiming the said sum of Rs. 500.

The plaintiff claims—

Rs.....

PLAINT.

210.

CHAMPERTY.

CLAIM by Financier to enforce Champertous Agreement. (w)

1. The defendant, a Hindu married woman, was the absolute owner of certain immovable properties of considerable value which had devolved upon her as her mother's *stridhan*. Particulars of the said properties are set out in Schedule "A" hereto annexed.

2. A.B., the defendant's brother and a man of position and influence, withheld the said properties from the defendant and wrongfully claimed them as his own.

3. In.....19..., the defendant's husband requested the plaintiff, his brother-in-law, to finance the intended litigation for recovery of the said properties in consideration of a share in the said properties.

agreed to by it for consideration it has committed a breach of contract for which it is liable to pay damages).

- (v) **Notice under Sec. 80, C. P. Code :** In the case of a suit against the Central Government, notice has to be served on a Secretary to that Government.
- (w) **Reference :** *Valluri Ramanamma v. Marina Viranna*, (1930-31) 35 C. W. N. 633, 639 P. O. It has long been held that in India agreements to finance litigation in consideration of having a share of property, if

4. By an agreement in writing dated.....19..., made between the plaintiff and the defendant, the plaintiff agreed to contribute one quarter of the costs of the litigation, and, in the event of failure, to pay one-quarter of the costs that might be awarded to the other side, and the defendant agreed, in the event of success, to convey and make over to the plaintiff one-quarter of whatever she might recover.

5. In.....19..., a suit (No..... of 19...) launched on the original side of the High Court of.....by the defendant against the said A. B. for declaration of title and recovery of the said properties, was decreed after contest on..... An appeal from the said decree was dismissed with costs on.....

6. The defendant recovered the said properties on or about19...

7. The plaintiff had contributed Rs....., being one-quarter of the costs of litigation, yet the defendant has not conveyed or delivered to the plaintiff one-quarter or any portion of the properties recovered in spite of demands in writing dated... .. and.....

The plaintiff claims—

1. One-quarter of the properties recovered, or Rs....., their value, and

recovered, are not *per se* opposed to public policy. They may be so if the object of the agreement is an improper one, such as abetting or encouraging unrighteous suits or gambling in litigation; or their enforcement against a party may be contrary to the principles of equity and good conscience, as unconscionable and extortionate bargains.): *Amrita Lal Baisya v. Pralap Chandra*, (1930) 52 C. L. J. 492. When such agreements are extortionate and inequitable, effect should not be given to them, although compensation for legitimate expenses may properly be awarded: *Kunwar Ram Lal v. Nil Kanth*, (1892-93) L. R. 20 I. A. 112. Cf. *Alopi Parshad v. Court of Wards*, A. I. R. 1938 Lah. 23, and *U Pe Gyi v. Mg. Thein Shin*, (1923) I. L. R. 1 Rang. 565, (where the agreement in question was held unconscionable and therefore invalid); *Harilal Nathalal v. Bhailal Prantal*, A. I. R. 1940 Bom. 143.

- (w) **Burden of proof:** In a suit to recover money given to finance litigation the burden of proving that the litigation was just and that the agreement to finance it was just and equitable is on the plaintiff. Where persons finance litigation by subscriptions, an agreement by which the subscribers are to receive half the decretal amount is on the face of it inconsistent with any suggestion that the subscribers are actuated by proper motives, that is to say, to help a litigant who is unable to finance himself in the pursuit of a proper claim: *Babu Ram v. Ram Charan Lal*, A. I. R. 1934 All. 1023.

2. Rs....., damages for withholding the same.
3. In the alternative, Rs.....as compensation for legitimate expenses incurred by the plaintiff in connection with the aforesaid law-suit.

PLAINT.

211.

CHARGE

Created by Act of Parties.

CLAIM to enforce Charge created in a Partition Deed. (x)

1. The plaintiff and the first and second defendants are brothers.
2. In 19..., there was a partition among the plaintiff and his said brothers, and the said partition was effected by a registered partition deed dated.....
3. On the date of the said partition deed there was due by the plaintiff and his said brothers to one K. D. a sum of Rs..... under a mortgage decree obtained by him in O. S. No..... of 19..., on the file of the.....
4. By the said partition deed there was a division of the properties and also an apportionment of the aforesaid mortgage debt in the following proportion :

Plaintiff's share	...	...	Rs.....
First defendant's share	...	...	Rs.....
Second defendant's share	...	...	Rs.....

The properties allotted on partition to the first and the second defendants are respectively specified in Schedule A and B hereto.

(x) Reference: *Abdul Razak v. Abdul Rahiman*, A. I. R. 1933 Mad. 715

(The indemnity clause in the partition deed undoubtedly creates a charge in favour of the person for any excess sum paid by him over and above his share of the debt, on the properties of the other sharers in proportion to the sums which they should have paid but defaulted to pay. The express undertaking to re-imburse the person who sustains such loss, by paying the amount found due to such person from out of the specific properties allotted in the partition deed to their respective shares is sufficient to create a charge on those properties within the meaning of Section 100, Transfer of Property Act The purchaser defendant must be deemed to have made the purchase with full knowledge of the arrangement come to among the brothers as set forth in the partition deed and, at any rate, he must be deemed to have had constructive notice of the covenants contained therein. He being an

5. The said partition deed also provided that each of the brothers should pay his share of the said debt together with proportionate interest thereon at 6 *per cent.* out of the specific properties allotted to him and that in case the properties allotted to the share of one brother should be made liable for the debts due by the other brothers they and the properties falling to their shares should be liable for the loss caused thereby.

6. The first and the second defendants defaulted in payment of their respective shares aforesaid, whereupon the properties allotted to the plaintiff's share were brought to sale.

7. In order to avert the said sale the plaintiff was obliged to deposit into Court on.....Rs..... including interest and subsequent costs in full satisfaction of the aforesaid mortgage decree.

8. Out of the said sum of Rs..... the first defendant is liable to pay Rs..... and the second defendant Rs.....

Particulars :

9. After the partition aforesaid the first defendant sold items 1 and 2 of Schedule "A," and second defendant, items 3 and 6 of Schedule "B," to the third defendant by registered sale deeds datedand.....respectively.

The plaintiff claims—

(1) Rs.....from the first defendant and Rs..... from the second defendant.

(2) Declaration that the properties specified in Schedules "A" and "B" hereto are respectively subject to a charge in plaintiff's favour for the recovery of the aforesaid sums.

(3) Decree under O. xxxiv, r. 4 of the Civil Procedure Code in Form No. 5 A in Appendix D to the first Schedule thereto as amended by Act XXI of 1929.

attestor to the partition deed and mention of that deed having been made in every one of the sale deeds obtained by that defendant his omission to ascertain the contents of the partition deed should be construed as wilful absention from inquiry which he ought to have made.),

- (x) **Bona fide purchaser for value without notice—onus of proof :** It is for the defendant to take the defence and to prove that he is a *bona fide* purchaser for value without notice. Cf. *Akhoy Kumar v. Corporation of Calcutta*, (1915) I. L. R. 42 Cal. 625, 636.
- (x) For Registration, Limitation, Form of decree, Rights of charge-holder and Conditions of charge, see notes under Form No. 212.

PLAINT.

212.

CHARGE

Created by Act of Parties.

**CLAIM to enforce a Charge for Payment of Annuity, by
a Person in whose Favour the Charge was created
but who was not Party to the Agreement
creating the Charge. (y).**

1. The parties at all material times were and are Mahomedans.
2. On the plaintiff, then a minor, was married to R. K., a son of the defendant.
3. In accordance with the arrangement made between the defendant and the father of the plaintiff on the occasion and in consideration of the marriage of the plaintiff with the said R. K., the defendant executed a document on whereby he agreed to pay the sum of Rs. 500/- a month "in perpetuity" to the plaintiff for her *Kharch-i-pandan* from the date of the marriage, and made the payment of her allowance a charge on the immovable properties therein specified. Particulars of the said properties are also specified in Schedule "A" hereto.
4. The defendant has not paid the plaintiff her allowance since

Particulars of claim :

Arrears of monthly allowance from to
..... .. Rs.

5. The plaintiff attained majority on

(y) Reference : *Khawaja Muhammad Khan v. Husaini Begam*, (1910) I. L. R. 32 All. 410 P. C. (It was contended, on the authority of *Tweddle v. Atkinson*, (1861) I. B. & S. 393, that as the plaintiff was no party to the agreement she cannot take advantage of its provisions. With reference to this it is enough to say that the case relied upon was an action of assumpsit, and that the rule of common law on the basis of which it was dismissed is not, in their Lordships' opinion, applicable to the facts and circumstances of the present case. Here the agreement executed by the defendant specifically charges immovable property for the allowance which he binds himself to pay to the plaintiff; she is the only person beneficially entitled under it. In their Lordships' judgment, although no party to the document, she is clearly entitled

The plaintiff claims—

- (1) Rs.....
- (2) A declaration that the said allowance is charged on the properties specified in the schedule hereto.
- (3) Decree under O. xxxiv, r. 4, of the Civil Procedure Code in Form no. 5A in Appendix D to the first Schedule thereto, as amended by Act XXI of 1929.

PLAINT.

213.

CHARGE

Created by Operation of Law.

CLAIM by Corporation to enforce Statutory Charge for Payment of Consolidated Rates. (z).

1. Premises no....., Calcutta, is debutter property belonging to Idol, of whom the defendant A. B. is the

to proceed in equity to enforce her claim. By the agreement on which the present suit is based the defendant binds himself unreservedly to pay to the plaintiff the fixed allowance.).

- (y) **Rights of a charge-holder :** Sec. 100 of the Transfer of Property Act, 1882, provides : "Where immovable property of one person is by act of parties or operations of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property : and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge."
- (y) **Form of decree :** See *Corporation of Calcutta v. Kumar Arun Chandra Singha*, (1933 34. 38 C. W. N. 917, 920.
- (y) **Limitation :** 12 years under Art. 132, Ind. Lim. Act.
- (y) **Registration :** The words "any right, title or interest" in Sec. 17 (i) (b) of the Indian Registration Act include a mere charge on immovable property as it is a right in immovable property : *Imperial Bank of India v. Bengal National Bank*, (1931) I. L. R. 58 Cal. 136 ; *Rangampudi v. Venkateswarlu*, A. I. R. 1934 Mad. 713 ; *Amruttal Gordhandas v. Kesharlal Kuberdas*, A. I. R. 1936 Bom. 495 ; cf. *Muina v. Bachechi*, (1936) I.L.R. 28 All. 655 (case of charge created by decree).
- (y) **Charge created by act of parties—conditions :** In order to make a property security for payment of money, the property must be specified and not described in general terms and a charge cannot be created on a future contingency : *Mohini Debi v. Purna Sashi*, (1931-32) 36 C. W. N. 153 ; cf. *Kesari Mal v. Tansukh Rai*, A. I. R. 1934 Lah. 765.
- (z) **Reference :** *Corporation of Calcutta v. Kumar Arun Chandra*

shebait. At all material times the defendant C. D. was the lessee and the defendant E. F. the mortgagee of the said C. D. in respect of the said property.

2. The municipal rates and taxes amounting to payable to the plaintiff Corporation in respect of the said premises are in arrears.

Particulars of Claim :

The plaintiffs claim—

(1) Rs.....

(2) A declaration that the plaintiffs have a first charge on the premises no..... for this sum with interest at 6 per cent.

(3) Decree under O. xxxiv, r. 4, of the Civil Procedure Code in Form No. 5A in Appendix D to the first Schedule thereto, as amended by Act XXI of 1929.

Singha, (1933-34) 38 C. W. N. 917 (In this suit the defence of the shebait defendant was that the Corporation had similar charges over other properties and hence under Sec. 67A of the Transfer of Property Act, the Corporation must enforce all such charges in one suit. *Held* : by his Lordship Lord-Williams J., at p. 919, "Careful examination of the terms of Sec. 67A makes clear, in my opinion, that it was not intended to apply to securities created by operation of law, such as statutory charges, but only to consensual securities which are created by act of parties... Moreover, the language of the section is inappropriate in other respects to a statutory charge such as that created by sec. 205 of the Calcutta Municipal Act..... It is true that the logical result of this construction of Sec. 67A is, that sec. 67 also, which contains the same words 'in the absence of a contract to the contrary', does not apply to securities created by operations of law, and thus the owners of such securities cannot avail themselves of the benefit of the provisions therein contained. But the Act was not intended to be exhaustive and does not profess to be a complete Code, and does not deal with the transfer of movables, or charges upon movables, such as are referred to in sec. 205, Calcutta Municipal Act. In any case not covered by the Act, the Court is entitled to apply rules of English Law which are not inconsistent with the Act and the holder of a statutory charge is entitled to a decree for sale. For all these reasons, I entertain no doubt that sec. 67A does not apply to statutory charges created under the provisions of sec. 205 of the Calcutta Municipal Act."). Cf. *Akhoy Kumar v. Corporation of Calcutta*, (1915) I. L. R. 42 Cal. 625,

PLAINT.

214.

CHARGE

Created by Decree of Court.

CLAIM to enforce Charge created by a Decree of Court. (a)

1. One D. B., a Hindu governed by the Mitakshara, died February 2nd., 1920, survived by the plaintiff, his widow, and his two brothers, defendants A. B. and C. B.

2. In 1921, A. B. instituted a suit for partition in the Court of.....(Suit No. of 1921) against C. B. and the plaintiff herein.

3. By the compromise decree dated.....1922, and made in the said suit, the properties, subject-matter of the suit, were divided between A.B. and C. B., and the plaintiff herein was declared entitled to receive from them Rs. 50 *per* month by way of maintenance, and a charge was created on the properties respectively allotted to the said A. B. and C. B. for payment of the said maintenance. The properties allotted to A. B. are specified in Schedule 'A,' and those allotted to C. B. are specified in Schedule 'B,' hereto.

4. By an indenture of conveyance dated.....1925, A. B. sold items 1 and 2 of the said Schedule 'A' to the defendant T. D.

5. The plaintiff has not received any maintenance from the defendants A. B. and C. B. or from either of them since November 1935.

Particulars of claim :

Arrears of maintenance from November 1935 upto.....Rs.....

The plaintiff claims—

1. Rs.....arrears of maintenance.

2. A declaration that the properties purchased by the defendant T. D. are subject to the charge in plaintiff's

- (a) **Reference:** *Hemlata Debi v. Bhowani Charan Roy.* (1934-35) 39 C. W. N. 725 (In this case a charge was created by a compromise decree and the suit was for recovery of arrears of maintenance for 11 years and 9 months and for a declaration that the alienations of the properties subsequent to the decree were subject to the charge. Several defences were raised, first, the suit was barred by Statue of Limitation and was not maintainable having regard to sec. 47 of the C. P. Code and that

favour created by the decree dated.....in Suit No..... of.....aforesaid.

3. Decree under O. xxxiv, r. 4 of the Civil Procedure Code in Form No. 5 A in Appendix D to the First Schedule thereto, as amended by Act XXI of 1929.

DEFENCE.

215.

CHARGE

Created by Act of Parties.

GENERAL DEFENCES to Claim to enforce Charge created by Act of Parties. (b).

1. The words used in the document sued on do not amount to a charge.
2. The properties on which the alleged charge was intended to be created are not specified.
3. Further or in the alternative, the charge, if any, was created on a future contingency.
4. The document creating the charge requires registration and is not registered.
5. The suit is barred by the provisions of Section 47 of the Civil Procedure Code.

the purchaser defendants not having notice of the charge are not bound by the charge and consequently there should be no declaration as against them. *Held* by Mitter and Patterson JJ., (1) the suit was in time having been instituted within 12 years of the date when the arrears fell due ; (2) the decree was merely a decree declaring a charge and there was no express provision in the decree that the decreeholder would be entitled to realise his dues by execution of the decree and the suit was competent ; (3) the question of notice does not arise when the charge is created by the decree). Cf. *Hari Sankar Rai v. Tapaikuer*, A. I. R. 1926 Pat 31.

(b) **Condition of a valid charge :** *Mohini Debi v. Purna Sashi*, (1931-32) 36 C. W. N. 153. Cf. *Kesari Mal v. Tansukh Rai*, A. I. R. 1934 Lah. 765.

(b) **Want of registration :** *Imperial Bank of India v. Bengal National Bank* (1931) 1 L. R. 58 Cal. 136 ; *Rangampudi v. Venkateswarlu*, A. I. R. 1934 Mad. 713.

(b) **Bona fide purchaser for value without notice :** *Akhoy Kumar v. Corporation of Calcutta*, (1915) 1 L. R. 42 Cal. 625.

6. The plaintiff's claim, if any, is barred by the Statute of Limitation.

7. (If the written statement is on behalf of a purchaser-defendant, add—) This defendant is a *bona-fide* purchaser for value without notice of the charge alleged.

PLAINT.

216.

CLUBS.

Members' Club.

CLAIM by Seller against Members of a Club who authorised the Secretary to order Goods. (c)

1. At all material times the defendants were among the members of the managing committee of a club at....., known as.....club, and at all material times the defendant no. 1 was the secretary of the said club.

2. On.....the defendant no. 1 verbally represented to the plaintiff that he as the secretary of the club had been authorised by a resolution passed at a meeting of the managing committee of the said club held on.....and at which the said members were present to place an order with the plaintiff for 20 tons of portland cement at rupees.....*per* ton.

3. The plaintiff on the faith of the said representation and induced thereby supplied the said cement at the request of the defendant no. 1 to the said club on.....

(c) **Liability of members of club:** A creditor may sue individually the members who actually authorised the order: See 'Clubs' under 'Classes of Persons', Part II, Chap. IX, pp. 281, 282. Cf. Sec. 235, Ind. Cont. Act.

(c) **Decree against Managing Committee, if binds association:** When a decree is made against named members of the managing committee and provides that it is not to be executed against them personally, it amounts to a decree against them in their representative capacity and will bind the association even if the managing committee change after the decree. Such a decree can be executed against the assets of the association at the time of execution, provided all the members of the present managing committee are brought on the record before execution is proceeded with: *Tara Prasanna Ganguly v. Nares Ohandra*, (1932-33) 37 C. W. N. 495.

4. The defendants have not paid the price of the said coal and are disowning liability therefor.

The plaintiff claims—

Rs.....against all the defendants, alternatively, against the defendant no. 1 as damages for misrepresentation.

PLAINT.

217.

CLUBS.

Members' Club.

CLAIM by Creditor against Members of a Club who authorised the Secretary to borrow Money on a Promissory Note. (d)

1. At all material times the defendants were the members of the governing body of an association at.....known as the Young Men's Literary Association, and at all material times the defendant no. 1 was the secretary of the said association.

2. On or about....., the defendant no. 1 verbally represented to the plaintiff that he had been authorised by a resolution passed at a meeting of the governing body of the said association held on.....to borrow Rs. 1000 with interest not exceeding rupees nine *per cent.* for purposes of the said association.

3. On the faith of the said representation and induced thereby the plaintiff on.....lent one thousand rupees to the defendants through the defendant no. 1, payable on demand with interest at rupees eight *per cent. per annum.*

4. By way of security for the said loan the defendant no. 1 as secretary of the said association executed the same day a promissary note for Rs. 1000 in favour of the plaintiff payable on demand with interest at the aforesaid rate.

(d) **Liability of the defendants :** The secretary having executed the promissory note in his capacity as secretary is not personally liable on the note. He can only be made liable on the original consideration, so as to the members of the governing body who authorised the secretary to incur the loan. If the plaintiff fails to prove the said authority he may get a decree against the secretary personally if he proves misrepresentation against the secretary. See 'Club' under 'Classes of Persons', Part II, Chap. IX, pp. 259-267.

5. The defendants have not paid the said loan, or any part thereof and are disowning personal liability therefor.

Particulars of claim :

.....	19..., Principal sum ...	Rs. 1000
	Interest from	
	to..... at 6 per cent....	Rs.....
	Total	Rs.....

The plaintiff claims—

Rs.....from the defendants on the original consideration, alternatively, against the defendant no. 1 as damages for misrepresentation.

PLAINT.

218.

CLUBS.

Members' Club.

CLAIM by Creditor against the Secretary of a Club. (c).

1. At all times material hereto the defendant was the secretary of a club known as the Sporting Union of.....

2. On, the plaintiff, at the request of the defendant and on his verbal promise (or, in writing, as the case may be) to remain personally liable for the price, sold and delivered the following articles to the said club.

Particulars of claim :

10 seers of sugar	...	...	...	Rs.....
20 seers of flour	...	...	...	" .....
15 seers of ghee	...	...	...	" .....

Total Rs.

The plaintiff claims—

Rs.....

(c) **Personal liability of members of a club :** No member of a Club is liable to creditors for the debts of a club except so far as by contract or dealing he may have made himself personally liable : see 'Club' under "Classes of Persons", Part II, Chap. IX, p. 260.

PLAINT.

219.

CLUBS.

Members' Club.

**CLAIM by Expelled Member for Declaration that
he is still a Member of the Club. (f).**

1. At all times material hereto the plaintiff was a member of a social club at known as the Club.

2. The defendants are members of the committee of the said club and are sued as representing themselves and all the other members of the said club.

3. The Rules of the said club contain the following provisions :

"Rule 12 : The management of the club shall be deputed to a committee of not more than ten members, who shall be elected at the annual general meeting. In addition thereto the president and treasurer shall be *ex officio* members of the committee."

"Rule 15 : The committee may at any time for any special purpose call a special general meeting, and they shall do so forthwith upon the requisition in writing of any twenty members stating the purposes for which the meeting is required."

- (f) **Cause of Action :** The plaintiff has to prove either that the rules are contrary to natural justice or that what has been done is contrary to the rules : *Dawkins v. Antrobus*, (1891) 17 Ch. D. 615. The phrase "the principles of natural justice" can only mean in this connection the principles of fair play so deeply rooted in the minds of modern Englishmen that a provision for an enquiry necessarily imports that the accused should be given his chance of defence and explanation : *Per Maugham J.*, in *Maclean v. The Workers' Union*, (1929) 1 Ch. 602. "Interference by the Court would not be justified unless the following conditions are satisfied, namely, that the rules providing for expulsion have been strictly observed, that the member expelled has had due notice and full opportunity of answering the charges made against him, that there had been no want of good faith in the exercise of power and expulsion and that the decision arrived at is not manifestly absurd." : Hals., 2nd. Edn., Vol. 4, p. 493. para. 912. Cf. *Ambatal Sarabhai v. Phiroz H. Antia*, A. I. R. 1931 Bom. 35. Cf. also *Siddheswar Dutt v. Maharaja Sir Manmatha Nath Roy Chowdhury* (1936-37) 41 C. W. N. 755 (where his Lordship Panckridge J. refused to grant an interlocutory injunction on the ground that there was no pecuniary or proprietary interest involved and because the question was merely

Rule 18 : It shall be the duty of the committee, if at any time they shall be of opinion that the interests of the club so require, by letter to invite any member to withdraw from the club within a time specified in such letter, and, in default of such withdrawal, to submit the question of his expulsion to a special general meeting to be held within six weeks after the date of such letter. At such meeting if, for sufficient reasons, two-thirds of the members present shall vote for his expulsion he shall thereupon cease to be a member of the club."

4. On, a special general meeting was held for the purpose of considering the question of expulsion of the plaintiff. At the said meeting the plaintiff was not allowed to offer an explanation of his conduct verbally or in writing and the reasons for the plaintiff's expulsion were not allowed to be discussed by the Chairman of the meeting, who simply put the resolution relating to the plaintiff's expulsion to vote and declared the same carried by two-thirds of the votes of the members present.

5. The plaintiff's expulsion as aforesaid is not in accordance with Rule 18 of the Rules of the said club.

6. Alternatively, the said rule, in so far as it permits expulsion of a member without due enquiry into his conduct is contrary to natural justice and is therefore void and of no effect.

The plaintiff claims—

(1) A declaration that the said resolution passed at the special general meeting of the said club expelling him from the club is null and void.

(2) A declaration that he is still a member of the said club.

(3) An injunction to restrain the defendants, their servants or agents from interfering with his enjoyment of the use and benefit of the said club.

one of personal status). See 'Club' under "Classes of Persons," Part II, Chap. IX, pp. 259-267.

- (f) **Reliefs** : For declaration that the resolution expelling the plaintiff as a member of the club is null and void, see *Gray v. Allison*, (1909) 25 T. L. R. 531. For declaration that the plaintiff is still a member of the club, see *Young v. Ladies Imperial Club*, (1920) 2 K. B. 523. For injunction restraining the defendants from interfering with the plaintiff's enjoyment of the use and benefit of the club, see *D'Arcy v. Adamson*, (1913) 29 T. L. R. 367.

DEFENCE.**220.****CLUBS.**

Members' Club.

DEFENCE by Members of a Club to Claim by Creditor alleging that they authorised the Secretary to borrow. (g)

1. At no material time the defendants nos.....and.....were members of the governing body of the association referred to in paragraph 1 of the plaint.

2. At no time these defendants or any of them authorised the defendant no. 1, the secretary of the said association, to borrow Rs. 1000/- or any sum with or without interest as alleged or at all. These defendants do not admit the representation alleged in paragraph 2 of the plaint.

3. If, which is not admitted, the defendant no. 1 made the alleged representation he did so falsely and without any authority from these defendants or any of them. These defendants do not admit the promissory note mentioned in paragraph 4 of the plaint and they deny that they or any of them received any consideration for the alleged promissory note.

DEFENCE.**221.****CLUBS.**

Members' Club.

DEFENCE by Secretary of a Club to Claim by Creditor against him personally. (h)

The defendant ordered the goods mentioned in paragraph 2 of the plaint as the secretary of the club. He did not make the alleged or any promise that he would remain personally liable for the price of the goods.

(g) This is a defence to Form No. 217.

(h) This is a defence to Form No. 218.

PLAINT.

222.

COLLISION.

CLAIM for Damages for personal Injury caused by Collision of a Motor Car with the Plaintiff's Bicycle. (i)

1. On.....19..., at about 8 A. M., the plaintiff was cycling along.....Road when a motor car bearing registered no..... driven rashly and negligently by the defendant, collided with the plaintiff's bicycle at.....and caused the plaintiff severe personal injuries :

Particulars of negligence :

The said negligence consisted in driving the motor car at an excessive speed, and upon the wrong side of the road etc.

Particulars of injury :

As a result of the collision the plaintiff was knocked down, and sustained a blow on the left forehead with severe injury to the left frontal lobe of the brain, a bruise on the left hip and scratches upon the chest and was rendered unconscious, for which he received medical treatment at first in.....hospital for.....days and then at home. The concussion and the unconsciousness which supervened brought on bronchial pneumonia in one of his lungs, and as a consequence of his injuries, he is suffering from traumatic dementia and traumatic epilepsy, and fibrosis of the lungs. He has been attended by a nurse and it is necessary that he should receive constant nursing and attention for the rest of his life.

-
- (i) **Reference :** *Roach v. Yates*, (1939) 1 K. B. 256 (*Per Greer L. J.* at p. 266 : In awarding damages, one must take a reasonable view of all matters which have to be considered. We have not to give what will be an absolute and perfect compensation for all the injuries which the unfortunate plaintiff in this case has suffered. We are not to give him as damages the price that he would have accepted in exchange for the life he preferred to go on living. There is no question about the amount of damages attributable to the loss of wages and expenses up to the date when the trial took place. In addition there is compensation payable for the other damages and losses. The sum of £6,542 is a reasonable compensation. *Per Slessor L. J.* at 271 : Care must be taken that the plaintiff is not compensated twice over, once on the basis of the wages

2. At the time of the accident the plaintiff was 33 years of age and was living a healthy, happy and vigorous life and was employed at.....as a.....on a monthly salary of Rs..... As a result of the accident, the plaintiff is permanently and totally incapacitated for any form of work and his normal expectation of living for another.....years has been reduced by at least half.

3. Since the accident the plaintiff's wife.....has been attending on the plaintiff as a nurse and on.....19..., she resigned her job at.....where she was getting a salary of Rs.....a month, so that she might attend on the plaintiff as a nurse day and night.

5. The loss of wages of the plaintiff and of his wife are continuing and the plaintiff shall have to incur further expenses for medical and surgical treatment.

6. As a result of the accident the plaintiff has suffered damages.

Particulars of special damage :

Loss of wages of the plaintiff up to date

at Rs.....per month.....Rs...

Loss of wages of the plaintiff's wife up to

date at Rs.....per month.....Rs...

Medical and nursing expenses up to date.....Rs...

Cost of repairs of the bicycle.....Rs...

Total...Rs....

In addition to the said special damage the plaintiff is also entitled to the following damages :

(a) Rs.....as compensation on the basis of the wages which he would have received in the future if his life had extended to its normal period, alternatively, on the basis of the loss of expectation of life.

(b) Rs.....on the basis of the loss of wages in future, of his wife.

which he would have received in the future if his life had extended to its normal period, and also for the loss of expectation of life. Cf. *Bailey v. Howard*, (1939) 1 K. B. 453 (*Per* Scott L. J. at p. 459 : As regards damages for loss of expectation of life, it should be left to the appreciation of the jury to fix a figure. It should not be hopelessly too large or hopelessly too small), following *Rose v. Ford*, (1937) A. C. 826. Cf. *Flint v. Lovell*, (1935) 1 K. B. 354.

(c) Rs.....as probable additional medical and nursing expenses.

(d) Rs.....as compensation for physical injuries and physical and mental suffering.

The plaintiff claims—

1. Rsby way of special damage, and
2. Rs.....as compensation payable for the other damages and losses.

PLAINT.

223.

COLLISION.

CLAIM for Damages for Mental Shock caused by Collision. (j)

1. On..... a funeral procession was going along
... Road,.....The hearse was carrying a coffin containing the corpse of a man named It was being followed by a carriage in which were the plaintiff A. B., the aged mother, and the plaintiff C. D., the aged uncle, of the deceased.

2. At..... a tramcar rashly driven by a servant of the defendant corporation collided with the hearse so violently as to break its glass side, and overturn the coffin. The plaintiff A. B. saw the actual impact of the tramcar with the hearse and the plaintiff C. D. saw the effects of it immediately after it happened.

3. The plaintiffs were horrified by the accident and in con-

- (j) **Reference :** *Owens v. Liverpool Corporation*, (1939) 1 K. B. 394. (The right to recover damages for mental shock caused by the negligence of a defendant is not limited to cases in which apprehension as to human safety is involved. In the present case the shock was said to have been occasioned, not by any fear for human life, but by the imperilment of the coffin containing the corpse of a near relative. It may be that the plaintiffs are of that class which is peculiarly susceptible to that luxury of woe at a funeral so as to be disastrously disturbed by any untoward accident to the trappings of mourning. But one who is guilty of negligence to another must put up with idiosyncracies of his victim that increase the likelihood or extent of damage to him : it is no answer to a claim for a fractured skull that its owner had an unusually fragile one).

sequence the plaintiff A. B. suffered from severe shock and collapse and the plaintiff C. D. from severe shock.

4. Each of the plaintiffs has suffered injury in the nature of shock.

Each of the plaintiffs claims—

Rs.....damage.

PLAINT.

224.

COLLISION.

CLAIM for Damages for Collision of Ships. (k)

1. The plaintiff has suffered damage from injuries to his ship, the....., and the cargo on board thereof, by a collision with the ship, the....., caused by the negligent navigation thereof by the defendant or his servants on the river....., on the19...

Particulars of negligence :

Particulars of loss and expenses :

(1) Charges of....., shipwrightsRs.....

(2) Loss of use of ship from.....19...,

to.....19..., at..... *per*..... ..Rs.....

Particulars of damage to cargo :

The plaintiff claims—

Rs.

- (k) This Form is based on the Form given in Bullen & Leake, 8th Edn., pp. 493,494 and R. S. C. 1883, App. C, Sect. VI, No. 5 and Form No. 534 Daniell's Chancery Forms, 6th Edn., p. 239.
- (k) Collision of a ship with another ship at her moorings: In such a case defendant must prove that there was no fault on his part but the collision was due to an inevitable accident: *Captain W. F. Wake-Walker v. Steamer Colin W. Ltd.*, A. I. R. 1937 P. C. 205. Cf. *American Mail Line Ltd. v. Motor Vessel "Afrika,"* A. I. R. 1937 P. C. 168 (where both vessels were guilty of negligent navigation).

DEFENCE.

225.

COLLISION.

**DEFENCE to Claim for personal Injury caused by Collision
of the Motor Car driven by Defendant with the
Plaintiff's Bicycle. (1)**

1. The defendant denies that he was guilty of the alleged or any negligence. He denies that he was driving the said motor car at an excessive speed or on the wrong side of the road, as alleged or at all.

2. The alleged injury was not caused by any negligence on the part of the defendant.

3. There was contributory negligence on the part of the plaintiff.

Particulars :

(Here set out the particulars of facts relied on as constituting contributory negligence).

Or,

The alleged injury arose from inevitable accident.

Particulars :

- (1) This is a defence to Form No. 222.
- (1) **Particulars of contributory negligence and of, inevitable accident** must be given in the pleading; *Wekelin v. L. & S. W. Railway Co.*, (1886) 12 A. C. 41, 52 (contributory negligence); *Martin v. M' Taggart*, (1906) 2 I. R. 120. See 'Contributory Negligence' under "Special Defences," Part II, Chap. XVII, p. 400.
- (1) **Burden of proof of negligence**: In a suit arising out of a collision case, the plaintiff who alleges negligence on the part of the defendant is bound to prove it. He must stand or fall by the averments he makes in his plaint. He cannot be allowed to improve upon his case on something that springs up in the evidence of the defendant, for this might work a great hardship to the defendant who has properly directed his evidence to the case mentioned in the pleadings: *J. D. Haywood v. F.M. Huggins*, A. I. R. 1937 Sind. 118.

PLAINT.

226.

COMPANIES.

CLAIM by a Company against Shareholder for Allotment Money. (m).

1. The plaintiff company is a company incorporated under the Indian Companies Act, 1913.

2. On 19..., the defendant applied for 100 shares of Rs. 10 each in the capital of the plaintiff company and at the same time he paid Rs. 2 on each share. In his application he offered to pay a further sum of Rs. 2 on each share on allotment with interest at the rate of 5 *per cent.* from the day appointed for payment thereof until the time of actual payment.

3. Pursuant to the resolution in that behalf the board of directors of the company on allotted to the defendant

(m) **Cause of action:** An application for shares is an offer and like any other offer must not only be accepted by the acceptance but must be communicated to the person making the offer. A mere entry of a shareholder's name in the company's register is insufficient to establish that an allotment of shares has in fact been made: *Official Liquidator v. Kanniram*, A. I. R. 1933 Mad. 320. Cf. *Changa Mal v. The Provincial Bank*, (1914) I. L. R. 36 All. 412; *Gunn's case*, (1867) 3 Ch. App. 40; *Ritso's case*, (1877) 4 Ch. D. 774. "There may be a valid executory contract for the allotment of shares constituted by offer and communicated acceptance before allotment is made. If, however, the only facts are that there is application for shares to a company, and nothing further is done by the company but allotment, there is no concluded contract until the allotment is communicated to the applicant." : *Per Lord Atkin in Bai Mangu v. Bharatkhand Cotton Mills*, A. I. R. 1930 P. C. 134.

Although in the case of a person who subscribes to the memorandum of association of a company, no separate application for shares is necessary, yet an express allotment of shares to the subscribers is necessary in order to give rise to liability to pay up the value of the share. Where there has been no valid allotment of shares to the subscriber, liability to pay up value of share does not arise: *Synemodelus v. Vannamuthu*, A. I. R. 1939 Mad. 498; cf. *Vishwanath Prasad v. Holyland Oinetone*, A. I. R. 1939 All. 739. Cf. *Alexander v. Automatic Telephone Co.*, (1900) 2 Ch. 56 (If the directors subscribe the memorandum for shares it is their duty not to favour themselves, but to make calls on their own shares *pari passu* with the other shares of the class.).

100 shares in the capital of the plaintiff company as applied for by him, and by a letter dated 19..., the plaintiff company informed the defendant about the same and required him to pay the sum of Rs. due on such allotment on or before 19....

4. The defendant has not paid the said sum or any part thereof.

Particulars of claim :

The amount due on allotment of					
100 shares	...	...	...	...	Rs. 200
Interest at 5 per cent. from					
..... to .....	...	...	...	...	Rs.....
Total amount...					Rs.....

The plaintiff claims—

- (1) Rs.....
- (2) Further interest at 5 per cent. until payment.

PLAINT.

227.

COMPANIES.

CLAIM by a Company against Shareholder for Calls. (n).

1. The plaintiff company (hereinafter referred to as 'the company') is a company limited by shares and was incorporated under the Indian Companies Act, 1913.

2. The defendant is a member of the company and is a registered holder of 50 shares of Rs. 100 each in its capital. The said shares are paid up only to the extent of Rs. 10 per share.

- (n) **Liability to pay calls :** When a call is made it becomes a debt and is realisable as such : Sec. 21, Ind. Comp. Act, 1913. A call does not bind a shareholder until he receives notice of the call. Where in a joint stock company the Articles of Association empower the board of directors to make calls upon its shareholders for the money unpaid on their shares and fix the liability on the shareholders to pay the amount at the time and place appointed, the company can make such calls only by a resolution of the board of directors and such resolution must indicate the amount of the call and the time and place at which, and

3. The articles of association of the company contain the following clauses numbered 12 and 14 :

"12. The directors may from time to time make calls upon the members in respect of any moneys unpaid on their shares, provided that no call shall exceed one-fourth of the nominal amount of the share or be payable at less than one month from the last call; and each member shall (subject to receiving at least fourteen days' notice specifying the time or times of payments) pay to the company at the time or times so specified the amount called on his shares".

"14. If a sum called in respect of a share is not paid before or on the day appointed for payment thereof the person from whom the sum is due shall pay interest upon the sum at the rate of five *per cent.* from the day appointed for the payment thereof to the time of the actual payment."

4. In exercise of the powers conferred on the directors of the company as aforesaid they duly made, pursuant to the resolution in that behalf, a call on members, including the defendant, of Rs. 5 *per share* payable on or before the 19... at the office of the company.

5. Due notice of the said call was given to the defendant on and he was required to pay the said call within the time aforesaid.

6. The defendant has not paid the said call or any part thereof.

Particulars of claim :

The amount of the said call	Rs.....
Interest at 5 <i>per cent.</i>	
from..... .. to	Rs.....
<hr/>	
Net amount due ...	Rs.....

The plaintiff claims :—

(1) Rs.....

(2) Further interest at 5 *per cent.* until payment.

* the person to whom, it is to be paid. Even if a notice is issued subsequently to the shareholders, it cannot cure any defect in this respect : *Pioneer Alkali Works v. Amiruddin*, (1926) I. L. R. 50 Bom. 481.

(n) Limitation : Under Art. 112, Ind. Lim. Act, 3 years from the date when the call is payable,

PLAINT.

228.

COMPANIES.

CLAIM by a Company against a Shareholder for Allotment Money and Calls after Forfeiture of Shares. (o)

1. The plaintiff company (hereinafter called 'the company') is a company incorporated on.....19..., under the provisions of the Indian Companies Act VII of 1913.

2. The capital of the company is Rs. 25,00,000 divided into 25,000 ordinary shares of the value of Rs. 100 each.

3. On.....19..., the defendant applied for 100 shares in the capital of the said company and duly paid the application money thereon, viz., Rs. 1000.

4. Pursuant to a resolution in that behalf the Board of Directors of the company allotted to the defendant 100 shares for which he had applied and by a letter dated.....19..., they informed the defendant about the same and required him to pay the sum of Rs.....due on such allotment on or before.....19...

5. By virtue of Article.....of the Articles of Association of the company authorising the directors of the company to make calls on all shares not fully paid up and to charge interest at the rate of 5 per cent. from the day appointed for the payment thereof to the time of the actual payment, the Board of Directors by a resolution passed on..... 19..., made a first call of Rs. 15 per share upon the members of the said company including the defendant, payable on or before.....19... Due notice in writing, of the said resolution was given to the defendant and he was required to pay the

- (o) **Reference :** *Habib Rowji v. Standard Aluminium and Brass Works*, (1925) I. L. R. 49 Bom. 715 (There was a special contract whereby the defendant agreed that in the event of his shares being forfeited he would be liable to pay to the company all the moneys that were due by him for allotment calls and further calls made on the shares allotted to him with interest, and the cause of action arose when the company forfeited the shares, and therefore the suit to recover what was due from the defendant on his shares was within time, if filed within 3 years of the date of forfeiture.), followed in *Maneklal v. Suryapur Mills Co.* (1928) I. L. R. 52 Bom. 477.

amount of the said call on or before19..., at the office of the company.

6. By another resolution passed on.....19..., a further call of Rs. 15 *per share* payable on.....was made upon the members of the company, including the defendant and due notice thereof was given to the defendant on.....19...

7. The defendant did not pay the amount due on the allotment or on the calls made by the company or any money on account thereof.

8. Accordingly, the Board of Directors served a notice datedon the defendant requiring him to pay the moneys due on the allotment and the calls aforesaid with interest thereon in accordance with the provisions of the Articles of Association of the company and stating therein that in the event of non-payment within 20 days from the date of the notice, i.e., on or before.....19..., the directors would forfeit the shares of the defendant and proceed to recover the dues.

9. The defendant failed to make any payment, whereupon by a resolution passed on.....19... by the Board of Directors the shares held by the defendant were duly forfeited in accordance with Article.....of the Articles of Association of the company.

Particulars of claim :

Allotment money	...	Rs...
Amount due on the first call	...	Rs...
Interest thereon at 5 <i>per cent.</i> from.....		
to.....	...	Rs...
Amount due on the second call	...	Rs...
Interest thereon at 5 <i>per cent.</i> from.....		
to.....	...	Rs...
Total amount due	...	Rs...

The plaintiff claims—

(1) Rs.....

(2) Further interest at 5 *per cent.* until payment.

PLAINT.**229.****COMPANIES.****CLAIM by a Shareholder against a Company for Recovery of Dividends. (p)**

1. The defendant company (hereinafter called 'the company') was incorporated on.....under the provisions of the Indian Companies Act, 1913.

2. The capital of the company is Rs. 10,00,000 divided into 10,000 shares of the value of Rs. 100 each.

3. The plaintiff is a registered holder of 50 fully paid up ordinary shares, nos.....to....., in the capital of the company.

4. Pursuant to the recommendation of its directors, the company at a general meeting held on.....declared a dividend of 8 per cent on the shares payable out of the profit for the year endingaccording to the amounts paid on the shares.

5. The company has not paid the plaintiff the dividend declared in respect of his said shares in spite of demand made in writing by the plaintiff on.....

The plaintiff claims—

Rs. 400.

PLAINT.**230.****COMPANIES.****CLAIM against a Company for inducing Plaintiff to apply for and take shares by Fraudulent Statements in a Prospectus. (q)**

1. The defendant company (hereinafter called 'the company') is a company limited by shares and having a nominal capital of

(p) **Limitation :** *Rama Seshayya v. T. Cotton Press*, (1926) I. L. R. 49 Mad. 468 (F. B.) : A suit by a shareholder of a limited company for recovery of arrears of dividend is a claim for debt and is governed by Art. 120, (6 years), Ind. Lim. Act.

(p) **Interest :** No dividend shall bear interest : Ind. Comp. Act, Schedule 1, Table A, Art. 102.

(q) **Action for rescission :** A contract to take shares which has been induced by misrepresentation or suppression of material facts is voidable and

Rs. 1,00,000/- divided into 10,000 shares of Rs. 10/- each. One of the objects for which the company was established was, as stated in the company's memorandum of association, to.....

2. In.....19..., the company issued or caused to be issued a prospectus to the public inviting applications for shares in the capital of the company.

3. In.....19..., the plaintiff applied for and was allotted by the directors of the company 100 shares of Rs. 10/- each in the capital of the company. The plaintiff paid to the company Rs. 2/- *per share* at the time of the application and Rs. 2/- *per share* on allotment thereof.

4. The prospectus contained several false representations of material facts of which the following are the particulars :

(a) The prospectus stated that.....whereas in fact.....

(b) The prospectus stated that.....whereas in fact.....

5. The following facts, which were within the knowledge of the directors of the company, are material, and were not stated in the prospectus :

(a)

(b)

6. The plaintiff subscribed for the said shares on the faith of the said prospectus and induced by and relying on the representations therein contained, and misled and induced by the omission of material facts therefrom as aforesaid.

not void : *Oakes v. Turquand*, (1867) L. R. 2 H. L. 325 ; *Peek v. Gurney*, (1873) L. R. 6 H. L. 377. If a man claims to rescind his contract on the ground that he has been induced to enter into it by misrepresentation, he must rescind it as soon as he learns the facts or else he forfeits all claims to relief : *Sharpley v. Louth, etc., Rail. Co.*, (1876) 2 Ch. D. 663, 685 ; *In re Jagannath Prasad*, A. I. R. 1938 All. 193. A short delay may be sufficient to deprive him of the right : See *Palmer's Company Law Precedents*, 15th Edn., Part I, p. 186.

- (g) **Non-disclosure of material facts :** In the case of an action for rescission, the non-disclosure of a material fact is sufficient to entitle the plaintiff to relief : *Coles v. White City (Manchester) Greyhound Assoon.*, (1929) 45 T. L. R. 230 ; but the plaintiff must show that the omission makes what is stated misleading ; *McKeown v. Boudard & Co.*, (1896) 74 L. T. 712. Cf. *R. v. Kylsant*, (1932) 1 K. B. 442.

7. The plaintiff discovered the misrepresentations and omissions of material facts aforesaid towards the end of June, 19.... On the 18th July 19..., he wrote to the company repudiating the shares aforesaid and demanding refund of the moneys paid by him thereon. The company has not complied with the said demand.

7. Had the plaintiff been aware of the falsity of the representations in the prospectus aforesaid and if all the material facts had been stated therein, he would not have subscribed for any share in the company.

8. On.....19..., the company made a call of Rs..... per share on the defendant.

The plaintiff claims :—

(1) To have the contract to take the shares aforesaid rescinded and to have his name removed from the register of members of the company.

(2) Repayment of Rs.....with interest thereon at 6 per cent. per annum.

(3) An injunction to restrain the company from making or attempting to enforce by suit or otherwise any call in respect of any of the said shares.

PLAINT.

231.

COMPANIES.

CLAIM by a Shareholder for a Declaration that a Special Resolution passed at a General Meeting is *ultra vires* and not binding on the Company. (r)

1. The defendant company (hereinafter called "the company") is a joint stock company incorporated under the Indian Companies Act (VII of 1913).

2. The registered share capital of the company is Rs. 30,00,000 divided into 3,00,000 shares of Rs. 10/- each.

(r) **Reference:** The *Dhakeswari Cotton Mills v. Nil Kamal Chakravarty*, (1936-37) 41 C. W. N. 1137 (*Per* Nasim Ali and Remfry J.J. "It is not necessary as a matter of law, formally to ascertain the views of the majority before proceeding, but nevertheless, if no reason is given

3. The defendants other than the company at all material times were and are the directors of the company of whom defendants nos. 2 and 3 were and are the managing directors.

4. The plaintiff at all material times was and is a registered holder of 200 shares in the capital of the company.

5. Article 63 of the Articles of Association of the company provides that "the monthly salary of the managing director or managing directors in any case shall not exceed Rs. 1,000/- and the rate of commission payable to them shall not exceed more than 5 per cent. of the net profits."

6. On..... 19..., a general meeting of the share-holders of the company was held to consider a special resolution for altering Art. 63 of the Articles of Association of the company, with the object of increasing the monthly allowance of the managing director or managing directors to Rs.1500/- and the commission to $7\frac{1}{2}$ per cent. of the net profits, if the profits would exceed 10 per cent. of the subscribed capital of the company. At this meeting the Chairman declared on a show of hands that 218 votes were for and 78 against the resolution and that the resolution was carried.

7. The said special resolution is *ultra vires* in as much as less than three-fourths of the members present voted for the same.

The plaintiff claims :—

(1) A declaration that the special resolution aforesaid is *ultra vires* and not binding on the company.

(2) An injunction to restrain the defendant company and the other defendants from acting upon the said resolution.

for the corporation not being consulted before litigation is undertaken it must be clearly alleged, and made to appear that the transaction is fraudulent or *ultra vires*..... In the present case the chairman by his declaration finds the figures and erroneously in point of law holds that the resolution has been duly passed, the resolution cannot be said to have been passed according to law. The special resolution is therefore not binding on the company," following *Burland v. Earle*, (1902) A. C. 83, 93 ; *Dominion Cotton Mills Co. v. George E. Amyol*, (1912) A. C. 546, 557. *Baillie v. Oriental Telephone and Electric Co.*, (1915) 1 Ch. 503, 518. Cf. *S. K. Ghandy v. L. P. E. Pugh*, (1923-24) 28 C. W. N. 479 (The cases where a minority can maintain an action are confined to those in which the acts complained of are of a fraudulent character or beyond the powers of a company).

PLAINT.

232.

COMPANIES.

CLAIM by a Shareholder on behalf of himself and all the other Shareholders of a Company except the Defendants for a Declaration that an attempted Amalgamation of the Company with another Company was not within the Powers of the Directors. (s)

1. The defendant F. C. Ltd. (hereinafter called "the first company") is a company incorporated under the Indian Companies Act VII of 1913, with a capital of Rs. 3,000,000/- in 150,000 shares of Rs. 20/- each.

2. At all material times the plaintiff was the registered holder of 2775 shares of Rs. 20/- in the capital of the first company.

3. The objects of the first company, as stated in the memorandum, were "the undertaking, assisting, and participating in financial, commercial and industrial operations and undertaking in India and abroad".

4. The articles of association, numbered, 58 and 112, of the first company provide as follows :—

"58. The powers herein contained for altering the regulations of the company should not extend to authorise any alteration of the regulations providing for the limitation of the liability of shareholders, which was to be deemed a fundamental and unalterable regulation."

"112. The directors are empowered, upon such terms as they think fit, to amalgamate with, or purchase or acquire the business and property of any company carrying on, or formed for the purpose of carrying, or intending to carry on, any business included among the objects of the company."

5. The defendant O. C. Bank Ltd. (hereinafter called 'the second

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- (s) **Reference :** *Clinch v. Financial Corporation*, (1963) L. R. 5 Eq. 450.
 (*Held* : Such attempted amalgamation was not within the powers of the directors of the first company and that the plaintiff was competent to sue on behalf of all the other shareholders (though some were assenting), to have a transaction set aside which was *ultra vires*).

company') was incorporated in December 19..., with a capital of Rs. 3,000,000 shares of Rs. 20/- each with the objects, as expressed in the memorandum; of carrying on mercantile, exchange, banking and agency business of all kinds, doing all such matters and things as might appear to be conducive to these objects, as well as any further objects which the company from time to time might adopt by special resolution.

6. In.....19..., the defendants nos. 2 to 9 who were directors of the first company entered into negotiations with the defendants nos. 11 to 19, the directors of the second company, for the amalgamation of the two companies, and on 24th of March 19....., a tentative arrangement was come to between the respective directors for the amalgamation of the two companies, upon the terms that the shareholders of the first company were to be bound to take 25,000 shares of the second company at Rs. 6/- *per* share (to be credited as Rs. 5/-), such sum of Rs. 150,000/- to be paid for out of the assets of the first company, and if they were insufficient, by a call on the shareholders of the first company.

7. By a resolution passed at an extraordinary general meeting of the first company held on 6th April 19..., it was resolved, 300 voting for, and 60 against including the plaintiff, that the amalgamation should be effected, pursuant to the terms of the said arrangement and that the first company should be wound up.

8. The aforesaid arrangement, if given effect to, would bring about amalgamation of the first company with another company whose objects are more extensive than those of the first company, as stated in its memorandum of association, and would increase the amount of liability of the shareholders of the first company which by the 58th article of association of the first company was declared to be fundamental and unalterable.

9. The directors of the first company are about to give effect to the said arrangement (which was beyond their powers) on the strength of the said resolution.

The plaintiff claims—

- (1) A declaration that the arrangement aforesaid which had been come to between the respective directors of the two companies was beyond the power of the directors of the first company, and not authorised by the articles of association of the first company, and that the said arrangement

is not binding on the plaintiff nor on any member of the first company.

(2) An injunction to restrain the first company and its directors from giving effect to the said arrangement.

DEFENCE.

233.

COMPANIES.

DEFENCE to Claim for Money due on Allotment of Shares. (t)

1. The defendant admits the allegations contained in paragraph 2 of the plaint.

2. He does not admit that any shares in the capital of the plaintiff company were ever allotted to him and denies that any notice of any allotment of shares was ever given to him as alleged or at all.

3. In the alternative, he says that no valid allotment to him of the alleged or any shares in the capital of the plaintiff company was ever made. Messrs.....and.....and.....who purported to have made the alleged allotment as directors of the plaintiff company on.....then had no authority to make the said or any allotment and further, the said allotment which they purported to make was not in conformity with the defendant's application for shares. (Here give particulars).

4. Further, or in the alternative, the defendant on..... 19.., wrote to the plaintiff company withdrawing his application for shares before the alleged allotment was communicated to him.

DEFENCE.

234.

COMPANIES.

DEFENCE to Claim by Company for Calls. (u)

1. The articles of association of the plaintiff company have not been fully or sufficiently set out in the plaint. By clause 12 of the said articles it is also provided that a call shall be deemed to have

(t) This is a defence to Form No 226.

(u) This is a defence to Form No. 227.

been made at the time when the resolution of the directors authorising the call was passed.

2. The defendant denies that the directors of the plaintiff company duly or in fact made a call on its members as alleged or at all or that due or any notice of such call was given to the defendant as required by the articles of association of the plaintiff company, or at all.

3. In the alternative, if there was any call as alleged, such call was invalid. A *quorum* was not present at the meeting at which the resolution authorising the directors to make the call was passed and no proper notice convening the said meeting was given.

4. The defendant does not admit that the alleged or any sum is due from him to the plaintiff company.

DEFENCE.

235.

COMPANIES.

DEFENCE by Company to Claim for Rescission of Contract to take Shares, on the Ground of Fraudulent Statements in Prospectus. (v)

1. If, which is not admitted, the said prospectus contained any such statement as is alleged in paragraph 4 of the plaint, such statement is substantially true or was substantially accurate at the time it was made.

2. The defendant company denies that any of the facts not stated in the prospectus as is alleged in paragraph 5 of the plaint is material or was within the knowledge of any of its directors. The defendant company will contend that the omission to state any of the facts alleged does not make what is stated in the prospectus misleading.

3. If, which is denied, any of the said representations were in fact false or any of the facts not stated in the prospectus was material, the defendant company denies that the plaintiff relied on any of the said representations at the time of applying for the said shares, or that he was misled or induced by the aforesaid omission to state the material facts in the prospectus to apply for the said shares, or

(v) This is a defence to Form No. 230. See notes under the said form.

that he would not have applied for the said shares had he known the true facts.

4. If, which is denied, any of the said representations were in fact false or any such material fact was not stated in the prospectus, the defendant company does not admit that the plaintiff discovered the said misrepresentations or omissions of material facts towards the end of June, 19.... Previous to that, in February, 19..., the plaintiff was aware of the facts and circumstances of the case, and with such knowledge he abstained from repudiating the contract to take 100 shares in the capital of the company. Moreover, in March 19..., the plaintiff attended a general meeting of shareholders of the defendant company and voted as a member of the company in respect of the said shares. If, which is not admitted, the said contract was initially voidable, the plaintiff is estopped by laches and acquiescence from now avoiding it.

PLAINT.

236.

CONTRIBUTION.

(Between Co-debtors)

CLAIM by a Person who paid the Whole of a Joint Debt for Contribution. (w)

1. The plaintiff and the defendant borrowed Rs. 2000/- from one C. D. on a promissory note, dated..... repayable on demand with interest at 12 *per cent. per annum*, each receiving Rs. 1000/- out of the consideration.

2. Thereafter, the said C. D. threatened to institute a suit on the said promissory note, whereupon on..... the plaintiff paid

(w) **Limitation :** Art. 61, Ind. Lim. Act. Cf. *Mothooranath v. Kristokumar*, (1878) I. L. R. 4 Cal. 369; *Walaiti Ram v. Ram Kishen*, A. I. R. 1924 Lah. 112 (case of one partner paying off common liability); *Sukhamoni Chowdhrani v. Ishan Chunder*, (1898) I. L. R. 25 Cal. 814 (case of payment by one of two joint owners of a tenure to save an estate from sale for arrears of revenue).

(w) **Form of decree :** Where there are more defendants than one the Court ought to pass a decree apportioning the liability of the several defendants; *Gurulingappa v. Somanna*, (1931) I. L. R. 55 Bom. 94.

Rs. 2000/- for principal and Rs. 150/- for interest then due on the said note to the said C. D., in full satisfaction of his claim.

The plaintiff claims—

Rs. 1075/- being one half share of the amount paid by the plaintiff as aforesaid.

PLAINT.

237.

CONTRIBUTION.

(Between Co-judgment-debtors).

CLAIM by an Executant of a Promissory Note who paid the whole of the Judgment Debt for Contribution. (x)

1. On.....19..., the plaintiff and the defendants jointly executed a promissory note for Rs... .. in favour of one S. R., each receiving Rs. 500/- out of the consideration.

2. Subsequently the said S. R. sued both the plaintiff and the defendants on the said promissory note in Original Suit No..... of

- (x) **Right to sue:** See Section 43 of the Ind. Cont. Act. The right to sue for contribution arises only on payment: *Abraham v. Raphial*, (1916) I. L. R. 39 Mad. 288, 292; *Venkatanarayana v. Lakshmiyamma*, A. I. R. 1929 Mad. 309. No cause of action for contribution arises unless the plaintiff pays the entire amount of the debt: *Dhirendra v. Harendra*, (1937) 64 C. L. J. 55. The mere existence of a decree against one of several joint debtors does not afford ground for a suit for contribution against the other debtors. Until he has discharged that which he says ought to be treated as a common burden or at any rate done something towards the discharge of it, he cannot say that there is anything of which he has relieved his co-debtors, and which he can call upon them to share with him: *Ram Pershad v. Neerbhoy*, (1872) 11 B. L. R. 78.

If persons who are under a joint liability are jointly sued and a decree is passed for debt and costs against both of them, each being under a joint liability in virtue of the decree, is bound to contribute, in respect of both debt and costs, his share of the decree. Where only one of several co-contractors is sued he is entitled to recover a proportionate share of the debt but cannot call upon his co-contractors to contribute to the costs of the suit: *Punjab v. Petum Singh*, (1874) 6 N.W. P. H. C. R. 192, referred to in *Parsotam Das v. Lachmi Narain*, (1923) I. L. R. 45 All. 99, 103, 104; *Gurulingappa v. Somanna*, (1931) I. L. R. 55 Bom. 94.

.....in the Court of.....and obtained a decree against them for Rs..... with costs and interest on judgment at 6 per cent.

3. The said S. R. executed the decree against the plaintiff alone by causing a warrant to be issued for his arrest, and on..... 19...., the plaintiff paid the said S. R. Rs..... in full satisfaction of his claim under the decree aforesaid.

The plaintiff claims—

Rs.....against each of the defendants being a third part of the amount paid by the plaintiff as aforesaid.

PLAINT.

238. .

CONTRIBUTION.

(Between Coparceners)

CLAIM by Manager of a Joint Hindu Family for Contribution in respect of Money borrowed for Joint Family Purposes. (y)

1. The plaintiff and the defendants A. B. and C. D. at all times material hereto were and are members of a joint Hindu family governed by the Dayabhaga. The relationship between the parties will appear from the pedigree set out hereunder :

(y) **Cause of action and Limitation :** *Aghore Nath v. Grish Chunder*, (1893)

I. L. R. 20 Cal. 18 (In this case the debt was considered to be the personal debt of the Karta and it was supposed that he had expended the amount for the purpose of the family. *Held*, the right to contribute arose under Article 107, Ind. Lim. Act, when the plaintiff expended the money, and not on the date on which he repaid the loan). This case has been distinguished in *Sat Rohan v. Bharath*, A. I. R. 1931 All. 652. (Where the debt was not the personal debt of the Karta, but was the joint family debt for which the whole family was liable. After separation, the Karta in lieu of the money decree passed against him as such Karta took upon himself the whole liability and sued the other separated members for contribution. *Held*, by Sulaiman A. C. J., and Bajpai J., that the joint family debt was wiped out when the whole liability had been taken on himself by the Karta and therefore the time for the suit for contribution began to run from this latter date and that the appropriate Article applicable to such a claim was Art. 99).

Pedigree :

2. At all material times the plaintiff was the managing member of the said family.

3. In..... 19..., money was required for payment of Government revenue and other joint family expenses and on or about.....19..., the plaintiff borrowed Rs. 1000/- repayable with interest at the rate of 6 *per cent.* from one X. Y. of..... on a promissory note and expended the amount for the said purposes.

Particulars of expenses :

(Here give particulars with dates).

4. In..... 19..., the defendant C. D. brought a suit for partition against the plaintiff and the defendant A. B. herein (Suit No..... ofon the file of.....)

5. By the decrees made in the said suit the joint family properties were partitioned and the money due under the said promissory note was declared to be a joint family debt.

6. In..... 19..., the plaintiff paid the said X. Y. the whole amount then due on the said promissory note for principal and interest, namely, Rs.....

The plaintiff claims—

Rs.....from each of the defendants as his share of the amount paid by the plaintiff as aforesaid.

PLAINT.**239.****CONTRIBUTION.**

(Between Co-lessees).

CLAIM by a Lessee against Co-lessees for Contribution. (z)

1. The plaintiff and the defendants are lessees under a lease dated..... 19..., in respect of..... and are jointly liable to pay to the landlord Rs. 500/- annually as rent.

(z) **Reference :** *Bepat Singh v. Sham Lal Sao*, (1931) I. L. R. 10 Pat. 168 (Once a decree for rent has been passed against lessees jointly it is capable of execution against each or either of them and if the decree is satisfied by one in charge of the leasehold property other lessees are liable to contribution.).

2. On..... 19..., the landlord recovered judgment against the plaintiff and the defendants for arrears of rent in respect of the said property for a period of three years next preceding the suit amounting to Rs. 1500/- and in execution of the decree recovered on..... Rs. 2000/- including costs of the suit from the plaintiff alone.

The plaintiff claims—

Rs.....from each of the defendants being a third part of the amount paid by the plaintiff as aforesaid.

PLAINT.

240.

CONTRIBUTION.

(Between Co-mortgagors)

CLAIM by Mortgagor against his Co-mortgagors for Contribution. (a)

1. The plaintiff and his brothers, the defendants, are Hindus governed by the Dayabhaga.

2. On.....the plaintiff and the defendants executed a mortgage bond in favour of one A. B. in respect of their joint family property.

Particulars of mortgage :

Date :

Principal sum :

Rate of interest :

Date of payment :

Properties mortgaged :

3. At all material times the plaintiff had an undivided $\frac{1}{3}$ rd interest in mortgaged properties.

4. After the execution of the mortgage bond, the plaintiff made

- (a) **Reference :** *Behary Lal Sen v. Indra Narayan*, (1926-27) 31 C.W.N. 985, 989 (The right of contribution is an independent equity which arises between the co-mortgagors and the mere circumstance that the plaintiff's right is barred as against certain of the mortgagors is not an obstacle to a suit for contribution nor is it possible to maintain that the cause of action in a suit for contribution would not arise upon payment being made.)

the following payments towards interest and made endorsements therefor on the back of the bond.

5. The defendants or any of them did not make any payment towards the loan.

6. On....., A. B. filed a suit on the mortgage (Suit No....of), against the plaintiff alone, his remedy against the defendants having then become time-barred.

7. On.....and....., the preliminary and the final decrees in the said suit were passed, and on.....the plaintiff's undivided share in the mortgaged properties was sold for Rs..... and the sale proceeds were appropriated in satisfaction of the mortgagee's claim under the decrees amounting to Rs.....

The plaintiff claims—

Rs.....from each of the defendants, being a third share of the amount received by the mortgagee as aforesaid.

PLAINT.

241.

CONTRIBUTION.

(Between Co-partners.)

CLAIM by a Partner against his Co-partner for Contribution. (b)

1. At all material times the plaintiff and the defendant carried on business in partnership under the name of.....at.....

2. On.....19..., the plaintiff and the defendant borrowed Rs. 2000/- from G.' Bank on their joint promissory note, repayable on demand with interest at 6 *per cent. per annum*, and applied the money for partnership purposes.

- (b) **Reference:** *Subbarayudu v. Adinarayudu*, (1895) I. L. R. 18 Mad. 134 (It was contended in this case on behalf of the defendants that advances made by one partner to the partnership concern could only result in matters of account and could not be made subject of a separate suit, *Held* :—The transaction in question was altogether *de hors* the partnership and as such capable of sustaining an action for contribution). See *Dayal v. Khatar*, (1875) 12 B. H. C. R. 97, 107; *Durga Prosonno v. Raghu Nath*, (1899) I. L. R. 26 Cal. 254; cf. *Laban Sardar v. Choyen*, (1914-15) 19 C. W. N. 768 (If partners borrow money from strangers

3. The said Bank instituted a suit in this Court on the said promissory note (Original Suit No.....of.....) and on....., obtained a decree for Rs. 2500/- with costs.

4. On.....19..., the plaintiff paid the said Bank Rs. 3000/- in full satisfaction of their claims under the decree.

The plaintiff claims—

Rs. 1500/- as half share of the amount paid as aforesaid.

PLAINT.

242.

CONTRIBUTION.

(Between Co-sureties)

CLAIM by a Surety against Co-surety for Contribution. (c)

1. By a bond dated January 5th, 19..., the plaintiff and the defendant became sureties for one G. H., whom one C. D. had then taken into his service and employment as his managing clerk, and jointly and severally bound themselves in the penal sum of Rs. 2000/- for the honesty of the said G. H. and the faithful discharge of his duties as such managing clerk.

for partnership business and a decree is obtained by the creditors against the partners and executed against one of them the latter is entitled to contribution from his co-partners.) ; *Debesh Chandra v. Benoy Krishna*, (1938-39) 43 C. W. N. 1214 ; *Arunachalam v. Varu Rowther*, A. I. R. 1928 Mad. 588; cf. *Chockalingam Chettiar v. Meyappa Chettiar*, (1938) 2 M. L. J. 287 ; *Kannayya Reddi v. Muthu Reddi*, A. I. R. 1939 Mad. 508 (It is one thing to say that money was borrowed as it was required for the partnership trade by the partners, the borrowing itself not being a partnership transaction though the partners borrow it in order to advance it to the partnership as capital, and it is quite another thing to say that the borrowing itself was by the partnership. It is only when the claim for contribution is based on the contract of partnership or intimately bound up with the relation of partnership, that it would be excluded by the general doctrine that as between partners there can be no claim for contribution.) ; *Chockalingam Chettiar v. Meyappa Chettiar*, *supra*.

(b) **Limitation** : Art. 99 of the Ind. Lim. Act, 1908.

(c) **Reference** : Section 146, Ind. Cont. Act, IX of 1872 provides that in the absence of a contract to the contrary co-sureties are liable to contribute equally. Cf. Section 147 of the said Act which provides for

2. The said G. H. did not faithfully discharge the duties of the managing clerk to the said C. D. and did not account for certain moneys received by him for and on behalf of the said C. D.

3. The said C. D. sued G. H. and the plaintiff in this Court (Suit No.....of.....) for recovery of moneys not accounted for by the said G. H. as such managing clerk, and judgment for Rs. 2000/- was obtained against the plaintiff and the plaintiff paid the said amount to the said C. D. on.....19...

The plaintiff claims—

Rs.....as half share of the money paid by the plaintiff as aforesaid.

PLAINT.

243.

CONTRIBUTION.

(Between Co-trustees).

CLAIM by a Trustee against his Co-trustees for Contribution. (d)

1. The plaintiff and the defendant are the trustees, and one C. D., the beneficiary, under the will of A. B., late of.....

2. In.....19..., the said C. D. instituted a suit in this Court (No.....of.....) against the plaintiff and the defendant herein for accounts and administration of the trust estate.

liability of co-sureties bound in different sums. A surety is not entitled to sue his co-sureties for contribution until he has paid on account of the principal debt a sum greater than he would be obliged to pay when the entire liability should be fairly apportioned among them : *Davies v. Humphreys*, (1840) 6 M. & W. 153, approved in *Ex p. Snowden*, (1881) 17 Ch. D. 44 and *Ibn Hasan v. Brijbhukan Saran*, (1904) I. L. R. 26 All. 407.

(c) **Limitation** : Art. 82, Ind. Lim. Act : The right to sue arises only on actual payment. The liability to contribute is based on an equity arising out of the co-debtor's payment and it has no reference to the original liability to the common promisee : *Abraham Servai v. Raphial* (1916) I. L. R. 39 Mad. 288. Cf. *Venkatanarayana v. Lakshmibayamma*, A. I. R. 1929 Mad. 309 (Cause of action dates from actual payment of the debt.).

(d) **Right to contribution** : When two trustees are jointly and severally liable to make good a trust fund, plaintiff may recover the whole from either of them, and the one who pays the whole is entitled to contribution as against the other : *Birks v. Micklethwait*, (1864) 33 Beav. 409.

3. On.....19..., the preliminary decree for administration was made in the said suit and an account was directed to be taken of the dealings of the defendants thereto with the trust estate.

4. The sum of Rs. 5,000/- was found due from the said defendants on the taking of accounts, and on.....a final decree was made in the said suit against them for the said sum together with all costs of the suit and of the reference and interest on judgment at 6 per cent.

5. The costs aforesaid were duly taxed and the party and party costs amounted to Rs. 9,250/- as *per allocatur* issued on.....

6. The said C. D. threatened to execute the decree against the plaintiff alone, whereupon the plaintiff deposited into Court to the credit of the said suit Rs. 9,250/- on.....in full satisfaction of the decree aforesaid.

The plaintiff claims—

Rs. 4,625/-, one half share of the amount paid by the plaintiff as aforesaid.

Of. Sec. 27, Ind. Trusts Act, 1882, which provides as follows : "Where co-trustees jointly commit a breach of trust, or where one of them by his neglect enables the other to commit a breach of trust, each is liable to the beneficiary for the whole of the loss occasioned by such breach.

But as between the trustees themselves, if one be less guilty than another and has had to refund the loss, the former may compel the latter, or his legal representative to the extent of the assets he has received, to make good such loss ; and, if all be equally guilty, any one or more of the trustees who has had to refund the loss may compel the others to contribute.

Nothing in this section shall be deemed to authorize a trustee who has been guilty of fraud to institute a suit to compel contribution."

- (d) **Limitation** : Art. 100, Ind. Lim. Act, applies to a suit by a co-trustee to enforce against the estate of a deceased trustee, a claim for contribution. A like suit brought against a trustee during his life time would fall within Art. 120. The principle established in *Wolmershausen v. Gullick*, (1893) 2 Ch. 514 that the Statute of Limitations does not begin to run against a surety suing a co-surety for contribution until the liability of the surety is established, applies equally to the case of a trustee claiming contribution against his co-trustee in respect of a liability incurred from loss occasioned to the trust estate by their joint default. In such a case, therefore, time does not begin to run as between the co-trustees until the claim of the *cestui que trust* has been established against one of them : *Robinson v. Harkin*, (1896) 2 Ch. 415.

PLAINT.

244.

CONTRIBUTION.

(Between co-plaintiffs in a former suit).

CLAIM by a Co-plaintiff in a former Suit who had to pay the Costs of Suit for Contribution. (e).

1. By a deed of assignment dated one P. R. assigned to the plaintiff and the defendants his right to recover Rs. 2,500/- payable to him by on account of contracts which he had undertaken to perform.

2. On or about, the money which was payable to P. R. as aforesaid was attached by one of his creditors named

(c) **Reference :** *Ram Sarup v. Baij Nath*, (1921) I. L. R. 43 All. 77 (*Prima facie* the fact of a joint decree having been paid off by one of the judgment-debtors would be some evidence that he had a right of contribution, but the defendant can always show that he, as between himself and the plaintiff, was not at all liable for the claim or was not liable equally with the plaintiff or that both being tort-feasors no contribution on public grounds should be enforced as between them or for other reasons the suit could not be maintained. The cases which have been cited in support of the contention that no suit for contribution would lie at all, unless there was some special equity in favour of the plaintiff, are cases where the contribution was sought as between the defendants in the former suit. Obviously there would be a difference between a case of co-defendants and that of co-plaintiffs. The defendants need not file a common defence. The plaintiffs, however, when they bring a suit must sue on a common ground. Therefore it does not follow of necessity that the rule which would regulate the enforcement of contribution as between co-defendants should be applied to co-plaintiffs also..... In the present case the then plaintiffs were acting in the belief that they had a *bona fide* right to contest the attachment. It is further clear that they all acted in concert for the benefit of all and that they were acting together through one set of attorneys. Each and every one of them had one and the same object and were acting in furtherance of it, and there was mutuality of interest as amongst themselves. The defendants took as much part in the litigation as the plaintiff did. Hence the present suit for 'contribution lies); followed in *Parsotam Das v. Lachmi Narain*, (1923) I. L. R. 45 All. 99, 106; cf. *Gurulingappa v. Somanna*, (1931) I. L. R. 55 Bom. 94; *Babu Ram v. Badri Das*, A. I. R. 1926 Jour. 150 (4).

(c) **Limitation :** Art. 99, Ind. Lim. Act. Cf. *Gahar Ali v. Abdul*, (1929) I. L. R. 56 Cal. 192.

G. S. in execution of a decree obtained by the said G. S. against the said P. R.

3. On, the plaintiff and the defendants, acting in the belief that they had a *bona fide* right to contest the attachment, put in an objection thereto. The said objection was disallowed, and thereupon the plaintiff and the defendants acting in the same belief instituted a suit on the original side of the Bombay High Court against the said G. S. for a declaration that the money was not liable to attachment in execution of the decree which G. S. had obtained against the said P. R.

4. After evidence taken, the said suit was dismissed with costs on

5. On the said G. S. realised those costs amounting to Rs. from the plaintiff alone.

The plaintiff claims—

Rs. from each of the defendants as his proportionate share of the said costs.

DEFENCE.

245.

CONTRIBUTION.

DEFENCE by Co-debtor to Claim for Contribution. (f)

1. The defendant at the request of the plaintiff and for his accommodation executed the said promissory note jointly with the plaintiff. The whole of the consideration money of the said promissory note was received by the plaintiff.

2. The plaintiff is not entitled to the alleged or any sum by way of contribution from the defendant.

(f) This is a defence to Form No. 236.

(f) **Defence:** *Kondamma v. Chinna Subba*, A. I. R. 1927 Mad. 160 (It is open to the party from whom contribution is sought to plead and establish that as between the joint debtors the plaintiff is solely liable for the debt or that he is not equally liable with the plaintiff). Cf. *Nityanand Sahu v. Radhacharan Sahu*, A. I. R. 1934 Pat. 411 (2) at p. 413 (It is open to the defendants to prove that they had executed the promissory note merely as sureties, the plaintiff being the principal).

DEFENCE.

246.

CONTRIBUTION.

DEFENCE by Co-judgment-debtor to Claim for Contribution. (g)

1. The defendant admits that he executed the promissory note referred to in the plaint jointly with the plaintiff but says that he did so at the request of the plaintiff and for his accommodation, without receiving any consideration for the same.

2. The defendant did not contest the suit instituted on the said promissory note. The plaintiff contested the said suit by setting up

(g) This is a defence to Form No. 237.

(g) **Contribution towards costs :** *Prima facie* defendants *inter se* are liable for contribution where a joint decree for costs have been passed against them. But the defendants who did not defend the suit or took no interest therein are equitably entitled to exemption: *Bal Kishan v. Chhidda*, A. I. R. 1929 All. 654. Where two or more persons join in an attack or in a common defence there is at least an implied contract that they would share the gain or loss: *Parsotam Das v. Lachmi Narain*, (1923) I. L. R. 45 All. 99. Thus, where different sets of defendants had jointly put forward a fatal defence in a previous case and had been ordered to pay the costs of the opposite party, any of them is entitled to maintain a suit for contribution against others: *Saran Dyal v. Dal Chand*, A. I. R. 1938 Lah. 579. It may often happen that the defendants to a suit may have different, antagonistic and exclusive defences, and that in such a case, in the absence of a contract or some equity between them there will be no contribution: *Parsotam Das v. Lachmi Narain*, *supra*. Cf. *Muthuswami Aiyar v. Subramania*, A. I. R. 1932 Mad. 146: *Per* Curgenven, J., "The mere fact that he has satisfied a joint decree for costs will not, without more, entitle the plaintiff to contribution. As to what more has to be shown, a distinction needs to be drawn between a decree for costs against co-plaintiffs and one against co-defendants.....
.....The objects and interests of co-plaintiffs are identical, and from their voluntary association it may be said that there arises an implied contract, which equity will enforce, to share gains and losses. It is otherwise with co-defendants who may be forced into the position against their will, and whose interest may be adverse *inter se*.
I think then that the learned Judge of the Court of Small Causes was not right in requiring defendant 1, who alone contested the suit, to show some equity in his favour which would entitle him to exemption. It is the plaintiff who must show an equity entitling him to contribution.").

a false defence and thereby unnecessarily increased the burden of costs.

3. The defendant is not liable to pay to the plaintiff the alleged or any sum by way of contribution.

4. Alternatively, the defendant is not liable to contribute any sum towards the costs of the said suit for which the plaintiff was responsible as aforesaid.

DEFENCE.

247.

CONTRIBUTION.

DEFENCE by Co-lessee to Claim for Contribution. (h)

1. The defendants admit the lease in the plaint mentioned and the terms thereof, but say that it was agreed between the plaintiff and the defendants that each of the defendants would pay to the plaintiff his one-third share of rent and the plaintiff would pay the full rent to the landlord by adding his share thereto.

2. The plaintiff received from each of the defendants his share of rent for the period for which the landlord instituted the said suit.

3. The plaintiff is not, in the premises, entitled to the alleged or any sum from any of the defendants.

DEFENCE.

248.

CONTRIBUTION.

DEFENCE by Co-partner to Claim for Contribution. (i)

1. The defendant admits that he and the plaintiff executed the promissory note for Rs. 2000/- as alleged in paragraph 2 of the plaint

(h) This is a defence to Form No. 239.

(h) Once a decree for rent has been passed against lessees jointly it is capable of execution against each or either of them, and if the decree is satisfied by one in charge of the leasehold property other lessees are liable to contribution, unless they show that there was money, in the hands of the lessee in charge of the property and on account of the leasehold property, sufficient to satisfy the decree: *Depat Singh v. Sham Lal Sao*, (1931) I. L. R. 10 Pat. 168.

(i) This is a defence to Form No. 241.

but says that the borrowing was by the partnership and the loan is an item in the partnership account.

2. The said partnership is still continuing.

3. The plaintiff's claim for contribution is, in the premises, not maintainable.

PLAINT.

249.

CONTRACT.

(Breach of Contract).

CLAIM by Actor against Theatrical Company for Breach of Contract and Damages for Loss of Publicity. (j)

1. The plaintiff carries on the profession of an actor.
2. The defendant company are theatrical producers.
3. By a contract contained in two letters dated..... 19..., and..... 19..., the defendant company agreed to engage the plaintiff to play one of the three leading parts in the musical comedy to be produced at..... Theatre, the foremost theatrical house in the city of....., called....., for six weeks certain from..... 19..., at a salary of Rs..... per week of nine performances.

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- (i) **Reference :** *Debesh Chandra v. Benoy Krishna*, (1938-39) 43 C. W. N. 1214 (If the debt was really a joint debt of the entire partnership, the plaintiff by satisfying the debt could not sue his co-judgment debtors who are only two out of the whole body of partners for contribution. It would be an item of partnership account and the partner who pays the whole of this partnership debt, though he would be entitled to charge the sum paid in the partnership accounts, could not recover proportionate shares from some of the other partners in the absence of special circumstances.) ; cf. *Chockalingam Chettiar v. Meyappa Chettiar*, (1938) 2 M. L. J. 287 (So long as the partnership continues or subsists, no separate action for contribution will lie and the right to contribution can be enforced only as part of a general suit for accounts of the partnership.). For other cases, see foot-note under Form No. 241.
- (j) **Reference :** *Clayton & Waller v. Oliver*, (1930) A. C. 209 (In this case, the findings were that upon a proper construction of the contract the defendant company were bound to provide a leading part to the plaintiff and that they assigned to him a minor part and accordingly the defendant company broke the contract. The plaintiff is en-

4. The defendant company cast the plaintiff for the part of, and on reading the first act of the play, the plaintiff found that the part assigned to him was not a leading but a trivial part and he therefore requested the defendant company to give him a leading part.

5. The defendant company refused to recast the plaintiff and alleged that the part assigned to the plaintiff was a good performance of the contract.

6. Therefore the plaintiff declined to appear in the production and was compelled to forego the opportunity of displaying his talent and abilities before the public and thereby suffered damage.

7. The plaintiff obtained service at an equivalent remuneration elsewhere.

The plaintiff claims—

Rs.....as damages for loss of publicity.

PLAINT.

250.

CONTRACT.

(Breach of Contract).

CLAIM by Actress against Theatrical Company for Breach of Contract and Damages for Loss of Publicity. (k).

1. The plaintiff is a well known actress of Southern India.
2. The defendant company are theatrical producers, and, at

titled to damages that may reasonably be supposed to be in the contemplation of the parties at the time the contract was made, as the probable result of its breach, and if any special circumstances were unknown to one of the parties, the damages associated with and flowing from such breach cannot be included. Here both parties know that as flowing from the contract the plaintiff would be billed and advertised as appearing at the Hippodrome, and in the theatrical profession this is a valuable right. The loss the plaintiff has suffered is loss of publicity. In assessing the damages the jury may consider the loss the plaintiff suffered (1) because the Hippodrome is an important place of public entertainment, (2) that in the ordinary course he would have been "billed" and otherwise advertised as appearing at the Hippodrome.; followed and explained in *Withers v. General Theatre Corporation*, (1933) 2 K. B. 536. See Chitty on Contracts, 19th Edn., p. 271: "Damages may be awarded for loss of publicity or reputation, if an obligation to afford publicity and the means of acquiring or sustaining a reputation is repudiated".

(k) Reference : *Marbe' v. George Edwardes (Daly's Theatre)* (1928) 1

all material times, the defendant W. was the managing director of the defendant company.

3. In April 19..., the plaintiff was introduced to the defendant W. at Madras and the said defendant persuaded the plaintiff to come down to Calcutta and to play the part of in the musical play called.....intended to be produced in May 19... at the.....theatre, Calcutta, which is an important place of public entertainment. The terms of employment of the plaintiff were verbally agreed upon between the said defendant and the plaintiff.

4. Before the plaintiff was willing to sign any agreement, she obtained a promise from the defendant W. that her name should appear at the head of the cast and up to the date of the dress rehearsal.

K. B. 269 (The contract imposed an express obligation upon the defendants to allow the plaintiff to appear in the part as agreed. *Per Banks L. J.* at p. 281, "In my opinion it is sufficiently established that where there has been a breach of contract to employ an actress, whose reputation depends on the continued and successful practice of her art, and where the engagement is accompanied by promises of wide-spread publicity and advertisement which will probably lead to future opportunities following on successful performance, the Court recognizes that the damages for that breach may properly include such a sum as a jury may award to compensate the plaintiff for the loss of the reputation which would have been acquired, or damage to reputation already acquired, or, to use another expression, for loss of publicity. The events which had happened would prejudice her chance of obtaining a suitable employment. The jury might properly decide how much longer the effects of the defendant's conduct were likely to last, and might decide that the mere salary was not adequate compensation."). The passage in the above judgment that the plaintiff is entitled to 'damage to reputation already acquired' has given rise to some controversy. In the case of *Clayton & Waller v. Oliver*, (1930) A. C. 209, Viscount Dunedin held that *Marbe's* case had been rightly decided (p. 221) but both Lord Buckmaster and Viscount Dunedin in discussing the basis of damages in such cases limited it to loss of publicity. In the later case of *Withers v. General Theatre Corporation*, (1933) 2 K. B. 536, Scrutton L. J. pointed out that according to the House of Lord's case, "Damage to a reputation already existing by not allowing an appearance is not a matter which can be considered, but what has to be considered is whether, if the actor had been allowed to appear, that appearance would have given him publicity, and whether he has been deprived of that opportunity of appearing."

5. Thereafter on 19..., an agreement in writing was made between the plaintiff and the defendant company at whereby the plaintiff was engaged to play the said part for a period of six weeks commencing from at a salary of Rs. 400/- *per* week of nine performances.

6. The plaintiff came to Calcutta hoping to acquire a reputation in Calcutta which she believed would sustain and increase the popularity she enjoyed in Southern India.

7. After the arrival of the plaintiff in Calcutta her name appeared at the head of the cast and upon the electric lights outside the theatre and elsewhere but this was stopped two days before the dress rehearsal, which took place on

8. On 19..., the day fixed for the commencement of her engagement, the defendant company refused to allow the plaintiff to appear in the play on that day or thereafter at all. The play ran into weeks, another actress appearing in the part of

9. By reason of the facts above stated the plaintiff was deprived of the opportunity of displaying her talents before the public and thereby suffered damage.

10. The defendant company paid the plaintiff the agreed salary for the period of her engagement and contended that the plaintiff was not entitled to any further damage.

The plaintiff claims—

Rs..... damages for loss of publicity.

PLAINT.

251.

CONTRACT.

(Rescission of Contract).

CLAIM to rescind a Contract of Sale on the Ground of Fraud and Misrepresentation. (1)

1. The plaintiff is aged 30 and the defendant, who is his cousin, is about 20 years his senior. The plaintiff, at all material times, reposed great confidence in the defendant.

(1) Reference : *John Minas Apear v. Louis Caird Mulchus*, I. L. R. (1939) 1 Cal,

2. On.....19...., the plaintiff entered into an agreement in writing with the defendant, whereby the defendant agreed to sell and the plaintiff agreed to buy the undivided $\frac{1}{2}$ share of the defendant in premises no.....for the price of Rs. 12,000/-.

3. Prior to the said agreement, the defendant made the following verbal representations to the plaintiff :

(a) that the defendant had lately received an offer of Rs. 15,000/- for the said undivided half share from one mr.and also another offer of Rs. 14,000/- from another party.

(b) that the municipal value of the entire premises was Rs. 30,000/-.

4. The defendant also showed the plaintiff two letters purporting to contain the offers mentioned above.

5. In.....19...., the plaintiff discovered that the said letters were not genuine and that they were written on the instructions of the defendant himself and were brought into being for giving a fictitiously high value to the property and for the purpose of deceiving persons to whom the defendant might later wish to sell his share in the property. The plaintiff also discovered that the municipal valuation of the property was Rs. 20,000/-.

6. The above representations were fraudulent and the plaintiff was induced to enter into the said agreement by reason of the said representations and in the honest belief that they were true.

The plaintiff claims—

Rescission of the said agreement.

389 : *Per* Derbyshire C. J.—“This is a case of deliberate active fraud which comes within Sec. 19 of the Ind. Cont. Act and not within the exception to that section. The circumstances under which fraud was perpetrated in this case were such that an ordinary person with ordinary diligence could not be expected to discover that fraud.” (p. 395). *Per* Lord-Williams J.—Sec. 19 of the Contract Act applies to cases of misrepresentation as distinguished from fraud and should not be interpreted as being meant to apply to misrepresentation which is “fraudulent within the meaning of Sec. 17” and that the phrase “fraudulent within the meaning of Sec. 17” should be deemed to apply to the preceding word “silence” exclusively, and not to the word “misrepresentation”. (p. 398).

PLAINT.

252.

CONTRACT.

(Rescission of Contract).

CLAIM to rescind a Contract on the Ground of Fraudulent Misrepresentation and Recovery of Money paid under it. (m)

1. In.....19..., the defendants entered into a contract with D. S. Ltd., shipbuilders, for building a steel screw steamer of.....tons at the price of Rs.....to be paid for in five instalments of Rs.....each—(1) when the keel was laid; (2) when the vessel was framed; (3) when the vessel was plated and ready for rivetting; (4) when the vessel was launched; and (5) when the vessel was completed.

2. In the month of.....19..., negotiations took place between the plaintiffs and the defendants through their respective brokers for the sale to the plaintiffs of the vessel then in the course of construction.

3. On or about.....the defendants by their brokers, Messrs. T. M. & Co. represented to the plaintiffs that the keel of the vessel had been laid, that the frames had been bent, and that the erection of the same had been started. These statements were also made in a telegram of the.....sent by the defendants to the plaintiffs and were repeated in a letter of the same date.

4. The defendants through their brokers offered the ship at Rs.....and the plaintiffs on the faith of the representations aforesaid accepted this offer.

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- (m) **Reference :** *Abram Steamship Co. v. Westville Shipping Co.*, (1923) A. C. 773 : In this case one of the points of defence was that the action was barred by the fact of the sub-sale. *Per Lord Dunedin* : So long as the sub-sale stood, this would of course be so (p. 779). The sub-contract, which was *ex hypothesi* the only obstacle, has been completely swept away. The plaintiffs have been put back to their original position—i. e., as purchasers under a contract with the defendants (p. 780). *Per Lord Atkinson* : When the contract with B. H. L. Ltd. was rescinded and thus got out of the way, I think there was nothing to prevent the plaintiffs from enforcing their rights against the defendants (p. 789).

5. Accordingly, by an agreement in writing dated..... made between the plaintiffs and the defendants, the defendants assigned to the plaintiffs the benefit of their contract of..... with D. S. Ltd. in consideration of a cash payment of Rs..... the plaintiffs undertaking to pay the subsequent instalments amounting to Rsin the manner following :

6. Shortly afterwards, the plaintiffs decided to resell their rights under the contract, and accordingly entered into negotiations with the B. H. L. Ltd., and passed on to that company copies of the telegram and letter mentioned in paragraph 3 hereof containing the information as regards the state of progress of the building of the vessel. The said B. H. L. Ltd. are hereinafter referred to as 'the said company'.

7. In reliance on these representations the said company, by an agreement dated....., agreed to purchase from the plaintiffs all their rights and benefits under the agreement of..... at the price of Rs.....and covenanted to pay the several instalments which should thereafter become due.

8. In....., the said company sent a representative toto inspect the ship and it was then discovered that the representations contained in the aforesaid telegram and letter of... ..with regard to the state of construction of the vessel, were with the exception of the statement that the keel was laid, untrue, and that nothing had been done except the laying of the keel.

9. Thereupon by letter dated the said company complained to the plaintiffs and on.....the plaintiffs asked for explanation from the defendants but the latter disclaimed all responsibility.

10. By letter, dated.....the said company informed the plaintiffs that if they had known the position and had any knowledge that the plaintiffs' statement with regard to the state of construction of the vessel was incorrect, they would not have purchased the contract, and gave notice that they repudiated their contract on the ground of misrepresentation.

11. On the plaintiffs having satisfied themselves about the facts, wrote to the defendants a letter saying that the said company had repudiated their contract with the plaintiffs and were applying to the Court to rescind the same and that the plaintiffs likewise claimed rescission of their contract with the defendants.

12. The said company have since commenced an action against the plaintiffs for rescission.

The plaintiffs claim—

1. Setting aside of the contract dated.....:.....
2. Recovery of the money paid under it.
3. Interest by way of damages on the said sum.

PLAINT.

253.

COPYRIGHT.

CLAIM for infringement of Copyright in a Dramatic Work. (n)

1. The plaintiff is the authoress and the owner of the copyright in a play in one act entitled "The Rogue", and of the sole right of performance of the said work.

2. The defendant at all material times was the President of The Young Women's Dramatic Society of.....and he authorised or permitted the members of the said society to represent or perform the said play on February 5th, 19..., at the.....Hall.

3. The said performance was without the plaintiff's license and was in public and constituted an infringement of plaintiff's copyright.

The plaintiff claims—

Rs.....damages.

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- (n) **Reference :** *Jennings v. Stephens*, (1936) 1 All. E. R. 409 (C. A.) (This case decides the question what performances are public performances within the meaning of the Copyright Act, 1911, S. 1 (2), *Held* : "The true criterion is the character of the audience, which must be a domestic or quasi domestic audience, and the following are immaterial : (i) number present ; (ii) presence or absence of visitors ; (iii) payment or non-payment of performers ; (iv) whether the performers are members of the domestic circle or strangers ; (v) whether or not a charge is made for admission.). Cf. *Performing Right Society, v. Hammond's Bradford Brewery Co.*, (1934) Ch. 121 (infringement by loud speaker placed in a private room, the sound being audible in the public part of the premises.) ; *Performing Right Society v. Camelo*, (1936) 3 All. E. R. 557.
- (n) **Place of suing :** Cf. *Ram Kishan v. Piari Lal*, (1911) I. L. R. 33 All. 24. For Courts which have jurisdiction to try copyright cases, see Sec. 13 of the Indian Copyright Act, 111 of 1914.
- (n) **Limitation :** Art. 40, Sch. I, Ind. Jām. Act ; *Niladri Nath Mukherjee v. Satis Chandra*, (1933-34) 38 C. W. N. 604, 610. See Sec. 10, Copyright Act, 1911.

PLAINT.

254.

COPYRIGHT.

CLAIM for Infringement of Copyright in a Plan. (o)

1. The plaintiff is a designer and fitter of shop fronts and the like and carries on business at.....in the town of.....

2. The defendants are partners who carry on business as..... at.....in the town of.....

3. On.....19..., the plaintiff sent to the defendant C.D., at his request, a blue print which was a plan and elevation for a shop front at.....and also a detailed specification of the work on the said shop front. A copy of the said blue print is marked 'A' and annexed hereto.

4. In October 19..., the plaintiff saw the shop front erected at

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- (o) **Reference :** *Chabot v. Davies*, (1936) 3 All. E. R. 221 (The plaintiff was the author of the plan and elevation and the question was if he was the owner of the copyright, if any, in it. *Held*, by Crossman J. : A plan is a literary work within the Copyright Act, 1911, and this plan is an original literary work. The Act does not require that the word 'original' must mean in an original or novel form, but the work must not be copied from another work.....that it should originate from the author. I find on the evidence that the plan and elevation originated from the plaintiff. The next question is— Is the shop front a reproduction of the plan ? The shop front was a reproduction of the plaintiff's plan, and as the plan was an original literary work within the Copyright Act, 1911, the defendants, by authorising the reproduction, have infringed the plaintiff's copyright in the plan. Damages presumably are at large in such a matter. But I think I am bound to consider this : What is the remuneration which the plaintiff would fairly have got for his plan if the defendant had applied for his leave and licence to use it ? I think I ought not to give beyond what I have come to the conclusion on the evidence would be a reasonable remuneration to the plaintiff for his work.)

Cf. Burke v. Spicers Dress Designs, (1936) Ch. 400 (This case deals with the question of the reproduction of a sketch design and whether a dress is a work of artistic craftsmanship. The dress was held not to be reproduction of the sketch, as the dress alone, bore no resemblance to the sketch. The dress was held to be a work of craftsmanship, but its artistic element came from the design and was not in the craftsmanship.),

.....by the firm of..... The said work was a reproduction of a substantial part of the said plan and elevation.

5. The plaintiff is the author and the owner of the copyright in the said plan and elevation and the defendants infringed the said copyright by authorising the reproduction of the said plan and elevation in the construction of the said shop front, without the consent of the plaintiff first had and obtained.

The plaintiff claims—

Rs.....damages.

PLAINT.

255. .

COPYRIGHT

CLAIM by Assignee of Copyright for Infringement of the Performing Right in a Song. (p)

1. The plaintiffs, The P. R. Society, Ltd., (hereinafter referred to as "the society,") are a company incorporated under the Indian Companies Act, VII of 1913, as a company limited by guarantee, the members of which consist of composers, authors, publishers and proprietors of musical, literary and dramatic works.

2. The objects for which the society was established, as stated in the Memorandum of Association, were "to exercise and enforce on behalf of the members of the society, being the composers of any musical works or the authors of any literary or dramatic works, or the owners or publishers of or being otherwise entitled to the benefit of or interested in the copyrights in such works, all rights and remedies under the Copyright Act, 1911, or otherwise in respect of the public performance of their works."

(p) **Reference :** *Performing Right Society v. London Theatre of Varieties* (1924) A. C. 1 (In this case the plaintiffs The Performing Right Society, Ltd. sued for injunction without joining the legal owner of the copyright. The Court of Appeal gave the plaintiffs the opportunity of amending by joining the legal owner upon terms, but they refused to accept the offer and took their stand upon their supposed right to sue alone in virtue of their equitable title. It was held by the House of Lords that the said plaintiffs were not entitled to the perpetual

3. By article.....of the articles of association, "every member who was a publisher, should during his period of membership assign to the society his interest, whether present or future, in the right to perform any musical or dramatic work which had been or which might thereafter be published by him, and to invest the society with the sole right during the period of his membership, to authorise or to forbid the public performance of any works published or to be published by him."

4. In the year 19..., the plaintiffs Messrs. C. & Co. Ltd., music publishers, became members of the society and by an indenture dated....., they in accordance with the articles of association, assigned to the society (among other things) "the right of performance in all parts of the world of each and every song with words thereof or musical work (not being a musical play) the right of performance of which then belonged to, or should thereafter be acquired by or be or become vested in the assignor during the continuance of the assignor's membership of the society" such rights to be held by the society for the period of the assignor's membership.

5. Thereafter on.....19..., one Mr. W. H. F., the author and composer of a song called "The Wedding," assigned the copyright and sole right of representation of that song to the said C. & Co. Ltd., in consideration of a cash payment.

6. On.....19..., the defendants, proprietors of the Music Hall at....., authorised the public performance of the said song in the said Music Hall without having obtained the consent of the plaintiffs.

7. The defendants threaten and intend to continue the said infringement.

The plaintiffs claim —

1. Perpetual injunction restraining the defendants from permitting their Hall to be used for public performance of the song without the consent of the plaintiffs.

2. Rs..... damages for infringement.

injunction which they claim). Note : The defect of parties is cured by adding C. & Co. Ltd. as co-plaintiffs.

- (p) **Infringement of musical work :** A copyright of a musical work is infringed by making any cinematograph record of such musical work without the consent of the owner of its copyright: *Wellington Cinema Co., v. Performing Right Societ.*, I. L. R. 1937 Bom. 724.

PLAINT.

256.

COPYRIGHT.

**CLAIM for Infringement of Copyright in a Book and for Conversion
with Additional Claims for Delivery up of Unauthorised
Copies and for an Injunction. (q)**

1. The plaintiff is the author of a book entitled "The Ancient History of Bengal", and the owner of the copyright therein.

2. The defendant company have infringed the plaintiff's copyright in the said book by reproducing a substantial portion thereof in a material form in a book entitled "Bengal, Past and Present," of which the defendant company are the publishers, without the consent of the plaintiff.

Particulars :

3. The defendant company caused the said book entitled "Bengal, Past and Present" to be printed in.....19...and have sold numerous copies of it since.

4. The defendant company have also in their possession custody or control many infringing copies of the said book "Bengal, Past and Present", which they refused to deliver up to the plaintiff although

- (q) **Reference :** *Carlton Publishing Co. v. Sutherland Publishing Co.*, (1938) 4 All. E. R. 389 (In an action for an infringement of the plaintiff's copyright in a certain publication, the plaintiffs claimed *inter alia* an inquiry as to (i) damages suffered by reason of the infringement, and (ii) damages for conversion. The defendants contended that the remedies given by the Copyright Act, 1911, Secs. 6 and 7, were alternative, and not cumulative, and that the plaintiffs must elect their remedy. *Held*, by the House of Lords, that upon a proper construction of the Copyright Act, 1911, the remedies were not in law mutually exclusive, and the plaintiffs were entitled to recover damages under both heads.). Cf. *Tallent v. Coldwell and Tailor & Cutter*, (1938) 2 All. E. R. 107 (This case decides that a claim for damages for infringement of copyright and conversion is a case in which a defendant should be permitted to pay in a lump sum in respect of damages without allocating it under the respective heads.).
- (q) **Original literary work—meaning of :** *Ramnarain Trivedi v. Shri Kumar* (1937-38) 42 C. W. N. 541 ; *Chabot v. Davies*, (1936) 3 All. E. R. 221.
- (q) **Copyright in a literary work and how it is infringed :** *MacMillan & Co. v. K. and J. Cooper*, (1923-24) L. R. 51 I. A. 109. Intrinsic evidence to be derived from comparison of two works must be of very cogent force

the plaintiff demanded the same from the defendant company by letter dated.....19..., and which they have detained and still detain from the plaintiff.

5. The defendant company threaten and intend to repeat the said infringement.

The plaintiff claims—

(1) An inquiry as to, (a) damages suffered by reason of the infringement, (b) damages for conversion.

(2) Judgment for the amount found due upon such inquiry.

(3) An account and delivery up of all unsold infringing copies of the said book, "Bengal, Past and Present" which are still in the possession, custody or control of the defendant company.

(5) An injunction to restrain the defendant company, their servants and agents from reproducing or authorising the reproduction of the plaintiff's said book entitled "The Ancient History of Bengal" or any substantial part thereof and from doing any acts to infringe the plaintiff's copyright therein.

in a case of infringement : *Florence A. Deeks v. H. G. Wells*, A. I. R. 1933 P. C. 26. As to when experts should be appointed as commissioners to investigate and report similarities, see *Gopal Das v. Jagannath Prasad*, I. L. R. 1938 All. 370. Similarity of expressions may amount to infringement under certain circumstances : *Moulvi Omar Ali Barlushker v. Jnan Ranjan*, (1934-35) 33 C. W. N. 945. Conglomeration of similarities, which cannot be mere coincidence, is evidence of infringement : *Mohini Mohan Singh v. Sitanath Basak*, (1929-30) 34 C. W. N. 540. There is no infringement of copyright where the two works are substantially different : *Kartar Singh Giani v. Ladha Singh*, A. I. R. 1934 Lah. 777. There is no copyright in ideas : *Gopal Das v. Jagannath Prasad*, *supra*.

- (q) **Infringing copies are the property of the owner of the copyright** : *Gopal Das v. Jagannath Prasad*, *supra*. (The owner of the copyright has the right to recover the possession of the infringing copies unsold and the price of the copies sold). See Sec. 7, Copyright Act, 1911.
- (q) **Temporary Injunction—when may be granted or refused** : *Kartar Singh Gayani v. Ladha Singh*, A. I. R. 1931 Lah. 624; *Prabhu Das v. The Law Reporters, Ltd.*, A. I. R. 1933 Lah. 448.
- (q) **Limitation** : 3 years under Art. 40, Sch. I, Ind. Lim. Act. Cf. *Kinmond v. Jackson*, (1877) I. L. R. 3 Cal. 17. See Sec. 10, Copyright Act, 1911.

PLAINT.

257.

COPYRIGHT.

CLAIM by Owner of Copyright in Law Reports for Infringement and Conversion with Additional Claim for Delivery up of Unauthorised Copies and for an Injunction. (r).

1. The plaintiff is the editor and proprietor of a weekly law journal called (hereinafter called the 'said journal'), in which were and are published amongst other things reports of appeals to the Judicial Committee of the Privy Council and of cases determined by the High Court with headnotes, statements of facts, notes of arguments and extracts from judgments of the lower Courts, where necessary. *

2. The plaintiff is the owner of the copyright in the said reports in so far as they relate to the selection of cases reported, the arrangement of reporting, the headnotes and statements of facts not to be found in judgments but gathered by the reporters from the records of cases and quotations from judgments appropriate to the reports.

3. The reports published in the said journal were and are the result of considerable labour and expense on the part of the plaintiff and of the staff in his employment.

4. The defendant at all material times was and is the editor, proprietor and publisher of a law journal known as Case Law (hereinafter called the 'said Case Law').

5. Since 19..., the defendant has been infringing the plaintiff's aforesaid copyright in the reports published in the said journal by systematically reproducing and publishing the said reports with colourable alterations without the plaintiff's permission. The defendant has sold and is offering for sale the said Case Law containing such pirated reports for profit. Particulars of such piracy are set out in the schedule marked "A" and hereto annexed

- (r) **Reference :** *Jogesh Ohandra Chaudhuri v. Mohim Chandra Rai*, (1913-14) 18 C. W. N. 1078 (*Per* Imam J. — "..... It is generally true that in the reports of judgments, the reporter has no copyright, but it cannot be said that in the selection of cases, and in the arrangement of the reporting, the reporter has not the protection of the law. The defendant is entitled to report such judgments as he obtained by expenditure of his time, labour and money, but where he fails to exert

The plaintiff craves leave to refer to the offending volumes of the said Case Law when produced.

6. The defendant has in his possession, custody and control several infringing copies of the said Case Law which he has refused to deliver up to the plaintiff in spite of demand in writing made by the plaintiff on

7. The defendant threatens and intends to repeat such infringement.

The plaintiff claims—

(1) Rs..... damage for infringement.

(2) An account of the pirated issues of the said Case Law published since and of the profits made by their sale.

(3) Damage for such sum as may be found due upon the taking of such account.

(4) An account and delivery up of the unsold copies of the pirated issues of the said Case Law published since which are in the possession, custody or control of the defendant.

(5) An injunction restraining the defendant from printing or causing to be printed, selling or offering for sale, circulating or causing to be circulated any of the copies

his own energies, he cannot be allowed to avail himself of other people's industry. The contesting defendant, instead of restricting himself to reporting the judgments only, has gone much farther. What he has done in the present case is that he has freely drawn on such portions of the plaintiff's reports as form no part of the judgment. He has also taken from the plaintiff's reports the quotations from judgments that were appropriate to the reports. The plaintiff's reports in many instances contain statements of facts not to be found in the judgment, but have been gathered by the reporters from the records of the cases. The defendant, no doubt, was at liberty to bestow his labour on collecting the facts for himself, but he was not entitled to avail himself of the labours of another. "Whilst all are entitled to resort to common sources of information, none are entitled to save themselves trouble and expense by availing themselves for their own profit of other man's works, subject to copyright and entitled to protection," so said Lord Langdale, M. R., in *Lewis v. Fullarton*, (1839) 2 Beav. 6, 8. The offending instances in this case are either copying or merely colourable alterations of the plaintiff's reports accompanied by blind repetition of obvious errors.").

of the pirated issues of the said Case Law in his possession, custody or control and from pirating from the plaintiff's said journal for the purpose of the publication or otherwise infringing the plaintiff's copyright in the reports contained in the said journal.

PLAINT.

258.

COPYRIGHT.

CLAIM for Infringement of Copyright in a Painting and for Conversion with Additional Claims for Delivery up of Unauthorised Copies and for an Injunction. (s)

1. The plaintiff is the author of a water colour painting called "The Village Woman", and is the owner of the copyright therein.

2. The said painting was first produced in.....and exhibited at the.....Exhibition held in.....

3. The defendant has infringed the plaintiff's said copyright by producing, selling and offering for sale, copies or imitations of the said painting made by photography and other mechanical processes, without the consent of the plaintiff.

4. The defendant threatens and intends to continue the said infringement and has refused to deliver up to the plaintiff the infringing copies in his possession, custody or control in spite of demand by the plaintiff in writing dated.....

The plaintiff claims—

(1) An inquiry as to (a) damages suffered by reason of the said infringement, and (b) damages for conversion.

(2) Judgment for the amount found due upon such inquiry.

(s) **Reference :** *Mahendra Chandra v. The Emperor*, (1928-29) 33 C. W. N. 172 (It is sufficient to constitute infringement if the offending pictures are copies of substantial portions of the copyright pictures. It is immaterial whether the figures have been reduced in size or slight modifications introduced or whether the clothes and colours have been made different in the offending pictures). See also notes under Form No 256.

(3) An account and delivery up of all infringing copies of the said painting in the possession, custody or control of the defendant.

(4) Injunction to restrain the defendant, his servants and agents from any further infringement of the plaintiff's copyright.

DEFENCE.

259.

COPYRIGHT.

DEFENCE to Claim for Infringement of Copyright in a Literary Work. (t)

1. The defendant denies that he infringed the plaintiff's copyright, if any, in the book mentioned in paragraph.....of the plaint as alleged or at all. He has not (here deny specifically the acts of infringement complained of).

2. The defendant admits that the plaintiff is the author of the book....., but says that he is not now the owner of the copyright therein.

3. By an agreement in writing dated.....the plaintiff assigned his copyright therein to one K. D. who published the book in.....

4. By an agreement in writing dated.....the said K. D., since deceased, assigned his copyright in the said book to R. G., father of the defendant.

5. The said K. D. died February 5th, 19..., that is, more than fifty years before the date of any of the alleged infringements, and accordingly no copyright any longer exists in the said book.

- (t) **Term of copyright:** Under Sec. 3, Copyright Act, 1911, the term for which copyright shall subsist shall, except as otherwise expressly provided by this Act, be the life of the author and a period of fifty years after the death. Cf. *Emperor v. Sheo Charan Lal*, A. I. R. 1931 All. 353 (If copyright subsisted when Act III of 1914 came into force, the period of copyright substituted by that Act would be 50 years from the death of the author.).

DEFENCE.**260.****COPYRIGHT.****DEFENCE to Claim for Infringement of Copyright in a
Literary Work. (u)****(Another Form).**

1. The defendant does not admit that the plaintiff is the author or the owner of the copyright in.....

2. If, which is not admitted, the plaintiff is the owner of the copyright in the said....., the defendant says that at the date (or dates) of the alleged infringement he was not aware of the existence of the copyright in the said work.

3. The defendant has not infringed the plaintiff's copyright, if any, in the said..... He has not (here deny specifically the acts of infringement complained of).

4. The suit was commenced more than three years after the alleged infringement and is therefore time-barred.

PLAINT.**261.****DEBENTURE.****CLAIM by a Debenture-holder on behalf of himself and
all other Debenture-holders to enforce Security. (v)**

A. B. (on behalf of himself and all other holders
of mortgage debentures of the defendant
company) Plaintiff.

vs. .

C. D. & Co. Ltd. Defendant.

- (u) **Exemption of innocent infringer from liability :** Sec. 8, Copyright Act, 1911, provides that the plaintiff shall not be entitled to any remedy other than an injunction or interdict in respect of the infringement if the defendant in his defence alleges that he was not aware of the existence of the copyright in the work and proves that at the date of the infringement he was not aware, and had not reasonable ground for suspecting that copyright subsisted in the work.
- (u) **Limitation :** Sec. 10, Copyright Act, 1911 ; Art. 40, Schedule I, Ind. Lim. Act.
- (v) **Debenture, what is a :** There is no precise legal definition of the term 'debenture' : *Per Chitty J., in Levy v. Abercorris etc. Co., (1887) 37 Ch.*

The plaintiff states—

1. The defendant company (hereinafter called “the company”) was incorporated in 19 , under the Indian Companies Act, 1913, for the purpose of.....

2. The objects of the company as stated in the Memorandum of Association included power to borrow or raise, or secure money upon such term and in such manner as the company might think fit, and in particular by the issue of debentures and debenture stock, perpetual or otherwise, charged upon the whole, or any part of the property of the company, both present and future, including its uncalled capital.

3. On or about 19 , the company borrowed and raised for the purpose of its business a sum of Rs. 50,000/-, by issue of a series of mortgage debentures duly registered in accordance with Sec. 109 of the Indian Companies Act, 1913.

4. The said mortgage debentures were all for Rs. 100/- each, and by each such debenture the company agreed to pay to the registered holder thereof the principal thereby secured on the.....day of 19 , and to pay interest thereon until the date of actual payment at the rate of 6 *per cent. per annum* by half yearly payments on the day of and day of

in each year, and the company thereby charged with the payment of such principal and interest its undertaking, and all its property both present and future, and each debenture was stated to be issued subject to, and with the benefit of, the conditions indorsed thereon.

5. The said indorsed conditions *inter alia* provided as follows :—

D. 260. There are various kinds of debentures : (i) debentures which are charges of some kind on property ; (ii) debentures which are bonds ; (iii) debentures which are nothing more than acknowledgments of indebtedness ; (iv) debentures in the form of statements by directors that the company will pay a certain sum of money on a given day, and will also pay interest half-yearly at certain times : *Per Lindley J., in British India etc. Co. v. Commissioners of Inland Revenue, (1881) 7 Q. B. D. 165, 172, 173.*

(v) **Floating security** : A general charge on all the property of the company is sufficient indication that the charge is to be floating security : *In re Florence Land etc. Co., (1878) 10 Ch. D. 530 ; Illingworth v. Houldsworth, (1904) A. C. 355.*

(v) **Power to borrow** : The power to borrow by the issue of debentures or debenture stock may be expressly given by the memorandum, but a

(a) That the debentures of the said series should rank *pari passu* in point of charge without any preference or priority one over another and that the charge created by the debentures should be a floating security ;

(b) that the principal moneys secured by the said debentures should immediately become payable if the company made default for a period of 12 months in the payment of any interest thereby secured, and the registered holder thereof before such interest is paid, by notice in writing to the company calls in such principal moneys.

6. The plaintiff is the registered holder of twenty of the said debentures, all dated the

7. The company made default in the payment of interest due to the plaintiff on his said debentures on the 19... and on the 19..., and the plaintiff on the , duly served on the company a notice calling in the principal moneys secured by his said debentures.

8. The company has not paid the principal money and/or interest thereon.

Particulars of claim :

9. It is necessary for the protection of the plaintiff and the other debenture-holders to have an account taken of what is due to the plaintiff and the other debenture-holders for principal, interest and costs, and to have a receiver and manager appointed of the property and assets of the company.

general power to borrow includes power to borrow by the issue of debentures or debenture stock : *General Auction &c. Co. v. Smith*, (1891) 3 Ch. 432.

(v) **Floating charge** : Unless otherwise agreed a floating charge retains its floating character until a receiver is appointed or a winding up commences : *In re Florence Land etc. Co.*, (1878) 10 Ch. D. 530. Cf. *Governments Stock etc. Co. v. Manila Ry. Co.*, (1897) A. C. 81, 86 ; *Illingworth v. Houldsworth*, (1904) A. C. 355.

(v) **Registration of mortgages and charges** : Sec. 109 (1), Ind. Companies Act, 1913, sub-clause (e) makes a mortgage or charge of movable property generally registrable. Pledges have been exempted from registration. If a mortgage or charge which requires registration is not registered, it is valid as an admission of debt, but as against a creditor or liquidator it could not be said that a valid charge on the company's property had been created : *Ram Narain v. Radha Kishen*, (1929-30) L. R. 57 I. A. 76, 83. For registration of charges on properties acquired subject

The plaintiff claims—

(1) A declaration that the said mortgage-debentures constituted a first charge upon the undertaking of the company and all its property both present and future.

(2) An account of what is due to the plaintiff and other debenture-holders for principal, interest and costs.

(3) That the said mortgage-debentures may be enforced by foreclosure or sale.

(4) That a receiver and manager be appointed, of the property and assets of the company.

PLAINT.

262.

DECLARATION.

(Declaratory suit under S. 42, Specific Relief Act, 1877).

CLAIM for a Declaration of Plaintiff's Title to the Goods pledged by a Third Person with the Defendant. (w)

1. In September 19..., the plaintiff handed over certain jewels (specified in Schedule "A" hereto) which belonged to him to one A.B., a broker, who desired to show the same to a prospective purchaser.

to charges, see Sec. 109A, Ind. Companies Act, 1913. For particulars in case of series of debentures entitling holders *pari passu*, see Sec. 110. For certificate of registration, see Sec. 114. For endorsement of certificate of registration on debenture or certificate of debenture stock, see Sec. 115. For effect of non-registration of debentures on the immovable assets of the company, see *Imperial Bank of India v. Bengal National Bank Ltd.*, (1930-31) L. R. 58 I. A 323.

- (v) **Parties:** Dissentient debenture-holders should be made defendants with the company. Care should be taken that the plaintiff personally has a good cause of action, for a good defence to the plaintiff's claim is a sufficient answer to the other persons on whose behalf he sues: *Burt v. British Nation Life Association*, (1859) 4 De G. & J. 158, 174; *Huggons v. Tweed*, (1879) 10 Ch. D. 359. Subsequent incumbrancers must be made defendants: *Wilcox & Co., In re*, (1903) W. N. 64; *Wallace v. Evershed*, (1899) 1 Ch. 591.

- (w) **Reference:** *Sundaresa Iyer v. S. S. V. Nidhi Ltd.*, I. L. R. (1939) Mad. 956.

{It was held in this case that a suit for a mere declaration that the plaintiff is the owner of certain property without consequential relief for possession is maintainable if at the time of the institution of the suit the property is in the possession of the Court pending the decision of the suit and not in the possession of the person against whom the relief

2. In.....19..., the plaintiff came to know that the said A. B. after having obtained possession of the jewels as aforesaid pledged them for a sum of Rs. 1000/- with the defendant company, bankers, without the knowledge or consent of the plaintiff.

3. On....., as a result of criminal proceedings instituted by the plaintiff, the Sub-divisional Magistrate of.....convicted and sentenced the said A.B. to two years rigorous imprisonment for criminal breach of trust under Sec. 409, Indian Penal Code, and directed that the said jewels should remain in the custody of the Court until either of the parties established title thereto in a Civil Court.

4. At the time of the pledge the defendant company had notice that the said A.B. had no authority to pledge.

is sought), follg. *Vedanayaga Mudaliar v. Vedammal*, (1904) I.L.R. 27 Mad. 951 ; *Malaiyya Pillai v. Tirumala Perumal Pillai*, (1913) I.L.R. 36 Mad. 62 (Where it was held that before the *proviso* to Sec. 42, Sp. Rel. Act applied it must be shown that the defendant was in possession, and that as against him the plaintiff could obtain an order for delivery of possession) ; *Sunder Singh etc. High School Trust, Indaura v. Managing Committee etc. Rajput High School, Indaura*, I. L. R. (1938) Lah. 63 (where the defendants were not in possession or in a position to deliver possession and there was no further relief available to the plaintiffs against the defendants.).

- (w) **Liability of pledgee** : See 'Bailor and Bailee' under "Classes of Persons", Chap. IX, pp. 86, 87.
- (w) **Limitation** : Under Art. 120, 6 years from the time when the plaintiff came to know of the pledge to the defendant.
- (w) **Right of Suit under S. 42, Sp. Rel. Act—conditions** : The conditions which would justify the Court in granting a declaration under s. 42 of the Specific Relief Act are : (1) the plaintiff must be entitled to a legal character at the time of the suit, or (2) to a right to property, (3) the defendant should have denied these, or be interested in denying this character or right, and (4) the plaintiff should not be in a position to ask for relief consequential upon the declaration sought. Even if the plaintiff has had a present existing right, no cause of action accrues to him until there is some infringement or threatened infringement of his right, in other words, a cloud must be cast on his title before he can ask for its removal. He must allege and prove hostility on the part of the defendant, for no Court will move on merely speculative grounds : *Jeka Dula v. Bai Jiri*, (1937) 39 Bom. L. R. 1072. 'Further relief' in s. 43, Specific Relief Act, does not mean every kind of relief that may be prayed for ; what is contemplated is a relief arising from the cause of action on which the plaintiff's suit is based : *Chellammal v. Aiyamperumal*, A.I. R. 1937 Mad. 495.

The plaintiff claims—

(1) A declaration that he is the owner of the said jewels.

(2) A declaration that the defendant company are not entitled to the benefit of the said pledge.

PLAINT.

263.

DECLARATION.

(Declaratory suit under Sec. 42, Specific Relief Act, 1877).

CLAIM for a Declaration that the Minor Defendant is not the Plaintiff's Son. (x)

1. The plaintiff is a Talukdar of the.....State in theTaluka. The succession to his talukdari estate is governed by the law of primogeniture.

2. The plaintiff married defendant no. 1 in.....19..., and, as she did not give birth to any son, the plaintiff took a second wife in.....

3. Thereupon, in.....19..., the defendant no. 1 left the plaintiff and went to live with her parents in the village of..... in.....

4. On... ..19..., the defendant no. 1's father informed the plaintiff by telegram that defendant no. 1 had given birth to a son, who is the minor defendant no. 2 in this suit.

5. The defendant no. 2 is not the plaintiff's son and is a supposititious son set up by defendant no. 1 and her father.

6. The defendant no. 1 and her father have been proclaiming to the world that defendant no. 2 was born on.....and was the plaintiff's son.

7. On.....the defendant no. 1 wrote a letter to the plaintiff claiming maintenance for the said alleged son.

The plaintiff claims—

(1) A declaration that the defendant no. 2 is not his son.

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- (x) **Reference:** *Bai Shri Vaktuba v. Thakore Agarsinghji*, (1910) I. L. R. 34 Bom. 676 (It was held that the suit was maintainable under Sec. 42, Sp. Rel. Act, 1877. Scott C. J. observed at p. 681, "It is not the case here that the plaintiff is seeking prematurely to force his opponent's hand; on the contrary the plaintiff's own hand has been forced by the open assertion of a definite claim on behalf of the minor defendant, a claim which the plaintiff is entitled to repel now when the material evidence is obtainable.").

PLAINT.

264.

DECLARATION.

(Declaratory suit under Sec. 42, Specific Relief Act, 1877).

**CLAIM by the Widow of a deceased Hindu for a Declaration
that the Adoption by her of the Defendant as a Son to
her Husband is invalid. (y)**

1. A. B., husband of the plaintiff, was a Hindu governed by the Dayabhaga. He died February 5th, 19..., childless and intestate.

2. By his Anumatipatra dated....., A. B. had authorised the plaintiff to adopt a son of his full-brother C. B. as a son to him.

3. The said C. B. declined to give any of his sons in adoption, whereupon, on....., the plaintiff, acting on the advice of G. B., her husband's step-brother, adopted the defendant, a son of the said G. B., as a son to her husband, in the honest belief that she was legally competent to do so.

4. The plaintiff is now advised that the said adoption was in excess of the authority given to her by her husband to adopt a son to him.

The plaintiff claims—

A declaration that the said adoption is invalid.

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- (y) **Authority to adopt:** All the schools of Hindu law recognise the right of the widow to adopt a son to her husband 'with the assent of her lord.' It is equally well established that the assent may be given either orally or in writing; that when given, it must be strictly pursued; that she cannot be compelled to act upon it, unless and until she chooses to do so; and that in the absence of express direction to the contrary, there is no limit within which she may exercise the power conferred upon her: *Mulsaddi Lal v. Kundon Lal*, (1905-06) L. R. 33 I. A. 55, folld. in *Bhupendra Mohan v. Purna Sashi*, (1938-39) 43 C. W. N. 1149, 1162 (P. C.). See also *Sitabai v. Bapu* (1919-20) L. R. 47 I. A. 202, 296; *Kalawati Debi v. Dharam Prakash*, (1932-33) L. R. 60 I. A. 90 (A widow adopting may herself sue for declaration of invalidity of adoption); *Sundarasivudu v. Adinarayana*, A. I. R. 1939 Mad. 909. In the Madras and Bombay presidencies a widow may adopt without authority from her husband subject to certain conditions: See Mulla's Hindu Law 9th Edn., pp. 524-530.

- (y) **Form of authority:** The authority to adopt may be given verbally or in writing. If it is in writing it must be registered unless the autho-

PLAINT.

265.

DECLARATION.

(Declaratory suit under S. 42, Specific Relief Act, 1877).

CLAIM by a Hindu Widow to have a Deed of Adoption obtained under Coercion declared void. (z)

1. The plaintiff is the widow of A. B., who was a Hindu Vaisya governed by the Mitakshara.

2. The said A. B. died February 5th, 19..., at about 4 P. M.

3. Some time before his death on that day the said A. B. verbally authorised the plaintiff to take a son in adoption.

4. The plaintiff was 13 years two months when her husband died.

5. At the time of the death of the said A. B., the defendant C. D., and his father the defendant E. F., and his uncle the defendant G. H., were present at the house of the plaintiff. The defendants E. F. and G. H. insisted that C. D. must be adopted by the plaintiff as a son to her husband then and there and that unless and until the plaintiff executed a deed of adoption in that behalf they would not allow the corpse of the plaintiff's husband to be removed from the house.

6. Being stricken with grief, the plaintiff was not then in a proper frame of mind to deliberate and decide whether an adoption should be made, and if so, who ought to be selected for the adoption, but finding that her husband's dead body would not be cremated unless the deed of adoption was executed by her, she was compelled to execute a deed purporting to adopt the said C. D. as a son to her husband, and upon her doing so, the dead body of her husband was allowed to be removed from the house for cremation.

urity is contained in a will : S. 17 (3), Regn. Act, 1908 ; *Mutsaddi Lal v. Kundan Lal*, (1905-06) I. L. R. 33 I. A. 55.

(y) **Court fees** : Art. 17 (v), Sch. II of the Court Fees Act.

(z) **Reference** : *Ranganayakamma v. Alwar Setti*, (1890) I. L. R. 13 Mad. 214.

(z) **Limitation** : Art. 118 of the Limitation Act does not apply to a suit by a Hindu widow to recover possession of her husband's share in the family properties after the latter's death and such a suit, if brought within twelve years from the husband's death, is within time : *Padmalay Achariya v. Sm. Fakira Debya*, (1930-31) 35 C. W. N. 465.

7. The plaintiff did not execute the deed out of her free will but under circumstances amounting to coercion.

8. Further, or, in the alternative, the said C.D. was not in fact adopted by the plaintiff. There was no formal giving and taking and no *datta homam* was performed.

The plaintiff claims—

(1) A declaration that the said deed of adoption is void.

(2) A declaration that the said C. D. was not adopted by the plaintiff.

PLAINT.

266.

DECLARATION.

(Declaratory suit under Sec. 42, Specific Relief Act, 1877).

CLAIM by the Widow of a Deceased Hindu for a Declaration that the Defendant was not adopted by her, alternatively, that the Adoption, if any, is invalid.

1. The plaintiff is the widow of one R. S., a Hindu governed by the Mitakshara, who died January 15th, 19..., leaving him surviving the plaintiff, his widow and sole heir, and leaving behind him zemindary properties of considerable value and extent.

2. R. S., in his life-time, employed one E. F., father of the defendant, as the manager of the said properties.

3. Shortly after the death of R. S., the said E. F., since deceased, wanted the plaintiff to give him a power of attorney.

4. On or about the said E. F., caused the plaintiff to put her thumb mark to a deed by verbally representing to her that it was the general power of attorney in his favour.

5. Subsequently, on the same day, a gentleman, who, the said E. F., told the plaintiff, was the Sub-Registrar of, visited the plaintiff's house. The said gentleman did not read out or explain the said deed to the plaintiff but only asked her if she had put her thumb mark on the said deed. The plaintiff admitted that she had done so, whereupon the said gentleman got her thumb mark affixed at another place on the said deed and also in a Register.

6. The said E. F. died on

7. On the plaintiff received a notice and a copy of

an application made by the defendant for mutation of his name in the revenue records as the owner of the said properties, and came to know that the aforesaid deed to which she had put her thumb mark was in fact a deed of adoption, in which it was stated that the plaintiff adopted the defendant, son of the said E. F., as a son to her deceased husband and that the defendant relied on the said deed for the purpose of his said mutation application.

8. The plaintiff is a pardanashin illiterate lady. She put her thumb mark to the said deed without knowing its contents and in the honest belief that it was a general power of attorney in favour of the said E. F. as had been represented to her by the said E. F.

9. The plaintiff did not adopt the defendant as a son to her husband.

10. In the alternative, the physical act of giving and taking the defendant as an adopted son did not take place.

11. Further, or, in the alternative, the plaintiff had no authority from her husband to adopt a son to him.

The plaintiff claims—

(1) A declaration that the said deed of adoption dated is void.

(2) A declaration that the defendant was not adopted by the plaintiff as a son to her husband.

(3) A declaration that the adoption, if any, of defendant by the plaintiff is invalid.

PLAINT.

267.

DECLARATION.

(Declaratory suit under Sec. 42, Specific Relief Act, 1877).

CLAIM by the Nearest Reversioners of a deceased Hindu for a Declaration that an Adoption by his Widow is invalid. (a).

1. One A. B., who was a Hindu governed by the Dayabhaga, died January 5th, 19..., leaving him surviving the defendant C. D., his widow, and the plaintiffs his nearest reversionary heirs.

(a) **Grounds for invalidity of adoption :** The grounds must be specifically stated. For requirements of a valid adoption, see Mulla's Hindu Law, 9th Edn., p. 516. Cf. *Bhagwan Singh v. Bhagwan Singh*, (1898-99)

2. The plaintiffs' relationship with the deceased will appear from the following pedigree :

(Here set out the pedigree).

3. The said A. B. died possessed of immovable properties of considerable value situate within the jurisdiction of this Court. Particulars of the said properties are set out in schedule "A" hereto annexed.

4. In September 19..., the plaintiffs discovered that the defendant J. P., alleging that he was the adopted son of A. B. deceased, got his name recorded in the government and municipal records as the owner of the said properties.

5. The defendant J. P. is giving out that he was validly adopted by the defendant C. D. as the son to A. B. deceased.

6. The defendant J. P. was not in fact adopted by the defendant C. D.

L. R. 26 I. A. 153, and *Haridas Chatterjee v. Manamatha*, A. I. R. 1936 Cal. 1 (for instances of adoption prohibited by Hindu law).

- (a) **Parties to suit :** Where the presumptive reversioner, or with the permission of the Court, a more remote reversioner, brings such a suit, the Court ought to require him to disclose the names of other persons interested in the reversion and direct notices to be served on them, to enable them to be made parties should they so desire : *Chiruvolu Pannamma v. Chiruvolu Perrazu*, (1906) I. L. R. 29 Mad. 390 (F.B.).
- (a) **Limitation :** Under Art 118 of the Ind. Lim. Act, a suit for a declaration that an alleged adoption is invalid or never in fact took place, must be brought within 6 years from the date when the plaintiff came to know of the adoption. When an adoption is made by a Hindu widow without authority, the immediate reversioner ought to bring a suit for declaration within the period prescribed by this article : *Chiruvolu Pannamma v. Chiruvolu Perrazu*, *supra*. Cf. *Jagadamba Chaothrani v. Dakhina Mohun*, (1886) I. L. R. 13 Cal. 306 (P. C.) ; *Kalyanadappa v. Chanbasappa*, (1923-24) L. R. 51 I. A. 220 (Art 118 of Sch. 1 of the Indian Limitation Act, 1908, applies only to a suit under Sec. 42 of the Specific Relief Act, 1877, for a declaratory decree that adoption is invalid or did not take place. The article applicable to a suit by a reversioner for possession of immovable property on the death of a Hindu female is Art. 141 even if it is necessary to decide in the suit whether an adoption was not valid.). When the right of the next reversioner to contest an adoption becomes time-barred, the right of the subsequent reversioner is not time-barred : *Abinash Chandra Mazumdar v. Hari Nath*, (1905) I. L. R. 32 Cal. 62 ; *Bhagwanta v. Sukhi*, (1900) I. L. R. 22 All. 33.

7. Alternatively, the said A. B. did not give any authority to the said C. D. to adopt a son to him.

8. In the further alternative, the defendant J. P. was at the time of the alleged adoption an orphan and was not given by any one competent to give him in adoption.

9. Further, or, in the alternative, the defendant J. P. is a brother's daughter's son of A. B. deceased, whose adoption is prohibited by the Niyoga rule and is wholly void.

The plaintiffs claim—

(1) A declaration that the defendant J. P. is not the adopted son of A. B. deceased.

(2) Alternatively, a declaration that the adoption, if any, of the said J. P. by the defendant C. D. is void.

PLAINT.

268.

DECLARATION.

(Declaratory suit under S. 42, Specific Relief Act, 1877).

CLAIM by the next presumptive Reversioners of a deceased Hindu for a Declaration that an Alienation by his Widow is not binding beyond her Life-time. (b)

1. A. B., a Hindu governed by the Mitakshara, died February 5th, 19..., childless and intestate, leaving him surviving the defendant no. 1, his widow, and leaving separate property of considerable value and extent.

2. Upon the death of A. B., the defendant no. 1 came into possession of the said property.

(b) **Reversioner's right to sue:** The reversioners are not bound to institute a declaratory suit in the life-time of the limited heir. They may wait until the estate vests in them on her death and then sue the alienor for possession of the property: *Bijoy Gopal v. Krishna*, (1906-07) L. R. 34 I. A. 87. The right to sue for a declaration rests in the first instance with the next reversioner unless the next reversioner refuses without sufficient reasons to institute proceedings or has by his conduct precluded himself from suing: *Rani Anund Koer v. The Court of Wards*, (1880-81) L. R. 8 I. A. 14; *Venkatanarayana v. Subbammal*, (1914-15)

3. The plaintiffs are the next presumptive reversioners of A. B., deceased, as will appear from the following pedigree :

(Here set out the pedigree)

4. By a sale deed dated....., the defendant no. 1 purported to convey the undermentioned property which formed part of the separate property of her husband to the defendant no. 2 absolutely for the alleged consideration of Rs. 2000. There is a recital in the said deed that the sale was for legal necessity, that is, for

5. The sale of the said property was without the alleged or any legal necessity.

The plaintiffs claim—

A declaration that the said sale is not valid beyond the life-time of the defendant no. 1. •

PLAINT.

269.

DECLARATION.

(Declaratory suit under Sec. 42, Specific Relief Act, 1877).

CLAIM by Assignee of a Decree for a Declaration of Right to execute the Decree. (c)

1. In..... 19..., the defendant no. 1 instituted a suit in this Court (Money Suit no.....of.....) against one.....

L. R. 42 I. A. 125, 130, or is from poverty not in a position to sue: *Mata Prasad v. Nageshar Sahai*, (1924-25) L. R. 52 I. A. 398. In a suit by the next reversioner, a remote reversioner may claim to be joined as a party on proof of laches on the part of the plaintiff or collusion between him and the widow: *Venkatanarayana v. Subbammal*, (1914-15) L. R. 42 I. A. 125. The grant of a declaratory decree is entirely at the discretion of the Court: *Ram Tawakal Tewari v. Mt. Dulari*, A. I. R. 1934 All. 469.

(b) **Limitation**: The suit must be brought within 12 years from the date of alienation, under Art. 125, Sch. I, Ind. Lim. Act, 1908.

(b) **Decree in such suit and *res judicata***: A decree fairly and properly passed in such suit, whether for or against the next reversioner, operates as *res judicata* between not only the next reversioner but the whole body of reversioners on the one hand and the alienee and his representatives on the other: *Kesho Prasad Singh v. Sheo Fragash Qjha*, (1923-24) L. R. 51 I. A. 381; *Pramatha Nath Basu v. Bhulan Mohan Basu*, (1922) I. L. R. 49 Cal. 45.

(c) **Reference**: *Purna Chandra v. Barna Kumari*, (1938-39) 43 C. W. N. 953

..... for recovery of Rs. 3500/- in respect of certain accepted bills for works done.

2. On January 5th, 19..., the defendant no. 1 borrowed Rs. 2000/- from the plaintiff and, in consideration of the said loan, executed a mortgage bond in favour of the plaintiff, assigning by way of security the decree that would be passed in the said Money Suit instituted by him. It was a condition of the said bond that the plaintiff would be entitled to realise out of the decretal amount the said sum of Rs. 2000/- with interest at 6 *per cent. per annum* and to pay the balance, if any, to the assignor.

3. On March 20th, 19..., a decree was made in the said Money Suit for Rs. 3500/- with costs and interest on judgment at 6 *per cent.*

4. Subsequent to the said decree the defendant no. 1 by a conveyance dated....., purported to transfer the said decree for an alleged consideration of Rs. to the defendant no. 2.

5. Defendant no. 2 is denying and is interested to deny the validity of the aforesaid assignment in favour of the plaintiff.

The plaintiff claims—

A declaration that as assignee of the decree in the said Money Suit no..... of....., he is entitled to realise the decretal amount by execution of the decree or otherwise.

(Among the defences in this suit were (1) that the assignment in favour of the plaintiff was an assignment of a mere right to sue and (2) that the suit for a pure declaration was bad under Sec. 42 of the Spec. Rel. Act. *Held* : (1) The suit was in respect of some unpaid bills and what was transferred was a claim to a debt. An assignment of future or non-existing property is quite valid and the transfer becomes operative as soon as the property comes into existence. Here the mortgage must be deemed to have attached itself to the decree which was for a definite amount as soon as a decree is passed. (2) All that the plaintiff could want possibly at the present stage was a declaration that she was an assignee of the decree, and if she gets a declaration it would be open to her to apply for an execution of the decree under O. XXI, r. 16 of the Code of Civil Procedure. No other consequential reliefs by way of injunction or otherwise could or should have been prayed for by the plaintiff in the present suit.).

DEFENCE.

270.

DECLARATION.

(Declaratory suit under Sec. 42, Specific Relief Acts, 1877).

**Defence to a Claim by adoptive Mother for a Declaration
that the Defendant was not adopted by her. (d)**

1. The allegation in paragraph 3 of the plaint that E. F., father of the defendant, wanted the plaintiff to give him a power of attorney is not admitted.

2. The deed mentioned in paragraph 3 of the plaint was a deed of adoption to which the plaintiff put her thumb mark after the same was read over and explained to her by the said E. F. in the presence of and who were witnesses to the said deed. The allegation in the said paragraph that E. F. represented to the plaintiff that the deed to which she was required to put her thumb mark was a general power of attorney in her favour is denied.

3. The allegation in paragraph 5 of the plaint that the Sub-Registrar did not read out or explain the contents of the said deed to the plaintiff is denied.

- (d) This is a defence to form No. 265.
- (d) **Defence of estoppel** : The estoppel pleaded against the plaintiff must be taken as purely personal. It does not bind any one who claims by an independent title : *Rani Dharam Kunwar v. Balwant Singh*, (1911-12) L. R. 39 I. A. 142, 148. Cf. *Dhanraj Joharmal v. Soni Bai*, (1924-25) L. R. 52 I. A. 231 (A long course of recognition of adoption by the adopter may give rise to an inference that the necessary ceremonies had been performed.).
- (d) **Custom as to widow's authority to adopt** : In a Mahratta country of the Bombay Presidency and in Gujerat a Hindu widow, whose husband has not expressly forbidden her to adopt a son to him, has power to do so, without the consent of her husband's kinsmen, whether or not her husband's estate is vested in her, and whether he died joint or separate in family : *Yadao v. Namdeo* (1920-21) L. R. 48 I. A. 513.
- (d) **Ceremony of giving and taking** : Actual gift and acceptance of the adopted son is necessary : *Bireswar Mookerji v. Ardha Chunder*, (1891-92) L. R. 19 I. A. 101, 105, 106 ; *Balak Ram High School v. Nanu Mal*, (1930) I. L. R. 11 Lah. 503. It is the act of adoption that confers the status : *Vishvanath Ramji v. Rahibai Ramji*, (1931) I.L.R. 55 Bom. 103,

4. The plaintiff is a literate lady and she put her thumb mark to the said deed fully knowing its contents.

5. The plaintiff duly adopted the defendant as a son to her husband. The physical act of giving and taking the defendant as an adopted son did take place.

6. The plaintiff had authority from her husband to adopt a son to him.

Alternatively, according to the custom among the Hindus of Guzerat to which R. S., the husband of the plaintiff, belonged, a widow can adopt a son in the absence of any express prohibition from her husband. The said R. S. imposed no such prohibition on the plaintiff.

7. In.....19..., the plaintiff had been obliged to defend a suit brought in this Court (No.....of.....) against her by one C. D., an alleged reversioner to the estate of R. S., and in her written statement in that suit she stated that she had adopted the defendant on..... pursuant to an authority given to her by her husband.

8. In the deed of adoption above-mentioned the plaintiff also stated that she had adopted the defendant under an express authority from her husband.

9. After his adoption by the plaintiff, the defendant was treated by the plaintiff as a member of the family of her deceased husband.

10. On....., the defendant performed the annual *sradh* ceremony of his adoptive father to the knowledge and under the directions, of the plaintiff.

11. In the premises the plaintiff is estopped from challenging the fact or the validity of the defendant's adoption.

(d) **Burden of proving and disproving adoption :** The adopted son must prove adoption : *Padmalav Achariya v. Sm. Fakira Debya*, (1930-31) 35 C. W. N. 465 (P.C.), and the authority of the widow to adopt : *Dal Bahadur Singh v. Bijai Bahadur*, (1929-30) 34 C. W. N. 369 (P.C.) *Cf. Harihar Pratap v. Bajrang*, (1936-37) 41 C. W. N. 1126 (P.C.).

(d) **Deed Executed by a *pardanashin* lady—when can be avoided :** The onus is upon the defendant to prove that the *pardanashin* lady had really understood and intended to execute the deed but not also that she had had independent advice : *Nawab Sikandar v. Zulfikar*, (1937-38) 42 C. W. N. 332 (P.C.)

PLAINT.

271.

DECLARATION.

(Declaratory suit under O. XXI, r. 63, C. P. Code).

**CLAIM by a Person who had unsuccessfully filed a Claim to
Attachment for a Declaration of Title to
Property attached. (e)**

1. In..... 19..., one M. Y. obtained a simple money decree against one K. N. K. in Money Suit no..... of..... in the Court of..... and thereafter assigned the said decree to the defendant, who in execution of the said decree attached the property specified at the foot of the plaint on or about.....19...

- (e) **Declaratory suit under O. XXI, s. 63, C. P. Code :** If a claim is preferred under O. XXI, r. 58, C. P. Code, then a suit for a bare declaration under O. XXI, r. 63, will lie, but where no such claim is preferred, then the declaratory suit will be governed by the provisions of Sec. 42, Spec. Rel. Act, 1877, and if the plaintiff is able to seek further relief and omits to do so, his suit will be barred : *U Po Thein v. O. A. O. K. R. M. Firm*, (1928) I. L. R. 5 Rang. 699, fd. in *Maung Khin Gyi v. Rahim Ulla Khan*, A. I. R. 1937 Rang. 249 ; cf. *Kakayan v. Lee Like*, A. I. R. 1937 Rang. 133. For a declaratory suit under O. XXI, r. 63, the question whether the claim was investigated or not is immaterial and accordingly a dismissal of the application for default would attract the operation of r. 63 : *Ambica Prosad v. Soorajumall*, (1938-39) 43 C. W. N. 999. A party who files a successful suit under O. XXI, r. 63 can recover as damages costs incurred by him in prior miscellaneous proceedings : *U. Soe Gyi v. Ko Po Khaing*, A. I. R. 1933 Rang. 91. Where orders have been passed against a person on his application for removal of attachment, O. XXI, r. 63 gives him a right to file a suit even though the attachment is withdrawn by the decree-holder : *V. S. Aiyar v. Maung Ngun*, A. I. R. 1929 Rang. 228. Cf. *Mt. Basanti Devi v. Chotte Lal*, A. I. R. 1931 All. 608 (Where the attachment ceases to exist within a period of one year it is no longer incumbent upon the claimant to file a suit for declaration of his title to the property. He is not barred from raising the objection again in fresh execution proceeding).
- (c) **Parties to suit :** In a suit by the claimant under O. XXI, r. 63 the judgment-debtor is not a necessary party : *Suppan Asari v. Alima Bibi*, A. I. R. 1934 Mad. 587. The auction purchaser is a necessary party and if there is no suit in which he is a party until more than a year after the dismissal of objection to the attachment, the order dismissing the objection is conclusive in favour of the auction-purchaser : *Ghulam Haider v. Said Ahmad Ali*, A. I. R. 1935 Pesh. 29. Cf. *Mt. Naurozi v.*

2. Thereupon, on, the plaintiff preferred a claim to the said attachment, (Claim Case No. of) on the ground that on 19...., that is, long before the said attachment, K. N. K., the judgment-debtor, had sold the said property to the plaintiff, and, accordingly, the same was not liable to such attachment.

3. On the said Claim Case was dismissed with costs.

The plaintiff claims—

(1) A declaration that he is the owner of the said property.

(2) A declaration that the said property is not liable to attachment and sale in execution of the said decree.

Najaf Ali Shah, A. I. R. 1939 Pat. 321 (where it was held that the plaintiff was not bound to implead an auction-purchaser who purchased the property during the pendency of the suit)

- (c) **Burden of proof** : The onus is upon the plaintiff to show that he is the owner of the property : *Sahdeo Karan Singh v. Usman Ali Khan*, A. I. R. 1939 Pat. 462 (where the plaintiff's purchase was challenged as benami); *Dhirendra Nath v. Indra Chandra*, A. I. R. 1939 Cal. 578; *M. S. M. Chettyar Firm v. Mrs. A. Murray*, A. I. R. 1937 Rang. 252; *Gopal Singh Khatri v. Sheokumar Singh*, A. I. R. 1937 Nag. 85; *Masina Bavamma v. Yendru Papanna*, (1937) 1 M. L. J. 133.
- (e) **Limitation** : The suit must be brought within one year from the passing of the order complained of : *Sardhari Lal v. Ambika Pershad*, (1889) I. L. R. 15 Cal. 521 (P. C.). Art. 11 of the Lim. Act. will apply whether the investigation has taken place or not : *Venkataratnam v. Ranganayakamma*, (1918) I. L. R. 41 Mad. 935 (F. B.).
- (e) **Court-fee** : Court-fee is payable under Art. 17 (1) of Sch. II of the Court-Fees Act : *Satindra Nath v. Shiva Prosad*, (1921-22) 26 C. W. N. 126; *Kisan v. Totaram Jaiaramal*, A. I. R. 1937 Nag. 253.
- (e) **Suit's valuation** : "The value of a suit under O. XXI, r. 63 of the Civil Procedure Code is the value of the property to the plaintiff. If the value of the property is less than the value of the decree, the market-value of the property is the value of the suit. But if the value of the decree be less, then the value of the decree affects the value of the suit. In such a case, when the property has already been sold in execution, the value of the suit would be the loss which the plaintiff would suffer by such sale : *Barjor Dorabji Randelia v. Calcutta Chemical Co.* (1938-39) 43 C. W. N. 609; *Mool Chand v. Ram Kishan*, (1933) I. L. R. 55 All. 315 (F. B.). Cf. *Mt. Radha Kunwar v. Thakur Reoti Singh*, (1915-16) 20 C. W. N. 1279 (P. C.) (Where in a mortgage suit a person claims adversely to the mortgagor and after his claim is disallowed he brings a suit under O. XXI, r. 63 the value of the said suit is the value of his claim and not mortgage-debt).

PLAINT.

272.

DECLARATION.

(Declaratory suit under O.XXI, r. 63, C. P. Code).

CLAIM by a Creditor that Property attached belongs to the Judgment-debtor and is liable to Attachment and Sale. (f).

1. In execution of his money decree obtained in Suit no..... of.....against one B. D., the plaintiff attached a house specified hereunder on.....19.....

2. Thereupon, on....., the defendants, sons of one G. H., deceased, preferred a claim to the said attachment under O.XXI, r. 58, C. P. Code, alleging that the said house had been purchased by their father by a registered deed dated from B. D., the judgment-debtor for a sum of Rs. 1000/-.

3. The said claim was allowed on and the house was released from attachment.

4. The said G. H., father of the defendants, was a cousin of B. D., and the said sale deed in his favour was without consideration and was a sham and bonami transaction. The property purported to be conveyed under the said sale deed was not conveyed at all and remained and still remains the property of B. D.

The plaintiff claims—

(1) A declaration that the sale deed aforesaid is void as against the plaintiff.

(2) A declaration that the property purported to be conveyed by the sale deed is liable to attachment and sale for recovery of the amounts due under the said decree.

- (f) **Representative suit by judgment-creditor—when necessary :** The necessity for the plaintiff to bring a suit under O. XXI, r. 63 arises by reason of a summary decision under O.XXI, r. 58 passed in execution of his own decree and there is no reason why he should be compelled to sue on behalf of other creditors also : *Mt. Bas Kuar v. Gaya Municipality*, (1939) I.L.R. 17 Pat. 583, folg. *Maung Tun Thein v. Maung Sin*, (1934) I.L.R. 12 Rang. 670 and *U Maung Nye v. P. L. S. P. Chettiar Firm*, A. I. R. 1934 Rang. 200. A suit by a creditor under O.XXI, r. 63, for a declaration that the property in dispute is attachable and saleable in execution of his decree and that the sale effected by the judgment-debtor is ineffective and void so far as the decree in favour of that creditor is concerned is maintainable on his own behalf. It is not necessary for him to bring a representative suit on behalf of

DEFENCE.

273.

DECLARATION.

(Declaratory suit under O.XXI, r. 63, C. P. Code).

DEFENCE to Claim by Creditor that the Property belongs to the Judgment-debtor and is liable to Attachment and Sale. (g)

1. The defendants deny that the said sale deed was without consideration or was a sham or benami one as alleged or at all.

2. The property purported to be conveyed under the sale

for the benefit of other creditors : *Mohammad Asgar Ali v. Md. Ishaq Ali*, A.I.R. 1940 All. 72. Where a creditor pleads that the deed of sale by judgment-debtor was a sham and bogus transaction and that the property which purported to be conveyed under the instrument of sale was never conveyed at all and remained the property of the vendor, there is no necessity to institute a suit under Sec. 53 of the T. P. Act, as there is in fact no transfer and there is nothing which can be avoided : *Purbhu Nath Prasad v. Sarju Prasad*, A.I.R. 1940 All. 407. A judgment-creditor who has been defeated at the instance of an intervenor in proceedings taken in execution of his decree need not necessarily file a representative suit under Sec. 53, T. P. Act. All that Para 4 of sub-s. (1) of s. 53, T. P. Act, says, that if a creditor, which term would include a decree-holder, whether he has or has not applied for execution of his decree, wants to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transferor, then he must sue on behalf of, or for the benefit of, all the creditors. But when the suit is not to set aside the transfer on the ground that it was made with intent to defeat or delay the creditors, but to establish a creditor's priority, it is difficult to see why the suit should be a representative suit : *Shrimal v. Hiralal*, A.I.R. 1938 Bom. 289. Cf. *A. K. A. C. T. V. Chidambaram Chettyar v. R. M. A. R. S. Firm*, A. I. R. 1934 Rang. 302.

(f) **Parties to suit** : The judgment-debtor is not a necessary party : *Harchandrai v. Gopaldas*, A. I. R. 1939 Sind 177. A purchaser of the property from a claimant after an order has been passed in his (claimant's) favour but before a suit under O. XXI, r. 63 was instituted, is an *alienec pendente lite* and is therefore not a necessary party to the suit ; and if the necessary parties had been brought on the record within one year, the alienec cannot advance the plea of limitation as Sec. 22 (2), Lim. Act expressly excludes the operation of Cl. 1 in such cases : *Mt. Bas Kuar v. Gaya Municipality*, (1939) I. L. R. 17 Pat. 583.

(g) This is a defence to Form No. 272.

(g) **Defence of adverse possession** : See *Ranganatha Aiyar v. Srinivasa*, A. I. R. 1926 Mad. 42 (An attachment under the C. P. Code does not confer any interest in the property and cannot disturb the continuance

deed was conveyed to G.H., the father of the defendants, for valuable consideration.

3. At the time of the attachment, the said property belonged to the defendants by virtue of the said sale deed.

4. In the alternative, the defendants state that G.H., in his lifetime and, after his death, the defendants, have been in continuous and exclusive possession of the said property without interruption to the knowledge of B.D., since....., and acquired title thereby by adverse possession before the date of the institution of the suit.

5. The suit is not instituted within one year from the date of the order allowing the defendants' claim to the attachment.

6. In the premises the plaintiff has no cause of action, and his cause of action, if any, is barred by the Statute of Limitations.

DEFENCE.

274.

DECLARATION.

(Declaratory suit under O. XXI, r. 63, C. P. Code).

DEFENCE to a Claim by a Person for a Declaration of Title to Property attached. (h)

1. The property attached belongs to K. N. K. the judgment-debtor.

2. The alleged transfer by the said judgment-debtor in favour of of physical possession of the holder at the time. Hence, a mere attachment cannot affect the continuity of adverse possession.)

(g) **Defence of satisfaction of the claim under the decree:** See *S. A. Kulathu Aiyar v. Vaithilingam*, A. I. R. 1927 Mad. 876 (Though an uncertified discharge cannot be recognized by "any Court executing a decree", a plea of discharge can be taken in a suit, provided of course that it is not taken by one of the parties to the decree.).

(g) **Defence of limitation:** See notes under Form No. 271. *Qasim Ali v. Kalyan Das*, A. I. R. 1933 Lah. 449 (The provisions of Art. 11 do not apply unless there has been an attachment in the manner provided by the Code. As there was no valid attachment, Art. 11 did not apply and that the suit was governed by Art. 120.).

(h) This is a defence to Form No. 271.

(h) For the defence that the transfer was in fraud of creditors, see *Ramaswami Chettiar v. Mallappa Reddiar*, (1920) I. L. R. 43 Mad. 760 (F. B.).

(h) For the plea of limitation, see notes under Form No. 271,

the plaintiff was made without consideration with intent to defeat or delay the creditors of the transferor.

3. The suit is not brought within one year from the passing of the order dismissing the claim.

DEFENCE.

275.

DECLARATION

GENERAL DEFENCES to a Claim for Recovery of a specific Article wrongfully detained.

The defendant denies that he ever received the alleged or any piano from the plaintiff by way of loan or otherwise and has not detained any such piano as alleged or at all.

Or,

The defendant admits that he took a loan of the said piano from the plaintiff on.....but says that he returned it to the plaintiff on.....

Or,

The defendant was and is the joint-owner of the said piano with the plaintiff. He says that he has detained and still detains the same, as he is entitled to do, as such joint-owner.

Or,

The said piano was and is not the property of the plaintiff. It is the property of one E. F. who on made a claim for it on the defendant. The defendant is relying upon the right of the said E.F. and defends this suit on the direction and by the authority of the said E.F. and on his behalf.

Or,

The said piano was delivered to the defendant by the plaintiff on for repairs at an estimated cost of Rs..... The plaintiff did not pay for such repairs and the defendant has detained and still detains the same for a lien to which the defendant was and is entitled. Each and every allegation in the plaint inconsistent with what is hereinbefore stated is denied.

And/or (if such be the case),

The suit is not brought within three years of the accrual of the alleged right to sue and is barred by the Statute of Limitations.

PLAINT.

276.

DEPOSIT.

CLAIM to recover Money deposited. (i).

1. The defendant firm carry on business as and also as bankers.

2. On September 4th, 19....., the plaintiff deposited with the defendant firm Rs. 1000/- and on the same day the defendant firm gave the plaintiff the following memorandum addressed to him evidencing the deposit and the terms thereof :

"The sum of Rs. 1000/- that you have deposited with us will be handed over to you whenever you demand the same and we will pay you interest at the rate of 12 annas *per cent. per mensem.*"

3. By letter dated.....19..... the plaintiff demanded payment of the money so deposited with accrued interest, but the defendant firm have failed to make any payment.

Particulars of claim :

Principal amount..... Rs.

Interest up to..... „

Net amount due...Rs.

The plaintiff claims—

(1) Rs.....

(2) Further interest.

- (1) **Limitation :** There has been a good deal of controversy as to the applicability of Art. 60 of the Ind. Lim. Act. But the controversy is now set at rest by the recent judgment of their Lordships of the Judicial Committee in *Suleman Haji v. Haji Abdulla*, (1939-40) 44 C.W.N. 1041, in which their Lordships have applied the following test : "The test to determine whether a bailment of money is a loan or a deposit for safe custody is whether there is an obligation on the bailee to seek out the bailor and repay him or whether he was to keep the money till the bailor asked for them." The same test was applied in *Gurcharan Das v. Ram Rakha Mal*, A.I.R. 1937 Lah. 81. In the Form given it was expressly agreed that the defendant firm would keep the money until the plaintiff asked for it. Therefore the transaction must be treated as a deposit and Art. 60 would apply. The mere fact that there was an undertaking to pay interest did not convert the transaction

PLAINT.

277.

DEPOSIT.

CLAIM by Depositor for Return of the Deposit Money. (j),

1. On....., the defendant employed the plaintiff as his cashier and in accordance with the terms of his employment the plaintiff deposited with the defendant the same day, $3\frac{1}{2}$ per cent. G.P. Notes of the face value of Rs. 4,000/- as security for the faithful discharge of his duties as such cashier.

2. By mutual consent, the plaintiff's said employment was terminated on.....

into a loan : *Gulxari Lal v. Manzoor Ahmad*, A.I.R. 1939 All. 378. Cf. *Mohammad Akbar Khan v. Attar Singh*, (1936) I.L.R. 17 Lah. 557, P.C. (If the written contract does not explain how the money came to be received, the parties are not prevented from showing that it was paid by way of loan or deposit or for some other purpose.). The agreement that money shall be payable on demand need not be an express agreement. It can be implied agreement and often is implied from the circumstances of the deposit : *Ramanna Reddy v. Abdul Rashid*, A.I.R. 1939 Rang. 42. Cf. *Firm Nokhlal Sarju Prasad v. Mt. Bibi Mojihan*, A.I.R. 1939 Pat. 261. For essentials of demand when the deposit is payable to more persons than one, see *Gopaldas Metharam v. Lokamal Ohellaram*, A.I.R. 1939 Sind 173. In a suit to recover amount deposited with a banker the necessity for a demand as furnishing a cause of action under Art. 60 may be got rid of by special contract or by waiver. The depositor cannot simultaneously repudiate liability to pay the sum deposited and insist that a demand previous to suit was essential to its maintainability. Hence a repudiation by a bank of a customer's right to be paid any particular sum would be a waiver of any demand in respect of such sum : *Nripendra Nath v. Arun Chandra* A. I. R. 1940 Pat. 129. The ordinary rule is that the cause of action for the recovery of principal and interest accruing due on it is a single cause of action and where the claim is a single claim for principal and interest, and is within time, no part of the interest can become time-barred. Therefore, where money is deposited on the understanding that the interest need not be paid out as it accrued but should be added to the principal, Art. 60 applies to the interest as well as to the principal and both would be deemed to be deposits payable on demand : *Nripendra Nath v. Arun Chandra*, *supra*.

(j) Limitation : See notes under Form No. 276.

3. The defendant has not returned the said G. P. Notes to the plaintiff in spite of demand in writing made on.....

The plaintiff claims—

Return of the said G. P. Notes or their value.

PLAINT.

278.

DEPOSIT.

CLAIM for Recovery of Specific Goods deposited (k)

1. Before he sailed for Europe in March 19..., the plaintiff left the following articles belonging to him with the defendant for safe custody. The defendant verbally promised to take particular care of the said articles and to return the same to the plaintiff when he would return to India.

Particulars of articles :

(1) An original painting of.....by....., a famous artist.

(2) Six ancient gold coins of the Moghul period.

2. The plaintiff returned to India in September 19...and on.....
...demanded return of the aforesaid articles from the defendant but the defendant disowned having received any of the said articles from the plaintiff.

3. The defendant wrongfully detains the said articles from the plaintiff.

6. The said articles are of unusual beauty, rarity and distinction

(k) **When plaintiff is entitled to delivery of specific goods :** Sec. 11 of the Spec.

Rel. Act mentions the cases in which a claim for specific movables can be made. In a suit to obtain delivery of specific movable property plaintiff must allege and prove facts which entitle him to compel the delivery of specific movable property under Sec. 11 of the Spec. Rel. Act: *Venkata Subba Rao v. Asiatic Steam Navigation Co.*, (1916) 1 I. L. R. 39 Mad. 1, 10 (F.B.); cf. *Whiteley v. Hill*, (1918) 2 K. B. 808, 819 (The power to grant specific delivery ought not to be exercised when the chattel is an ordinary article of commerce and is of no special value or interest and not alleged to be of any special value to the plaintiff and when damages would fully compensate); *Cohen v. Roche*, (1927) 1 K. B. 169. A decree for specific movable property can be executed in the manner provided in O.XXI, r.31, C. P. Code. See Notes under Form No. 279.

and are of special value to the plaintiff and no pecuniary compensation will be an adequate compensation to the plaintiff for the said articles.

The plaintiff claims—

Return of the said articles.

PLAINT

279

DETENTION

CLAIM for Recovery of Specific Goods or their Value and Damages for Detention. (1)

1. The plaintiff at all material times was and is the owner of a grand piano, the estimated value whereof is Rs.....

(k) **Limitation** ; Act. 145, Sch. 1, Ind. Lim. Act. The word 'depository' in the Article means, where one man's property was handed by that man to another, he becomes a depository of it, unless of course there was something in the terms of that handing over which would prevent his being so treated as a person with whom it was deposited at all : *Per Schwabe C. J.*, in *Kishtappa Chetty v. Lakshmi Ammal*, A. I. R. 1923 Mad. 578, folld. in *Bibhu Bhusan v. Anadi Nath* (1934) I. L. R. 61 Cal. 119 ; *Gurbaksh Singh v. Kharaiti Ram*, A. I. R. 1930 Lah. 913. Art. 145 is not governed by Art. 49 : *Ma Shwe On v. Ma Saw*, A. I. R. 1928 Rang. 309. Art. 145 of the Ind. Lim. Act is not applicable to deposits of money. "Deposit" in Art. 145 means only deposit of goods to be returned in *specie* when wanted : *Balakrishnudu v. Narayanaswamy* (1914) I. L. R. 37 Mad. 175. A contrary view was taken in *Lala Gobind Prasad v. Chairman of Patna Municipality*, (1907) 6 C. L. J. 535 (*Per Mookerjee J.*, The term "movable property" as used in Art. 145 includes money and is not restricted in its application to cases where property is recoverable in *specie*). For distinction between Arts. 49 and 145, see, *Promatha Nath Mullick v. Prodynno Kumar Mullick*, (1921-22) 26 C. W. N. 772, 779 (suit for recovery of specific movable property from the legal representative of the deceased bailee) ; *Bibhuti Bhusan Datta v. Anadi Nath*, (1933) 58 C. L. J. 502, 509. *Of. Mohammad Habi-bul Haq v. Tikam Chand*, A. I. R. 1938 P. C. 110 (Where Government promissory notes are left by debtor with his creditor as a security for a sum borrowed by him or for safe custody, a suit for recovery of the notes or for credit in the account between the parties for the sum realized by the sale of the notes and interest, is, in either case, governed by Art. 145 and not by Art. 49). For distinction between Arts. 49, 115 and 145, see, *Tejram v. Chedilal*. 20 N. L. J. 198.

(l) **Cause of action** : An action for 'detinue' is a wrong independent of

2. On.....the defendant took a loan of the said piano from the plaintiff promising to return the same the next day.

3. As the defendant did not return the said piano as promised, the plaintiff made a verbal demand for its return on..... ; yet the defendant has detained and still detains the same from the plaintiff.

contract and is founded in tort. To support the action the plaintiff must have a special or temporary right to the present possession of the property : Sec. 10, Sp. Rel. Act, 1877, Expl. 2. Sec. 11 of the said Act mentions the cases in which a decree for recovery of specific movables can be made.

- (1) **Form of decree :** *Per* Schwabe C. J., in *Sinnan Chetty v. Alagiri Aiyer*, (1923) I. L. R. 46 Mad. 852 (F. B.) at pp. 861, 862, "There are two distinct forms of action which could be brought against a defendant who has or should have movable property of the plaintiff in his possession. They are known as detinue and conversion, the latter being in the old law also called trover. In the former the suit is primarily for the return of the chattel to which is usually added a claim for its value in default of its return. The decree in such an action takes two alternative forms with the same effect. One is for the return to the plaintiff within a limited time of the chattel or its value together with damages, if any, for its detention, and the other is for a sum being the value plus the damages for its detention, to be reduced to the damages only if the chattel is returned in a certain time. In either case the option to return or to pay is in the defendant, but the Court may, in proper cases, order the specific delivery of the chattel which the defendant must comply with on pain of contempt, or it may order the issue of a writ of delivery to the sheriff directing him to seize the chattel. The action for conversion or trover is for damages only and is as a rule for the value of the chattel and is based on an allegation that the defendant has converted the chattel to his own use by some wrongful dealing with it, one instance of which is the refusal to deliver up on demand, and on a decree of this kind the defendant has no option to deliver up the chattel nor has the plaintiff a right to demand it." See O. XX, r. 10, C. P. Code. The plaintiff will be entitled to a decree for recovery of the goods in *specie* if the goods are in the possession or control of the defendant : *Murugesu Mudali v. Jotharam Davay*, (1899) I. L. R. 22 Mad. 478. A decree for specific movable property can be executed in the manner provided in O. XXI, r. 31, C. P. Code : *Karnani Industrial Bank v. Barabani Coal* (1937-38) 42 C.W.N. 523, 527.
- (1) **Measure of damages :** The judge should take into consideration all the circumstances of each case presumably within the knowledge of the defendant at the time he committed the act which forms the cause of action, and allow for their natural and immediate consequences : *Shaikh Funju v. Shaikh Oodoy*, (1872) 18 Suth. W. R. 337. Cf. *McIvor v. Stainbank*, (1869) 5 M. H. C. R. 70.

The plaintiff claims—

- (1) Delivery of the said piano, or Rs..... its value, in case delivery cannot be had.
- (2) Rs....., compensation for the detention thereof.

PLAINT.

280.

DOWER.

CLAIM by Mahomedan Wife for Prompt and Deferred Dower (m)

1. The parties were and are Sunni Mahomedans.
2. The plaintiff was married to the defendant on.....
3. At the time of the marriage, it was verbally agreed between A.B., father and natural guardian of the plaintiff, acting for the plaintiff, who was then a minor, and C. D., father and natural guardian of the defendant, acting for the defendant, who was also then a minor, that the plaintiff's dower should be Rs..... out of which half was to be prompt and half deferred.
4. The marriage was duly consummated.
5. By a Talaknama dated....., made in the presence of witnesses and duly registered, the defendant who was then a major declared that he divorced the plaintiff as from that date.
6. The plaintiff came to know of the said divorce on..... when the defendant sent a copy of the said Talaknama to her.

(l) **Limitation** : 3 years under Arts. 48 and 49, Sch. I, Ind. Lim. Act. Art. 49 is the ordinary article to apply in a case where the original possession of the defendant is lawful but it became unlawful by reason of certain facts : *Bhupendra Nath Bhose v. Goonendra*, (1927-28) 32 C. W. N. 133, folld. in *Bulakhidas v. Radhakisan*, A.I.R. 1939 Nag. 177.

(m) **Divorce and claim to dower** : Even if a divorce is brought about by the operation of the law on the apostasy of the wife, she is entitled to the whole dower if consummation of the marriage had taken place before such divorce just as much as in a case where the divorce has occurred under a talaknama : *Md. Ebrahim v. Ma Ma*, A. I. R. 1939 Rang. 28.

(m) **Right to sue** : Plaintiff is entitled to maintain the suit although no party to the contract : Cf. *Khujaja Muhammad Khan v. Husaini Begam*, (1910) I. L. R. 32 All. 410, (P. C.).

(m) **Liability of father and his heirs for dower** : Cf. *Sabir Husain v. Farzand Hasan*, (1937-38) L. R. 65 I. A. 119 (Shia law).

7. The plaintiff had made no demand for dower before the said date.

8. The defendant has not paid the said dower or any part thereof to the plaintiff in spite of demand in writing dated.....

The plaintiff claims—

(1) Rs.....

(2) Interest by way of damages.

PLAINT

281.

DOWER.

CLAIM by Shia Mahomedan Wife for Prompt Dower, where the Nature of Dower was not specified. (n)

1. The parties were and are Shia Mahomedans.

2. The plaintiff was married to the defendant on..... and the marriage is still subsisting.

3. By a *Kabin Nama* dated.....and executed at....., the defendant agreed to pay the plaintiff Rs. 21,000/- as dower, without specifying whether the same was prompt or deferred.

(n) **Prompt dower:** Prompt dower is payable immediately on the marriage taking place, and it must be paid on demand : *Husseinkhan Sardarkhan v. Gulab Khatum*, (1911) I.L.R. 35 Bom. 386. Where the contract of dower does not specify whether it is to be prompt or deferred, it is payable as prompt in the absence of evidence of what is customary, according to the Shia law : *Mirza Bedar Bukht v. Mirza Khurram Bukht*, (1878) 19 Suth. W.R. 315 (P.C.) ; *Masthan Sahib v. Assan Bivi*, (1900) I.L.R. 23 Mad. 371 (F.B.) ; *Taufik-un-nissa v. Ghulam Kambar* (1877) I. L. R. 1 All. 506, 507 ; *Mangat Rai v. Mt. Sakina Begam*, A. I. R. 1934 All. 441 ; *Mahbooban Bibi v. Md. Ammeruddin* (1929) I.L.R. 8 Pat. 645. According to the Sunni law, except in the presidency of Madras, the rule is well settled that the Court may determine the amount to be considered as prompt with reference to the position of the woman and the amount of the dower named in the contract, taking into consideration at the same time what is customary. See the Allahabad and Patna cases cited above. The rule followed in the presidency of Madras, is that under the Mahomedan law, dower, unless payment of the whole or part of it is expressly postponed, must be presumed to be prompt and payable on demand and that this is the law in the case of all Mahomedans, whether of Shia or Sunni

4. On....., the plaintiff verbally demanded payment of the said sum as prompt dower, but the defendant refused to pay the same or any portion thereof.

The plaintiff claims—

- (1) Rs.....as prompt dower.
- (2) Rs.....interest by way of damages.

PLAINT.

282.

DOWER.

CLAIM by Mahomedan Widow against the other Heirs of her deceased Husband for Recovery of Deferred Dower with additional Claim for Declaration of Charge. (o)

1. The parties were and are Shia Mahomedans.
2. The defendants A. B., C. D. and E. F., are the mother, brother and sister respectively of T. H., the plaintiff's husband, now deceased.

pursuasion : *Sheik Mohamed Rowther v. Ayesha Bivi*, (1937) 2 M.L.J. 779. See Tyabji's Mahomedan Law, 3rd Edn., p. 200.

- (n) **Limitation** : Three years from the date when the dower is demanded and refused : Ind.Lim.Act, 1908, Sch. I, Art. 103. *Cf. Mt. Amtul Rasul v. Karim Baksh*, (1933) 142 I. C. 833.
- (n) **Interest by way of damages** : *Hamira Bibi v. Zubaida Bibi*, (1915-16) L.R. 43 I.A. 294, 300, 302, folld. in *Mt. Maimuna Begam v. Sharafat Ullah*, A.I.R. 1931 All. 403.
- (o) **Dower** : may be "prompt" or "deferred". "Prompt dower" is payable on demand, "deferred dower" is payable only on the expiration of the period fixed for the same at the time of the marriage or after the dissolution of marriage by death or divorce : *Sarb Krishan v. Mt. Fatima*, A.I.R. 1937 Lah. 859. The dower ranks as a debt, and the wife is entitled, along with other creditors, to have it satisfied on the death of the husband, out of the estate : *Hamira Bibi v. Zubaida Bibi*, (1915-16) L.R. 43 I.A. 294, 301. The amount of dower may be fixed either before or at the time of marriage or after marriage : *Kamar-un-nissa v. Husaini Bibi*, (1880) 3 All. 266 (P.C.) ; *Mt. Amina Bibi v. Md. Ibrahim* (1929) I.L.R. 4 Luck. 343 ; *Mt. Fatima Bibi v. Lall Din*, A.I.R. 1937 Lah. 345 ; and may be increased at any time during continuance of the marriage : *Johuran Bibi v. Soleman Khan*, (1933) 58 C.L.J. 251 ; *Mt. Nasiban v. Mt. Iqbal Begam*, A.I.R. 1935 Lah. 816. In a suit upon a contract of dower, the Court should, unless it is otherwise

3. The plaintiff was married to the said T. H. on.....

4. By a verbal agreement made (before, or) at time of the marriage, between the said T. H. and the plaintiff at....., the said T. H., in consideration of the marriage, settled upon the plaintiff a dower of Rs. 50,000/- payable upon dissolution of marriage by death or otherwise.

5. The said marriage subsisted until....., when T. H. died.

provided for in any legislative enactment, award the entire sum provided in the contract : *Sugra Bibi v. Masuma Bibi*, (1877) I.L.R. 2 All. 573 (F.B.). However large the dower fixed may be, the wife is entitled to recover the whole of it from her husband's estate without reference to his circumstances at the time of marriage or the value of the estate at his death : *Md. Ebrahim v. Ma Ma*, A.I.R. 1939 Rang. 28.

(o) **Liability of heirs for dower debt** : The heirs are not personally liable. "Each heir is liable for the debt to the extent only of a share of the debt proportionate to his share of the estate" : See Mulla's Mahomedan Law, 11th Edn., p. 223 ; *Sabir Hussain v. Farzand Hasan*, (1937-38) L.R. 65 I.A. 119.

(o) **Parties** : Under the Mahomedan Law, each heir inherits a separate and defined share ; and as he has no interest in the share inherited by another heir he cannot be said to represent the estate that has devolved upon the other heirs. Therefore, the decree in a suit by a creditor against one heir is not binding on the other heirs who are not parties to the suit, and the said decree cannot be executed against the assets of the debtor in the hands of other heirs : *Manni Gir v. Amar Jati*, (1936) I.L.R. 58 All. 594, and this will be so even if the heir against whom the decree is passed was in possession of the whole estate : *Bhagirthibai v. Koshanbi*, (1919) I.L.R. 43 Bom. 412 ; *Lala Miya v. Manubibi*, (1923) I.L.R. 47 Bom. 712 ; *Abdul Majeeth v. Krishnamachariar*, (1917) I.L.R. 40 Mad. 243, 255 ; cf. *Abbas Naskar v. Ohairman, Dist. Board, 21 Parg.*, (1932) I. L. R. 59 Cal. 691 (where it was held that the other heirs would not be liable if the heir sued held the estate not on behalf of the other heirs but on his own behalf.) ; *Amir Jahan v. Khadim Husain*, A.I.R. 1931 Oudh 253. For contrary decisions of the Lahore High Court, see *Mt. Amir Begum v. Ahmad Jalal Din*, A.I.R. 1935 Lah. 273 ; and *Balak Ram v. Inayat Begum*, A.I.R. 1935 Lah. 940.

(o) **Charge in respect of Dower Debt** : A claim for dower is a simple money claim. A decree for dower against the other heirs, even though it may be realizable from the assets of the deceased, does not create a charge against those assets, unless the decree specifically creates such a charge : *Durga Das v. Mt. Hanifa Begam*, A.I.R. 1940 Oudh 104. Cf. *Sayyid Qasim v. Habibur Rahman* (1928-29) 33 C.W.N. 926, 930 (P.C.).

(o) **Limitation** : In a suit to recover 'deferred dower', the period of limitation is three years from the date when the marriage is dissolved by death or divorce : Art. 104, Ind.Lim.Act.

6. The respective shares of the parties in the estate of the deceased are as follows :

(Here set out the shares)

7. The defendants are in possession of their respective shares in the estate of the deceased but have not paid the plaintiff any portion of the amount of the said dower in spite of repeated verbal demands made between and .

8. The plaintiff, as one of the heirs of the deceased, is liable to contribute Rs.....towards the dower debt. The defendants are liable to contribute Rs..... out of their respective shares in the estate of the deceased in the following proportions :

The plaintiff claims :—

(1) Rs.....from the defendant A.B., Rs.....from the defendant C.D., and Rs.....from the defendant E. F., limited to the extent of their respective shares in the estate of J. H., deceased.

(2) A declaration of charge for the payment of the aforesaid sums on the respective shares of the parties as aforesaid.

PLAINT.

283.

DOWER.

CLAIM by the other Heirs of a deceased Mahomedan against his Widow in Possession of his Estate in Lieu of her Dower; for Accounts and Administration. (p.)

1. The parties are Shia Mahomedans.

2. One G. H. died February 6th, 19....., leaving him surviving the defendant, his widow, and the plaintiffs A.B., C.H. and E.F., his mother, brother and sister respectively, as his heirs under the Mahomedan law.

3. The defendant was married to the said G. H. on.....

(p) **Liability of widow in possession to account:** See notes under Form No. 286.

(p) **Suit for accounts and administration:** Cf. *Mt. Bebee Bachun v. Sheikh Hamid Hossein*, (1871-72) 14 M.I.A. 377.

4. At the time of the said marriage the said G. H. settled upon the defendant a dower of Rs. 50,000/- payable upon dissolution of marriage by death or otherwise.

5. The said G. H. died on.....

6. Immediately after the death of G.H. the defendant came into possession of certain immovable properties left by her husband (particulars whereof are set out in schedule "A" hereto annexed) under her claim as an heir of the deceased and for her dower, and it was then verbally agreed between the defendant and the plaintiffs that the defendant should remain in possession, and appropriate the rents and profits of the said properties until the dower debt would be discharged. The net annual income of the said properties is about Rs.....

7. By letter dated....., the plaintiffs called upon the defendant to account for the rents and profits realised and appropriated by her out of the said properties and offered to pay her the balance, if any, of the dower debt; but the defendant by letter dated..... refused to render any account to the plaintiffs or any of them.

8. The plaintiffs are entitled as the heirs of G. H. deceased to the undermentioned shares in the properties left by him. (Here state the shares). The remaining share in the said properties belongs to the defendant as one of the heirs of G. H. deceased.

The plaintiffs claim :—

(1) An account of the dealings of the defendant with the properties specified in the schedule "A" hereto.

(2) Administration of the said properties.

(3) Appointment of a receiver.

PLAINT.

284.

DOWER.

CLAIM by the Heirs of a deceased Mahomedan against Transferee from his Widow who was in Possession of the Property in Lieu of her Dower. (q)

1. One A. M., a Hanafi Mahomedan, died November 6th, 19..., leaving him surviving the defendant no. 1, his widow, and the plaintiffs, his heirs, under the Mahomedan law. The relationship

(q) **Widow's possession of her husband's property under her claim for dower :**

The widow of a deceased Mahomedan who obtains actual and lawful

of the plaintiffs with the deceased will appear from the pedigree set out hereunder.

(Here set out the pedigree).

2. Immediately on the death of the said A.M., the defendant no. 1 took possession of his immovable properties under her claim as an heir of the deceased and for her dower and procured her name to be entered on the registry as its possessor instead of his. The said properties are fully set out in Schedule "A" hereto annexed.

3. By a sale deed dated.....the defendant no. 1, for the consideration therein mentioned, purported to transfer and convey the said properties to the defendant no. 2 absolutely. There is a recital in the said deed that the defendant no. 1 was the absolute owner of the said properties.

4. On....., the defendant no. 2 entered into possession of the said properties on the strength of his purchase and is continuing in possession thereof and is denying the title of the plaintiffs or any of them to the same.

5. The defendant no. 1 has got.....annas share in the said properties as an heir of A.M. deceased and the plaintiffs have got the remaining.....annas share therein.

The plaintiffs claim—

(1) A declaration that the sale deed aforesaid in so far

possession of the estate under a claim as an heir and for her dower is entitled to retain that possession until her dower is satisfied: *Maina Bibi v. Chaudhri Vakil* (1924-25) L. R. 52 I. A. 145, 150. "There is conflict of opinion whether it is necessary to entitle the widow to retain possession of her husband's property that the possession should have been obtained by her not only 'lawfully and without force or fraud' but also 'with the express or implied consent of the husband or his other heirs'. The High Courts of Madras and Allahabad have held that no such consent is necessary: *Beeju Bee v. Syed Moorthiya*, (1920) I.L.R. 43 Mad. 214; *Zamin Ali v. Mt. Axixunnissa*, (1933) I.L.R. 55 All. 139). The High Court of Calcutta has held that it is necessary: *Sabur Bibi v. Ismail*, (1924) 51 Cal. 124; *Mulla's Mahomedan Law*, 11th Edn., p. 224. But the right of widow to retain such possession does not carry with it the right of selling, mortgaging or otherwise transferring the property. If she alienates the estate and delivers possession thereof to the alienee, her husband's heirs are entitled to recover possession of the property from the alienee without payment to him of the dower debt: *Sitaram Bibi v. Ganesh Prasad*, (1927) I.L.R. 2 Luck. 553; *Mt. Fahiman v. Bulaqi*, (1935) I.L.R. 10 Luck. 440; cf. *Maina Bibi v. Chaudhri Vakil*, *supra*.

as it affects the plaintiffs' share in the said properties is invalid and not binding on the plaintiffs.

(2) Possession of the said properties to the extent of the plaintiffs' share therein.

(3) Rs.....as mesne profits from.....up to the date of suit.

(4) Future mesne profits from the date of suit up to that of delivery of possession.

DEFENCE.

285.

DOWER. .

DEFENCE to Claim by Shia Mahomedan Wife for Prompt Dower, where the Character of Dower was not specified. (r).

1. The defendant admits the *Kabin Nama* mentioned in paragraph 3 of the plaint, but says that by the immemorial custom among Shia Mahomedans of....., the locality to which the plaintiff belonged, where the contract of dower does not specify whether it is to be prompt or deferred, only one third of the total amount of the dower is payable as prompt.

2. Between and the defendant paid the plaintiff Rs. 4000 in cash and purchased for her articles of jewellery of the value of Rs. 3000 and the plaintiff received the said amount and the said jewellery in lieu or satisfaction of her claim for prompt dower.

3. The plaintiff did not make the alleged or any demand for dower.

4. Save what is hereinbefore expressly admitted all allegations in the plaint are denied.

(r) This a defence to Form No. 280. See Notes under the said Form. Cf. *Nawab Mirza Mohammad Sadiq Ali Khan v. Nawab Fakr Jahan Begam*, (1931-32) L R. 59 I.A. 1 (In this case the defendants failed to prove that the presents given to the plaintiff by her deceased husband were allocated towards the dower debt or that the plaintiff had accepted them as such.).

DEFENCE.

286.

DOWER.

**DEFENCES by the other Heirs of the Plaintiff's Husband to
a Claim for Dower. (s)**

The defendants state that the plaintiff's claim for dower was discharged by payment made by her husband during his life time.

Or,

In....., the plaintiff's husband put the plaintiff in possession and enjoyment of certain immovable properties specified in Schedule "A" hereto and the plaintiff has since been in peaceful possession of the said properties in lieu of her dower. The plaintiff's alleged claim for dower has been more than satisfied by the rents, issues and profits of the properties of which she has been in possession as aforesaid.

Or,

The defendants do not admit that the alleged or any sum is due and owing to the plaintiff as dower. Since the plaintiff has been in possession of the property specified in Schedule "A" hereto, in lieu of her dower, and has not accounted for the rents, and profits she has received out of the said properties although repeatedly thereunto verbally requested.

-
- (s) **Release or relinquishment of dower:** See *Nurannessa Khanum v. Khaje Mahomed Sakroo*, (1920) I.L.R. 47 Cal. 537, 542, 543 (In this case upon the facts it was held that the relinquishment was obtained by undue influence and there was no exercise of free and deliberate judgment.)
- (s) **Liability of widow in possession to account:** "A widow in possession of her husband's estate in lieu of dower, is bound to account to the other heirs of her husband for the rents and profits received by her out of the estate": Mulla's Mahomedan Law, 11th Edn., p. 227; *Hamira Bibi v. Zubaida Bibi*, (1915-16) I.L.R. 43 I.A. 294, folld. in *Maina Bibi v. Chaudhri Wakil*, (1924-25) L.R. 52 I.A. 145, 150; *Bebez Bachun v. Sheikh Hamid*, (1871) 14 M.I.A. 377.
- (s) **Widow cannot retain possession and have a decree for her dower debt:** A widow in possession of her husband's estate in lieu of her dower cannot both retain possession and have a decree for her dower debt. She must in a suit for dower offer to give up possession of the property: *Ghulam Ali v. Sagir-ul-nissa*, (1901) 23 All. 432.

Or,

Since..... the plaintiff has been in possession of the property specified in Schedule "A" hereto in lieu of her dower. On.....the defendants ascertained from an examination of the accounts relating to the said property that the sum of Rs. was the balance then due to the plaintiff as her dower and they verbally offered to pay her the said sum provided she at the same time put the defendants in possession of the said property to the extent of their respective shares therein. The plaintiff did not accept the said offer and is still in exclusive possession and enjoyment of the said property.

Or,

By a deed of release dated the plaintiff for the consideration therein mentioned released her claim for dower in favour of her husband.

Or,

On or about....., a few days before the death of her husband, the plaintiff in the presence of her husband and in the presence of and voluntarily relinquished her claim for dower by uttering the following words addressed to her husband: "I have forgiven my *maharana*, may God also forgive you".

PLAINT.

287.

EXECUTORS AND ADMINISTRATORS.

CLAIM by Executors against a Debtor to the Estate. (t)

1. One A. B., late of....., died April 6th, 19..., having made his will April 2nd, 19..., and appointed the plaintiffs his executors.

2. The plaintiffs as such executors are in possession of the estate and effects of the testator.

- (t) **Executor's right of suit before grant of probate:** Executor derives his title from the will and not from the grant of probate. He can institute an action in the character of an executor before he proves the will. But he cannot obtain a decree before probate: See 'Executors and Administrators' under 'Classes of Persons', Part II, Chap. IX, p. 144.

3. The defendant is a debtor to the estate of the deceased.

Particulars of claim :

Principal sum due on a bond dated.....
 executed by the defendant in favour of the
 testator Rs.

Interest at the rate of 8 *per cent. per annum* as
 mentioned in the bond from.....
 to..... Rs.

Rs. _____

The plaintiffs claim—
 Rs.....

PLAINT.

288.

EXECUTORS AND ADMINISTRATORS.

**CLAIM by Executors against an Agent of the Testator for
 Account. (u)**

1. One C. D. died February 5th, 19..., having made his will January 15th, 19..., and appointed the plaintiffs his executors.
2. The plaintiffs proved the will April 6th, 19...
3. The defendant was the agent employed by the said C. D. to collect the rents of his house properties specified in Schedule "A" hereto.
4. The defendant acted as such agent from till the death of the said C. D.
5. During the said period the defendant as such agent collected

-
- (u) **Termination of agency :** Under Sec. 201, Ind. Cont. Act an agency is terminated, *inter alia*, by the principal or agent dying.
- (u) **Limitation :** Art 89, Ind. Lim. Act. This article applies to a suit for accounts brought by a principal against his agent as also to a suit brought by the legal representative of the principal against the agent or *vice versa* : *Maharaja Bir Bikram Kishore Manikya Bahadur v. Jadab Chandra*, (1935-36) 40 C. W. N. 245 ; *Mohendra Nath Ghosh v. Jadu Nath*, (1909) 9 C. L. J. 107 ; *Sm. Sarashibala Dasi v. Chuni Lal*, (1921-22) 26 C. W. N. 320.
- (u) See notes under Form No. 1, pp. 615-617.

large sums of money from the tenants for which he has not accounted and refuses to account.

The plaintiffs claim—

(1) To have a full and true account of all sums received or which ought to have been received by the defendant as such agent.

(2) Payment of such sum as may be found due from the defendant upon the taking of accounts.

PLAINT.

289.

EXECUTORS AND ADMINISTRATORS.

CLAIM by Executors for Malicious Prosecution of the Testator. (v)

1. One A. B., late of, used to carry on business in provision stores at and acquired good reputation in business dealings.

2. The said A. B. died February 6th, 19..., having made his will dated January 10th, 19..., and appointed the plaintiffs his executors who proved the will April 20th, 19....

3. On, shortly before the death of A. B., the defendant falsely, maliciously and without reasonable or probable cause preferred before, a presidency magistrate of a complaint against the said A. B., charging him with, and procured the said magistrate to issue a warrant against him for his arrest on the said charges and caused him to be arrested on and kept in the hajat till.....

4. The trial of A. B., before the said magistrate commenced on when charges under sections 417 and 420 of the Indian Penal Code were framed against him. The trial lasted till..... when he was found not guilty and acquitted.

-
- (v) **If right to sue for malicious prosecution survives to the legal personal representatives:** Upon this question the High Courts have differed. According to the Calcutta and Rangoon High Courts, the right to sue survives, and s. 306, Ind. Suc. Act, is no bar to such suit: *Krishna Behari v. Corporation of Calcutta*, (1904) I. L. R. 31 Cal. 993, folld. in *Bhupendra Narayan Sinha v. Chandramoni*, (1926) I. L. R. 53

5. By reason of the premises the said A. B. was greatly injured in his credit and reputation and suffered pain in body and mind and was long prevented from attending to his said business and incurred expenses in defending himself from the said charges.

Particulars of special damage suffered by the said A. B. :—

The plaintiffs claim—

Rs. as general damages and Rs.
as special damages.

PLAINT.

290.

EXECUTOR'S AND ADMINISTRATORS.

CLAIM by rightful Executors against an Executor *de son tort* for Accounts. (w)

1. One A. B. died January 11th, 19..., having made his will dated December 26th, 19..., and appointed the plaintiffs his executors.
2. On January 20th, 19..., the plaintiff applied for probate of

Cal. 987 ; *Oassim & Sons v. Sara Bibi*, (1936) I. L. R. 13 Rang. 385 (*Per* Page, C. J. : "personal injuries" in s. 306, Ind. Suc. Act mean "physical", "corporal" or "bodily injuries", injuries to the "person" as opposed to injuries to property or reputation having regard to the context which mentions "assault" immediately before and "not causing death" immediately afterwards). The same interpretation on "personal injuries" has been put by the Lahore High Court : *Peoples Bank of Northern India v. Des Raj*, A. I. R. 1935 Lah. 705. According to the Madras, Bombay, Allahabad, and Patna High Courts and Nagpur Judicial Commissioner's Court, the right to sue does not survive : *Rustomji Dorabji v. Nurse*, (1921) I. L. R. 44 Mad. 357. (The expression "personal injuries not causing the death of the party" does not mean injuries to the body merely, but all injuries which do not necessarily cause damage to the estate of the person charged), folld. in *Motilal v. Harnarayan*, (1923) I. L. R. 47 Bom. 716 ; *Mahtab Singh v. Hub Lal*, (1926) I. L. R. 48 All. 630 ; *Punjab Singh v. Ramautar Singh*, (1919) 4 P. L. J. 676 ; *Ratanchand v. Municipal Commillee, Hinganghat*, A. I. R. 1931 Nag. 9.

- (v) **Limitation** : Under Art. 20, Sch. I, Ind. Lim. Act, one year from the date of the death of the person wronged.
- (w) **Executor *de son tort*,—liability of** : Under Sec. 303, Ind. Suc. Act, 1925, "A person who intermeddles with the estate of the deceased, or does any

the said will to this High Court in its Testamentary and Intestate Jurisdiction, and the defendant N. B., the widow of the deceased, filed a caveat against the grant thereof and had the case set down as a contentious cause, the proceedings were thereupon marked as Suit No.....of 19... .

3. On June 25th, 19..., a consent decree was made in the said suit and probate was directed to be issued to the plaintiffs. On July 12th, 19..., probate was actually issued to the plaintiffs.

4. Between January 11th, 19..., the date of the death of the testator, and July 12th, 19..., when the probate was issued to the plaintiffs as aforesaid, the defendant through her agents realised the rents of the house properties forming part of the testator's estate for which she has not accounted to the plaintiffs and refuses to account. Particulars of the said house properties are set out in Schedule "A" hereto.

The plaintiffs claim—

(1) To have a full and true account of all sums received by the defendant during the period she intermeddled with the estate of the deceased as aforesaid.

(2) Payment of such sum as may be found due upon the taking of accounts.

other act which belongs to the office of executor, while there is no rightful executor or administrator in existence, thereby makes himself an executor of his own wrong." Under Sec. 304 of the said Act, "When a person has so acted as to become an executor of his own wrong, he is answerable to the rightful executor or administrator, or to any creditor or legatee of the deceased, to the extent of the assets which may have come to his hands after deducting payments made to the rightful executor or administrator, and payments made in due course of administration." Probate is necessary to complete the title of a rightful executor, and until it is actually taken out, a person intermeddling with the assets constitutes himself an executor *de son tort*: *Narānbai v. Pestonji*, (1897) I. L. R. 21 Bom. 400 (creditor's suit against a person who received part of the assets of the deceased during a contentious probate proceeding). For liability to account, see *Shivaprasad v. Prayagkumari*, (1934) I. L. R. 61 Cal. 711.

PLAINT.

291.

EXECUTORS AND ADMINISTRATORS.

CLAIM by Creditor against Executor for Recovery of Money
out of the Estate of the Testator (x).

1. One A. B. died November 14th, 19..., having made his will dated June 15th, 19..., and appointed the defendant his executor who proved the will December 1st, 19...

2. The said A. B. was a trader who carried on business under the name of.....

3. By his will the testator authorised his executor to continue the said business after his death.

4. On the defendant as such executor borrowed Rs. 3,000/- from the plaintiff for the purposes of paying probate duty and also for the purposes of the said business, agreeing to repay the same on demand with interest at 6 *per cent. per annum*. The money borrowed has been spent for the purposes aforesaid.

Particulars of claim :

Principal sum.....Rs. 2,000/-

Interest at 6 *per cent.* from.....

..... to

.....

..... „

Total Rs. _____

5. The plaintiff is entitled to be subrogated to the right of the defendant as such executor to be indemnified out of the estate to the extent of his claim on the said promissory note.

The plaintiff claims—

Rs. payable out of the estate of A. B. deceased.

- (x) **Right of creditor against the estate :** *Maharaja Sir Manindra Chandra v. Sudhir Krishna* (1930-31) 35 C. W. N. 850 (Where an executrix executed promissory notes as such executrix and it appeared the loans were taken for the benefit of the estate and the creditor impleaded all the parties and applied for a decree binding the estate : *Held*, that the only right which the creditor could claim was the right to be subrogated to the right of the executrix to be indemnified out of the estate to the necessary extent. It is consequently necessary that the right of the executrix to the indemnity is established before the creditor can be subrogated to such a right). Where a creditor

PLAINT.

292.

EXECUTORS AND ADMINISTRATORS.

CLAIM by Creditor of a deceased Person against his Executor
in his Representative as well as Personal Capacity. (y)

1. On19..., one A.B., since deceased, executed a promissory note in favour of the plaintiff payable on demand with interest at 8 *per cent. per annum.*

2. The said A.B. died January 15th, 19..., having made his will dated19..., and appointed the defendants his executors who proved the will April 6th, 19....

3. On19..., in consideration that the plaintiff would forbear from suing the defendants for the said debt until, the defendants undertook in writing to remain personally liable to the plaintiff for his dues on the said promissory note.

4. The defendants have not paid the plaintiff's dues or any part thereof.

Particulars of claim :

Principal sum	...	...	...	Rs. 1000/-
Interest at 8 <i>per cent.</i> from.....to.....	...	...	...	"
Net amount due				Rs.

The plaintiff claims—

Rs.....from the defendants personally and as such executors.

has lent money to the executor for obtaining probate and the money has been used for that purpose the creditor is entitled to stand in the shoes of the executor and can be allowed the benefit of the indemnity which the executor enjoys for the purpose of recovering the money from the estate although he is not entitled to a charge : *Subramania Chettiar v. Sarprasadam*, I. L. R. 1940 Mad. 45.

- (y) See, *Jamshedjee v. Sorabji*, (1939-40) 44 C. W. N. 653 P. C. (Forbearance on the part of a creditor to sue is good consideration for an executor's promise. In India, as in England, it is open to an executor, in consideration of a creditor's forbearance to sue, to make himself liable for the debt whether the assets be sufficient or insufficient. But the question in each case is what was agreed to : a question of fact as to what the agreement was or of construction, if the agreement was reduced to

PLAINT.

293.

EXECUTORS AND ADMINISTRATORS.

CLAIM against Executors for Tort (Conversion) committed
by the Testator. (z)

1. The plaintiff at all material times was and is the owner and occupier of a coal mine known as at

2. At all material times one A. B. was the lessee and occupier of a coal mine adjacent to the said coal mine of the plaintiff.

writing. There is, in the law of India, no presumption of personal liability against the executor in this regard : the matter must be decided on the covenant, interpreted in the light of considerations which show the intention of the parties. The English doctrine as to the personal liability of executors arising out of admission of assets, in its unqualified form, is no part of the law in India.). See Part II, Chapter. IX, p. 127.

(y) **Joinder of claims against executors :** Under O. II, r. 5, C. P. Code, no claim against an executor as such shall be joined against him personally unless the last mentioned claims are alleged to arise with reference to the estate in respect of which he is sued as executor or is liable for jointly with the deceased person whom he represents. Cf. *Nathubhai v. Narayanacharya*, (1927) I. L. R. 51 Bom. 800. See Part II, Chap. IX, "Classes of Persons", p. 127. The words "arise with reference to" in O. II, r. 5, C. P. Code, are very general : *Arunachalam Chettiar v. Arunachellam Chettiar*, A. I. R. 1922 Mad. 436. The word 'estate' as used in O. II, r. 5, C. P. Code means both the estate rightly and properly held as executors and the estate in its physical sense : *Nripendra Nath v. Birendra*, (1916-17) 21 C. W. N. 939, 943.

(z) Cf. *Adjai Coal Co. v. Panna Lal Ghosh*, (1929-30) L. R. 57 I. A. 144 (This was a suit against the heirs and legal representatives of the deceased. One of the defences taken was that the cause of action did not survive against the defendants. *Held* :—That Sec. 1 of Legal Representatives' Suits Act XII of 1855 does not apply to the present case which seeks to recover property or its value after conversion, and that in any event, the cause of action survives under Sec. 89 of the Probate and Administration Act, Act V of 1881 (now Sec. 306 of the Indian Succession Act, 1925) which applies to Hindus, against executors and administrators.).

(z) **Limitation :** See Sec. 1 of Legal Representatives' Suits Act (XII of 1855) and Arts. 33 to 35 of Sch. 1 of the Ind. Lim. Act. In *Adjai Coal Co. v. Panna Lal Ghosh*, (1929-30) L. R. 57 I. A. 144, Art. 48 of the

3. Between and the said A. B. broke and entered the said coal mine of the plaintiff and took and carried away large quantities of coal therefrom.

4. The said A. B. died February 5th, 19..., having made his will dated, and appointed the defendants his executors who have since proved the said will.

The plaintiff claims—

(1) Rs. damages for the value of the coal removed as aforesaid.

(2) Alternatively, an enquiry as to the amount of coal taken away by the said A. B. and the value thereof, and payment of such sum by way of damages as may be found due upon such enquiry.

PLAINT.

294.

EXECUTORS AND ADMINISTRATORS.

CLAIM by Beneficiary against a Debtor to the Estate. (a)

1. One C.D. died February 12th, 19..., having made his will dated, and appointed the defendant E.F. and one K.D. his executors.

2. Of the two executors named in the will, the defendant E. F. alone proved the will on and is administering the estate of the deceased.

3. The plaintiff is the sole beneficiary under the said will.

4. The defendant G.H. is a debtor to the estate of C.D. deceased.

Sch. 1 of the Ind. Lim. Act was applied because it was held that Sec. 1 of Act XII of 1855 did not apply to the facts of the case.

(z) **Measure of damage :** The value recoverable should be the value recoverable at the date of the conversion : *Shivaprasad v. Prayagkumari*, (1934) I. L. R. 61 Cal. 711.

(a) **Beneficiary's right to sue :** Mere refusal of the executor to sue the debtor does not give the beneficiary the right to sue. There must exist special circumstances, such as, collusion between the debtor and the executor, to give him such right. See "Classes of Persons", Part II, Chap. IX, p. 138. Cf. *Yeatman v. Yeatman*, (1877) 7 Ch. D. 210, 214.

Particulars of debt :

Promissory note dated executed by the said G.H. in favour of the said C.D. for Rs. 10,000/- repayable on demand with interest at 8 *per cent. per annum.*

5. The defendant E.F. is a brother-in-law of the defendant G.H. and is colluding with the said G.H. and not taking any steps to realise the amount due on the said promissory note and is about to allow the claim against the said G.H. to be time-barred, regardless of the loss that will be caused to the estate of the deceased.

6. The plaintiff is accordingly obliged to file this suit.

Particulars of claim :

Principal sum	...	...	...	Rs.
Interest up to	...	...	...	Rs.
				<hr/>
				Total Rs. <hr/>

The plaintiff claims—

Judgment for Rs. against the defendant G.H. in favour of the defendant E.F. as executor to the estate of C.D. deceased.

PLAINT.**295.****EXECUTORS AND ADMINISTRATORS.**

CLAIM by a Creditor against a Specific Legatee who has received his Legacy for Refund of sufficient Amount to satisfy his Claim. (b)

1. One A. B. died January 5th, 19..., having made his will dated December 15th, 19..., and appointed the defendant C.D. his executor.

2. By his said will the testator specifically bequeathed $3\frac{1}{2}$ *per cent* G. P. Notes of the face value of Rs. 20,000/- to the defendant E. F.

-
- (b) **Creditor's remedy against legatee who has received his legacy:** The right of a creditor to follow the assets in the hands of a legatee is a right which has to be exercised by a suit. It cannot possibly be exercised merely by levying execution against the assets in the hands of

3. The defendant C. D. proved the said will April 20th, 19...
4. The plaintiff is a creditor of A. B., deceased, in the sum of Rs. 2,000/- due to the plaintiff for price of goods sold and delivered to the said A. B. at his request.
5. On the plaintiff demanded in writing payment of the said sum of Rs. 2,000/- from the defendant C. D.
6. By letter dated the defendant C. D. informed the plaintiff that he had already administered the estate and had distributed the assets and had made over the said G. P. Notes to the defendant E. F. on
7. By letter dated the plaintiff called upon the defendant E. F. to refund so much of the amount received by him as such legacy as might be requisite to satisfy the plaintiff's claim, but he has not complied with the said demand.

The plaintiff claims—

Rs. 2,000/- from the defendant E. F. out of the legacy received by him as aforesaid.

the legatee under a judgment against the legal representative. Properties specifically bequeathed is not discharged from its liability to the testator's debts by the circumstances that there has come to the hands of the executor personal property of the testator not specifically bequeathed more than sufficient to pay his debts and that the specifically bequeathed property has been made over by the executor to the specific legatee: *Per Rankin C. J.*, in *Jay Chandra v. Satish Chandra* (1929-30) 34 C. W. N. 761, follg. *Davies v. Nicolson*, (1858) 2 De G. & J. 693; distd. in *Susil K. Mitter v. Samarendra*, (1937-38) 42 C. W. N. 65 (In this case, the executor was himself the specific legatee. His Lordship Pankridge J. held that the principle that a decree against the legal representative cannot be executed against the property already made over to a specific legatee without a separate suit has no application when such representative (here an executor) is himself the specific legatee. In such a case the decree-holder can proceed against such property in execution of his decree without a separate suit and the provisions of Sec. 52, C. P. Code would apply.). See 'Executors and Administrators' under "Classes of Persons," Pt. II, Ch. IX, pp. 134, 135.

- (b) **Limitation** : Under Art. 43, Ind. Lim. Act, the period of limitation for a claim for refund against the legatee is 3 years from the date of payment or distribution.

PLAINT.

296.

EXECUTORS AND ADMINISTRATORS.

CLAIM by a Creditor of a deceased Person against an
Executor *de son tort*. (c)

1. The plaintiff is a creditor of one A.B., late of
2. The said A.B. died March 5th, 19..., intestate, survived by his widow, the defendant C.B.
3. After the death of the said A.B., the defendant G.D. has possessed himself of the estate and effects of the deceased, and has been realising the rents and profits thereof with the connivance of the defendant C.B.
4. The defendants have not paid the plaintiff his debt, although there are sufficient assets of the testator wherewith to pay the same.

Particulars of claim :

Principal sum due on a promissory note dated	executed by the said A.B., in favour of the plaintiff	...	...	Rs. 2,000/-
Interest at 8 per cent. per annum from	to .....	...	...	"
Net amount due				Rs.

The plaintiff claims —

To be paid Rs. or to have the estate of A.B. deceased administered.

- (c) **Right to sue :** Sec. 304, Ind. Suc. Act, 1925; *Narayanasami Pillai v. Esa Abbayi Sait*, (1905) I. L. R. 28 Mad. 351 (Where there is an executor *de son tort* a creditor may sue for his debt and is not confined to an administration action. The rule of English law that no liability as executor *de son tort* can arise when there is another personal representative does not apply in India.).
- (c) **Extent of liability of executor *de son tort*.** An executor *de son tort* is liable to the extent of assets which may have come to his hands : Sec. 304, Ind. Suc. Act, 1925. Cf. *Mrs. Munroe v. Rodrigues*, A.I.R. 1940. Rang. 178. For exceptional cases when the liability may be enforced to a greater extent than the assets received, see *Magaluri Garudiah v. Narayana*, (1881) I. L. R. 3 Mad. 359, 365.
- (c) **Description of executor *de son tort* :** In a creditor's action a defendant may be described as executor generally although he turns out to be an

PLAINT.

297.

EXECUTORS AND ADMINISTRATORS.

CLAIM by an Administrator against an Executor *de son tort* for Possession and Mesne Profits. (d)

1. One A. B. died January 12th, 19..., intestate, leaving him surviving the defendants, his heirs and legal representatives. The relationship between the said A. B. and the defendants is shown in the pedigree set out hereunder :

(Here set out the pedigree).

2. The said A. B. died possessed of certain movable and immovable properties specified in schedule "A" hereto annexed.

3. After the death of A. B., the defendant C. B. came into possession of the immovable properties left by the deceased with a view to collect the rents and profits thereof on behalf of himself and the other defendants.

4. In the defendant C. B. set up an adverse claim to the properties in his possession as aforesaid and denied that they were part of the estate of the deceased.

5. Thereupon the plaintiff at the instance of the defendants other than C. B. applied for grant of letters of administration to the estate and effects of A. B., deceased, and on obtained the said grant.

executor *de son tort* : See "Classes of Persons", Part II. Chap. IX, p. 141 ; Williams on Executors, 12th. Edn., p. 161 ; *Prayag Kumari v. Shiva Prasad*, (1925) 42 C. L. J. 280, 467, affirmed in (1931-32) L. R. 59 I. A. 331.

(c) **Plea of *ne unques* executor may result in personal judgment :** If the executor *de son tort*, being sued by a creditor, should plead *ne unques* executor, on which issue should be joined, this issue, on proof of acts by the defendant, such as constitute in law an executorship *de son tort*, would be found against him, and the judgment thereon would be that the plaintiff do recover the debt and costs, to be levied out of the assets of the testator if the defendant have so much, but if not, then out of the defendant's own goods : Williams on Executors, 12th Edn., p. 162.

(c) **Parties to a suit for administration against executor *de son tort* :** See Part II, Chap. I, pp. 141-144 ; *Rajah Parthasarathy v. Venkatadri*, (1923) I. L. R. 46 Mad. 190 (F. B.) ; *Mrs. Munroe v. Rodrigues*, A. I. R. 1940 Rang. 178 (in which all the earlier cases have been reviewed).

(d) **Right to sue :** An administrator of a deceased person is his legal representative for all purposes and the entire property of the deceased vests in

6. By letter dated the plaintiff as such administrator called upon the defendant C. B. to make over possession of the said properties to him and also to account for and pay over the moneys received by him out of the said properties, but he has refused to do so.

The plaintiff claims—

(1) A declaration that the said properties form part of of the estate of A.B., deceased.

(2) Possession of the said properties.

(3) Rs. as mesne profits, or an account of mesne profits up to the date of suit and payment of such sum as may be found due upon the taking of account.

(4) Further mesne profits up to the date of delivery of possession of the said properties.

him as such. So where one of the heirs of the deceased obtains possession originally with a view to collect rents and profits on behalf of himself and his co-heirs but afterwards sets up an adverse title, and consequently letters of administration are obtained at the instance of the other heirs, the administrator is entitled to be put in possession of the whole of the property of the deceased and not only of the shares of those at whose instance the letters of administration are obtained. An administrator is entitled to claim from the executor *de son tort* an account of the rents and profits of the estate of the deceased : *Harry Percival Robson v. Administrator-General, Punjab*, A. I. R. 1929 Lah. 753.

- (d) **Limitation** : A suit by an administrator of an intestate person against an executor *de son tort* is governed by Art. 123 and the latter is liable to account for mesne profits for a period of 12 years before suit : *Harry Percival Robson v. Administrator-General, Punjab, supra*, follg. *Rajah Parthasarathy v. Venkatadri* (1923) I. L. R. 46 Mad. 190 (F. B.) and other cases. Cf. *Sri Nathji v. Mt. Panna Kunwar*, (1935) I. L. R. 56 All. 711 (a suit by a legatee for recovery of legacy against an executor *de son tort*), follg. in *Bhola Nath Banerjee v. Sarbamangala* (1939-40) 44 C. W. N. 221.

- (d) **Parties to suit** : In a suit by an administrator for an account of mesne profits against the heir of the deceased intestate, who had acted as an executor *de son tort*, the other heirs of the deceased though not necessary parties are proper parties and it is open to the Court, should both the parties so agree, to implead them even after the case comes back to it having been remanded by the High Court in order to avoid litigation in the future : *Harry Percival Robson v. Administrator-General, Punjab, supra*.

PLAINT.

298.

EXECUTORS AND ADMINISTRATORS.

CLAIM by a Legatee against Executors *de son tort* for
Payment of Legacy. (e)

1. One B. N. G., a Hindu governed by the Dayabhaga, died January 11th, 19..., having made his will, dated December 30th, 19..., and appointed his nephew K. S., his executor.

2. The plaintiff is the daughter of the testator.

3. By his said will the testator directed his executor to pay a sum of Rs. 500 yearly to the plaintiff for her maintenance.

4. The said K. S. died March 16th., 19..., having made his will dated March 4th, 19..., whereby he purported to dedicate the entire estate of B. N. G., deceased, in favour of Idol Sri installed in a temple at and appointed the defendants as the trustees of the said endowed properties.

5. The defendants are in possession of the said estate of B. N. G., deceased. They have not paid the legacy payable to the plaintiff although they have got sufficient funds belonging to the said estate in their hands wherewith to pay the same.

Particulars of claim :

Arrears of maintenance from
..... to Rs.

The plaintiff Claims—

Rs. arrears of maintenance.

-
- (e) **Right to sue :** An executor *de son tort* can be sued by a legatee in the absence of the legal personal representative when there is no such legal representative as also when a representative of the deceased or a person in possession of the estate is proved to have received enough to pay all demands against the estate in full : *Rajah Parthasarathy v. Venkatadri*, (1923) I. L. R. 46 Mad. 190 (F. B.).
- (e) **Interest on legacy when payable :** *Rajah Parthasarathy v. Venkatadri*, *supra*.
- (e) **Limitation :** Art. 123, Sch. I, Ind. Lim. Act. *Per* Kumarswami Sastri, J. in *Rajah Parthasarathy v. Venkatadri*, *supra* at p. 246, "The wording of Art. 123 is general. It refers to a suit for a legacy or for a share of residue bequeathed by a testator, and if the legatee has a cause of action against the person in possession of the assets of a testator, I do not see why there should be a further qualification that the person in possession of

DEFENCE.**299.****EXECUTORS AND ADMINISTRATORS.****DEFENCE by Executor to a Claim against him in his Representative as well as Personal Capacity. (f)**

The defendant denies that the terms of his written undertaking have been accurately set forth in paragraph 3 of the plaint. He denies that he gave the alleged or any undertaking to remain personally liable to the plaintiff for his alleged dues on the said promissory note.

DEFENCE.**300.****EXECUTORS AND ADMINISTRATORS.****GENERAL DEFENCES by Executor to Creditor's Claim against the Estate of the Deceased.**

The defendant is not and never was the executor of the said deceased.

Or,

The defendant denies that the testator was indebted to the plaintiff in the alleged or any sum.

Or,

The money borrowed by the testator from the plaintiff on the said promissory note has been discharged by payment.

Or,

The properties left by the testator were mortgaged to one After payment of funeral expenses, the said mortgage debt, and the

the assets should be an executor or administrator,"folld. in *Sri Nathji v. Mt. Panna Kunwar*, (1935) I.L.R. 56 All. 711. Cf. *Ghulam Mohammad v. Ghulam Husain*, (1931-32) L. R. 59 I. A. 74, expd. in *Sri Nathji v. Mt. Panna Kunwar*, *supra*, as laying down that in suits by an heir against his co-heir in possession for recovery of his share of the property, the Article of the Ind. Lim. Act, applicable is Art. 144 and not Art. 123.

(f) This is a defence to Form No. 292.

costs of obtaining probate, no assets of the testator were left for payment of the plaintiff's claim.

Or,

Long before the institution of the suit, the defendant caused notices to be published in the "Statesman" of the and the of the inviting creditors of the testator to send in their claims not later than 19.... The plaintiff did not send in any claim. Accordingly, on....., the defendant distributed the assets among the creditors who proved their claims and among the legatees. The defendant had not at the commencement of this suit, nor has he now any assets of the testator in his hands to be administered.

DEFENCE. ,

301.

EXECUTORS AND ADMINISTRATORS.

GENERAL DEFENCES by a Person sued as Executor *de son tort.* (g).

The defendant denies that he intermeddled or is intermeddling with the estate of the testator as alleged or at all.

Or,

The defendant had before the institution of the suit handed over all the assets of the said deceased that had come to his hands to the rightful representative.

Or,

The defendant realised the rents issues and profits of the properties specified in Schedule "A" hereto and forming part of the estate of the said deceased from to and made disbursements thereout in due course of administration. On the defendant settled accounts with, the rightful representative, and there are no assets of the said deceased in his hands. A statement of the amounts realised and disbursements made by him as aforesaid is marked "A" and hereto annexed.

-
- (g) An executor *de son tort* can discharge himself by accounting to the rightful executor before suit : *Hill v. Curtis*, (1865) L. R. 1 Eq. 90, 98 ; *Curtis v. Vernon*, (1790) 3 T. R. 587. If an executor *de son tort* can prove a settled account with the rightful representative before suit, it is a sufficient answer to an action against him for an account : *Hill v. Curtis*,

PLAINT.

302.

FALSE IMPRISONMENT.

CLAIM for Damage for False Imprisonment. (h)

1. At all material times the plaintiff was employed as a cashier of the defendant bank.

2. On, the defendant bank through their agent W.C. lodged an information before the Deputy Commissioner of Police, Calcutta, charging the plaintiff with criminal breach of trust in respect of some demand drafts on London totalling Rs....., and caused the plaintiff to be arrested the same day at and detained in the police office for hours.

(1865) L.R. 1 Eq. 90. He is not liable beyond the extent of the goods which he has administered. Therefore, in an action by a creditor of the deceased, under a plea of *plene administravit*, he is not chargeable beyond the assets which came to his hands: See Williams on Executors, 12th Edn., pp. 162, 163; *Magaluri Garudiah v. Narayana* (1881) I.L.R. 3 Mad. 359, 365.

(h) **Reference:** *Gouri Prosad Dey v. Chartered Bank of India, Australia & China*, (1925) I. L. R. 52 Cal. 615; *Sadik Hossain Khan v. Taffaxal Khan*, (1938-39) 43 C. W. N. 1090 (When a person gets another arrested by the police on a false complaint he is liable for damages for false imprisonment although not for malicious prosecution). Nothing short of actual detention and complete loss of freedom will support an action for false imprisonment: *Mahammad Yusufuddin v. Secy. of State*, (1903) I.L.R. 30 Cal. 872, 879 (P.C.), follg. *Bird v. Jones*, (1845) 7 Q.B. 742. In a suit for damages for false imprisonment, where the person sued is not the person who actually arrested and imprisoned the plaintiff, the question in each case is whether the defendant so acted as to render the plaintiff's arrest the act of the defendant. Generally, the Court holds a private individual responsible for an arrest by the police, if the individual has either "given the plaintiff into custody", "directed the constable to arrest", or "signed the charge sheet" with the knowledge that the plaintiff would not otherwise be detained: *Graham v. Henry Gidney*, (1933) I. L. R. 60 Cal. 955.

(h) **Limitation:** One year from the date of liberation, Art. 19, Ind. Lim. Act: *Mahammad Yusufuddin v. Secy. of State*, *supra*.

(h) **False imprisonment and malicious prosecution—distinction between:** "The distinction between false imprisonment and malicious prosecution is well illustrated by the case where, parties being before a magistrate, one makes a charge against another, whereupon the magistrate orders

3. On the following day the plaintiff was brought in custody before Magistrate. There the charge was preferred against the plaintiff and the Magistrate remanded him in custody.

4. On the plaintiff was committed by for trial to the High Court Sessions.

5. The said trial commenced on and lasted till when the plaintiff was found not guilty and acquitted.

The plaintiff claims—

Rs, damages for false imprisonment.

DEFENCE.

303.

FALSE IMPRISONMENT.

DEFENCE to a Claim for False Imprisonment. (i)

1. The plaintiff was the senior cashier of the defendant Bank and was responsible for the safe custody of the drafts referred to in paragraph 2 of the plaint. On or about it was discovered that one Mr., a customer of the Bank, had obtained possession of certain of these drafts of the total value of Rs without previously having paid for them. The matter was investigated by Mr. W. C., a director of the Bank, and he had reasonable and probable cause for suspecting plaintiff's complicity in the crimi-

the person charged to be taken into custody and detained until the matter can be investigated. The party making the charge is not liable to an action for false imprisonment, because he does not act out a ministerial officer in motion, but a judicial officer. The opinion and judgment of a judicial officer are interposed between the charge and the imprisonment." : *Per Willes J., in Austin v. Dowling*, (1870) L. R. 5 C. P. 534, 540. In an action for false imprisonment the onus is on the defendant to plead and prove affirmatively the existence of reasonable cause, whereas, in an action for malicious prosecution the plaintiff must allege and prove affirmatively its non-existence : *Thakdi Hajji v. Budrudin Saib*, (1906) I. L. R. 29 Mad. 208.

- (h) **Measure of damages** : Damages are in the discretion of the Court. Exemplary damages may be given where the wrongs import insult or outrage and so are not merely injuries but *iniuræ* in the strictest Roman sense of the term : See Pollock on Torts, 14th Edn., p. 153. Cf. *Madhab Chunder v. Bane Madhub* (1885) 15 Suth. W. R. 85.
- (i) This is a defence to Form No. 302.
- (i) An action for malicious arrest is not sustainable when the defendant has

nal transaction. Thereupon, on, the said Mr. W. C. informed the Deputy Commissioner of Police and placed all the facts before the said officer who made the usual enquiry and exercised his discretion and ordered the arrest of the plaintiff.

2. In the premises the defendant Bank did not cause the arrest of the plaintiff and is not liable in damage.

PLAINT.

304.

FALSE IMPRISONMENT.

CLAIM against a Police Officer for False Imprisonment. (j)

1. The defendant at the time material hereto was and is a police constable of the Police Force.

2. On the 19..., the defendant maliciously and without reasonable and probable cause arrested the plaintiff at without a warrant and took him to the police station and there detained him in the lock up for hours, when he was discharged by an order of a magistrate.

The plaintiff claims—

Rs damages.

placed all the facts before the officer having the discretionary power to order such arrest and when such officer with full knowledge of all the facts exercised his discretion and ordered the arrest. In an action for false imprisonment the onus is on the defendant to plead and prove affirmatively the existence of reasonable cause : *Thakji Hajji v. Budrudin Saib*, (1906) I. L. R. 29 Mad. 208, refd. to in *Nagendra Nath v. Basanta Das*, (1930) I. L. R. 57 Cal. 25 ; *Balbhaddar Pande v. Basdeo* (1907) I. L. R. 29 All. 44 ; cf. *Gouri Prasad Dey v. Chatered Bank of India, Australia & China*, (1925) I.L.R. 52 Cal. 615 (in which Page J. held that an issue as to whether in arresting or causing the arrest of the plaintiff the defendant had reasonable or probable cause in so doing is immaterial). Cf. *Graham v. Henry Gidney*, (1933) I.L.R. 60 Cal. 935.

(j) **Cause of action :** In an action against a police officer for false imprisonment the plaintiff must prove facts showing that the said officer acted illegally in the exercise of his authority. Under Secs. 54, 55, and 57 of the Cr. P. Code the police officer is empowered to arrest persons without warrant under circumstances specified in those sections. A defence of justification must come within the scope of those sections according to the circumstances of the case.

(j) **Reasonable cause of suspicion to justify arrest :** "The only thing which

DEFENCE.**305.****FALSE IMPRISONMENT.****DEFENCE of Justification by Police Officer to a Claim for False Imprisonment. (k)**

1. On the night of the defendant was on patrol duty in the area.

2. At about.....the same night the defendant found plaintiff loitering near On being questioned by the defendant, the plaintiff could not give any satisfactory explanation as to why he was loitering there and also refused to give his name and residence.

3. The defendant had cause to suspect and did suspect that the plaintiff was about to commit a burglary or theft in the neighbourhood and he accordingly took him into custody so that he might be dealt with according to law.

PLAINT.**306.****FATAL ACCIDENTS.****CLAIM by Representatives of the Deceased under the Fatal Accidents Act, 1855. (l)**

1. At 8-45 P. M. on the night of the, when the fatal accident, hereinafter mentioned, happened, a motor lorry bearing registered no, the property of the defendant, was

can be certainly affirmed in general terms about the meaning of "reasonable cause" in this connection is that, on the one hand, a belief honestly entertained is not of itself enough; on the other hand, a man is not bound to wait until he is in possession of such evidence as would be admissible and sufficient for prosecuting the offence to conviction, or even of the best evidence which he might obtain by further enquiry. "It does not follow that because it would be very reasonable to make further inquiry, it is not reasonable to act without doing so". It is obvious, also, that the existence or non-existence of reasonable cause must be judged, not by the event, but by the party's means of knowledge at the time": Pollock on Torts, 14th Edn., pp. 178, 179.

(k) See notes under Form No. 304.

(l) **Parties to suit** : The intention of the Fatal Accidents Act, XIII of 1855, is to prevent any further action to be brought on the same subject-

drawn across the Road between and in such a way as to obstruct the passage of about two-thirds of the road, and to persons coming along the road, it was an unlighted obstruction.

2. At that time, A. D., riding on a motor cycle at a proper pace along the said road, was unable to observe the obstruction in time to stop, and travelling straight on, crashed into the said lorry and was killed. The said accident was caused by the negligence of the defendant in placing the lorry across the road as mentioned above.

3. The said A. D. died intestate and was at the time of his death aged thirty. He was of sober habits and of sound physique,

matter. Hence all the parties who are to be benefited ought to join as plaintiffs. Accordingly a suit, in which the widow and the children were all co-plaintiffs, but which was brought only for the benefit of the widow—the children having agreed to forego their right to compensation in favour of the widow—was held to be properly constituted: *Mrs. E. V. Penheiro v. M. Minney*, (1934) I, L. R. 61 Cal. 480. In the absence of an executor or administrator, the persons for whose benefit a right of action is given by the Act are to be deemed representatives of the deceased for the purpose of bringing suit under the Act. The word “representative” therefore does not mean only executors or administrators but includes all or any of the persons for whose benefit a suit can be brought under the Act: *Goolbai v. Pestonji*, A. I. R. 1935 Bom. 333; *Mrs. E. V. Penheiro v. M. Minney*, *supra*.

- (1) **Negligence**: In a suit by the heirs of a deceased dying as a result of motor accident, for recovery of damages under the Fatal Accidents Act, although the deceased is proved to have been guilty of negligence, nevertheless, the claim in the suit will succeed, if the effect of the deceased's negligence could have been avoided by the exercise of reasonable care on the part of the driver of the vehicle: *Saghirul Hassen v. Rangoon Elec. Tram. & Supply Co.*, A. I. R. 1936 Rang. 295. Cf. *Tidy v. Battman*, (1934) 1 K. B. 322 (where it was held that the defendant had been negligent; and, secondly, that the deceased man could not by the exercise of ordinary care have avoided the consequences of that negligence.); *Stewart v. Hancock*, A.I.R. 1940 P.C. 128.
- (1) **Cause of action**: The cause of action under the Act is the loss resulting to the plaintiffs from the death of the deceased, and loss means the loss of pecuniary benefit which the plaintiffs would have got from the deceased if the latter had not died, e.g., his pecuniary savings from his income, his contributions to the family for maintenance and education, and the assistance that he would have continued to give for the maintenance of the family, all which are estimable in terms of money. The age of the deceased, his expectation of life, and condition of his health, and his habits are also matters to be considered. The action is one which is purely com-

and was employed as on a salary of Rs. per month and was the only earning member of the family consisting of himself and the plaintiffs.

4. The plaintiff no. 1, is the father, no. 2, the mother, no. 3, the widow, nos. 4 and 5, the minor sons, of A. D., deceased. The suit is brought for the benefit of the plaintiffs, the representatives of the deceased.

5. By the death of A. D., the plaintiffs have been deprived of the means of support and have suffered and are suffering and shall continue to suffer pecuniary loss.

pensatory and the plaintiffs are entitled to sue for compensation in respect of their reasonable expectation of the value of the services of the deceased which have been lost to them for ever : *Goolbai v. Pestonji*, A. I. R. 1935 Bom. 333 ; cf. *Devi Siny v. Mangathayammal*, A. I. R. 1935 Mad. 322.

- (1) **Measure of damages :** Compensation awarded under the Act is compensation for the loss of the actual pecuniary benefit which the beneficiaries might reasonably have expected to enjoy, had the man not been killed : *Caitano De Mello v. M. E. E. Co.*, A. I. R. 1927 Bom. 357 ; Sec. 1, Fatal Accidents Act, XIII of 1855 ; *Goolbai v. Pestonji* ; A. I. R. 1935 Bom. 333 ; *Stanes Motors Ltd. v. Vincent Peter*, (1936) I. L. R. 59 Mad. 402.

In assessing damages many factors have to be considered : The possibility of his or her early death, the possibility of the deceased dying from other causes and the possibility of the deceased losing the employment on which he was engaged and being unemployed : *Kuppammal v. M. & S. M. Ry.*, 1937 M. W. N. 921. Assessment of damages under the Fatal Accidents Act must necessarily be rough and approximate, but it should not be arbitrary or whimsical : *Pulghat Coimbatore Transport Co. v. Narayanan*, 1938 M. W. N. 1241. In assessing damages under the Fatal Accidents Act, one cannot take into consideration the mental suffering of the survivors : *Secretary of State v. Rukhminibai*, A. I. R. 1937 Nag. 354. Funeral expenses and expenses incurred in the Police Court in prosecuting the accused cannot be recovered even when a claim for damages is allowed : *Mrs. E. V. Penheiro v. M. Minney*, (1934) I. L. R. 61 Cal. 480.

- (1) **Particulars to be stated in the plaint :** The plaint should furnish full particulars of the person or persons for whom or on whose behalf the action is brought and the nature of the claim in respect of which damages are sought to be recovered : *Per Roy J.*, in *Mrs. E. V. Penheiro v. M. Minney*, *supra* ; *Goolbai v. Pestonji*, *supra* ; *Rivers Steam Navigation Co. v. Hiratal*, (1933-34) 38 C. W. N. 553.
- (1) **Limitation :** Under Art. 21, Ind. Lim. Act, one year from the date of the death of the person killed.

Particulars :

The plaintiffs claim—

- (1) Rs., compensation.
- (2) Apportionment of compensation amongst the plaintiffs, if necessary.

PLAINT.**307.****FATAL ACCIDENTS.**

CLAIM by an Administrator of the Deceased under the Fatal Accidents Act, 1855.

1. On the 5th of September, 19..., at about P.M., one A.B. was riding a bicycle upon the highway known as when a motor car bearing registered no, driven by the defendant's servant, a man named K. C., violently collided with the said bicycle and as a result thereof the said A. B. was immediately killed.

2. The said collision was caused by the negligent driving of the defendant's servant.

Particulars of negligence :

3. On, the plaintiff obtained letters of administration to the estate of A. B., deceased.

4. This suit is brought on behalf and for the benefit of the following persons who have suffered damage by the death of the said A.B. : (*State names of the persons and their relationship with the deceased*).

5. The deceased was aged 26 and was employed as, earning Rs a month and was the sole support of the persons mentioned in paragraph 4 hereof.

The plaintiff claims—

Rs. damages.

PLAINT.

308.

FISHERY.

CLAIM to establish an exclusive Right of Fishery in a tidal navigable River and for Damages etc. (m)

1. The plaintiffs at all material times were and are proprietors of a zamindary known as and of a several and exclusive jalkar or fishery in the tidal and navigable river in the district of in Bengal, between and The said jalkar is known as mahal.

2. The said jalkar or fishery has existed and been vested in the plaintiffs and their predecessors in title by a lost grant from the Crown and the plaintiffs and their predecessors in title have possessed and enjoyed the same from time immemorial.

3. In the year, a channel was formed by a change in the course of the said river and flowed over the defendants' zamindary known as This channel is tidal and navigable and its waters are part of the river system within the upstream and downstream limits of the plaintiffs' jalkar.

4. In, the defendants fished in a portion of the said channel and caught and carried away large quantities of fish therein and converted them to their own use.

5. The defendants are wrongfully claiming a right to fish in the said channel as part of their rights as owners of the subjacent soil.

6. The defendants threaten and intend to continue to fish in the said channel.

- (m) **Reference :** *Srinath Roy v. Dinabandhu* (1913-14) L. R. 41 I. A. 221, 235, 241 (It must now be taken as decided in Bengal that the Government's grantee can follow the shifting river for the enjoyment of his exclusive fishery so long as the water forms part of the river system within the upstream and downstream limits of its grant, whether the Government owns the soil subjacent to such water as being the long established bed, or whether the soil is still in a riparian proprietor as being the site of the river's recent encroachment.....). The rule which in the United Kingdom connects the subject's right to an exclusive fishery in tidal navigable waters with the limits of the Crown's ownership of the subjacent soil is itself the result of conditions partly historical and partly geographical which had no counter part in lower Bengal). *Rajnandini v. Monmotha*, (1939-40) 44 C.W.N. 1079

The plaintiffs claim—

(1) A declaration that the said newly formed channel is within the upstream and downstream limits of their jalkar or fishery and forms part of it.

(2) Rs damages.

(3) Injunction to restrain the defendants, their servants and agents from fishing or otherwise interfering with the plaintiffs' exclusive right of fishing in the said channel.

PLAINT.

309.

FOREIGN JUDGMENT.

CLAIM on a Foreign Judgment in a Personal Action. (n)

1. On....., at in the State (or Kingdom or territory) of, the Court of that State (or Kingdom or

(The owner of a fishery right in the navigable river has a right to follow the shifting river in the enjoyment of his exclusive right of fishery so long as the waters may be considered a part of the river system).

- (m) **Crown's right to grant exclusive right of fishing in a navigable river :** *Srinath Roy v. Dinabandhu*, (1913-14) L. R. 41 I. A. 221 ; *Midnapore Zemindary v. Trailokya Nath* (1924) I. L. R. 51 Cal. 110 ; *Rani Pravabati v. Secy. of State*, (1933-40) 44 C. W. N. 1017.
- (m) **Burden of proof :** It is not absolutely essential to prove an express grant after a considerable lapse of time and the plaintiffs can establish their right by proof of an uninterrupted user of fishery prior to their dispossession : *Kedar Nath v. Amrit Mandal*, A. I. R. 1925 Pat. 568 ; *Nani Lal Roy v. Prothad*, (1932) 56 C. I. J. 369.
- (m) **Limitation :** Jalkar is regarded as an easement and consequently 20 years' enjoyment is necessary under Sec. 26 of the Ind. Lim. Act to acquire any right of fishery. That might be the case where the right is claimed without any exclusion of the owner or in common with others. A case of exclusive right to fishing falls within the definition of interest in the immovable property under Art. 144 and adverse possession of such a right for more than 12 years would by operation of Sec. 28 of the Ind. Lim. Act extinguish the right of the lawful owner to that extent : *Krishna Nandi v. Lokenath Mookerjee*, (1932) I. L. R. 59 Cal. 344.
- (n) **Remedies of the decree-holder :** A decree-holder may bring a suit under Sec. 13, or, in certain specified cases, apply for execution under Sec. 44, C. P. Code, but if he elects the latter remedy and is unsuccessful, he can not sue again under Sec. 13. Where in regard to the decree

territory), in a suit therein pending between the plaintiff and the defendant in respect of, duly adjudged that the defendant should pay to the plaintiff rupees, with interest thereon at 6 *per cent. per annum* from the said date.

2. The sum of Rs..... is due from the defendant under the said judgment.

Particulars of claim :

The plaintiff claims—

Rs.....

DEFENCE.

310.

FOREIGN JUDGMENT.

DEFENCE to a Claim on Foreign Judgment in a Personal Action. (o)

1. The defendant at the time the suit commenced was not a subject of, nor resident in, the country in which the judgment was obtained.

2. The defendant never had any notice of the proceedings in the suit in which the judgment was obtained.

of any native state, a notification has been issued under Sec. 434 of the Code of 1877 or Sec. 44 of the present Code, the sole remedy of a decree-holder in a British Indian Court is to apply for execution of the decree, a suit on the foreign judgment under Sec. 13 of the Code is not maintainable: *Ohormal Balchand v. Kasturi Chand*, (1936) I. L. R. 63 Cal. 1033.

(n) **Limitation** : Art. 177, Sch. 1, Ind. Lim. Act: *Madern Chemical Works, v. Manmohan* (1935) I. L. R. 17 Lah. 341; *Veeraraghava Ayyar v. Muga Sait*, (1916) I. L. R. 39 Mad. 24, (F. B.) at p. 34.

(o) This is a defence to From No. 309.

(o) **Defence of want of jurisdiction** : S. 13 (a), C. P. Code; *Kassim Mamooji v. Isuf Mahomed*, (1902) I. L. R. 29 Cal. 509. No foreign judgment can be regarded as a judgment given by a Court of competent jurisdiction on the ground that the cause of action arose within its jurisdiction. No territorial legislation can give jurisdiction, which any foreign court ought to recognise, against absent foreigners who owe no allegiance or obedience to the power which so legislates. But where the non-resident foreigner is subject to the same sovereign power which legislates, the latter may confer power on the Court to try against such foreigner a suit for which the cause of action arose within its jurisdiction.

Or,

The said judgment was obtained by fraud of the plaintiff.
(Particulars of fraud)

Or,

The defendant was a minor at the time the said judgment was obtained, and a person, whose interest was in conflict with that of the defendant, was appointed his guardian *ad litem*. The said appointment was against the rules of natural justice and prejudicial to the defence of the defendant.

3. The plaintiff's claim in the suit in which judgment was obtained was based on a wagering contract which is not enforceable in British India.

tion : *Per* R. C. Mitter, J., in *Ohormal Balchand v. Kasturi Chand*, (1936) I. L. R. 63 Cal. 1033.

(o) **Defence of want of notice of the suit** : Courts in British India, when called upon to give effect to a foreign judgment, should insist upon a strict proof of the validity and service of summonses and other processes alleged to have emanated from a foreign Court, and made a foundation for a liability to be enforced here by Courts that have no cognisance of the case on its merits : *Edulji Burjorji v. Manckji Sorabji* (1887) I. L. R. 11 Bom. 241 ; *Bangarusami v. Balasubramanian*, (1890) I. L. R. 13 Mad. 496. Cf. *Janoo Hassan v. Mahamad Ohulhu*, (1924) I. L. R. 47 Mad. 877 (where notice of suit served on a person holding a power of attorney from the defendant was held sufficient. It was also held that where a foreign Court had held service of notice of a suit sufficient, it must be taken to be correct in the absence of evidence to the contrary).

(o) **Defence that judgment was obtained by fraud** : S. 13 (e), C. P. Code. Cf. *Vadala v. Lawes*, (1890) L. R. 25 Q. B. D. 310, expld. by R. C. Mitter, J., in *Kunjabehari v. Krisnadhone*, (1939-40) 44 C. W. N. 912, 918, 919 (When the case of fraud cannot be determined without re-opening the merits, the merits can be re-opened Even if the self-same case of fraud had been investigated by the foreign Court and had been negatived on the basis of false evidence adduced in that Court, still the English Court could go into the matter again to see the circumstances under which that judgment was given. The law thus formulated as applicable to foreign judgments is wider in terms than what would be applicable to domestic judgments ; for a domestic judgment cannot be attacked simply because it was obtained by false evidence, and any *direct issue already decided cannot be re-agitated on the principle of *res judicata*.)

(o) **Other Defences** : See S. 13 (c), C. P. Code.

(o) **Defence that the rules of natural justice had not been followed in the appointment of guardian-ad-litem of the defendant (minor)** : S. 13(d),

DEFENCE.

311.

FOREIGN JUDGMENT.

DEFENCE to a Claim on Foreign Judgment, setting up the Plea that the Judgment was not given on the Merits. (p)

The plaintiff in the suit brought by him in the foreign Court claimed £400 alleged to be due to him in respect of transactions he had with the defendant as a member of a firm in Madras. By his defence the defendant denied that he was ever a member of the firm in Madras and also denied that there was any money due by him to the plaintiff. Thereafter the plaintiff delivered certain interrogatories to the defendant. Upon the refusal of the defendant to answer the said interrogatories, his defence was struck out, the merits of the case were not investigated and the defendant was treated as though he was not defending and judgment was given on that footing.

C. P. Code ; *Popat Virjee v. Damodar Jairam*, A. I. R. 1934 Bom. 390 ;
Cf. *Gajanan Sheshadri v. Shantabai*, A. I. R. 1939 Bom. 374.

- (o) Defence that the plaintiff's claim is founded on a breach of any law in force in British India : S. 13(f), C. P. Code.
- (p) This is a defence to Form No. 309.
- (p) Reference : S. 13 (f), C. P. Code ; *Keymer v. P. Visvanathan*, 1916-17 L. R. 44 I. A. 6. (Note : It is not sufficient to plead that judgment was not given on the merits of the case. The facts showing that the judgment was not one upon the merits ought to be pleaded.). The test to determine whether a foreign judgment was given on the merits is to find out whether it was given as a penalty for any conduct of the defendant or whether it is based on a consideration of the truth or otherwise of the plaintiff's case on the evidence. Where the foreign Court has given a decree to the plaintiff not because the defendant was unrepresented or that he did not raise any objection to the plaintiff's claim, but it considered the plaintiff's claim on its merits, and after taking evidence it came to the conclusion that the claim was proved, the suit must be held to have been disposed of on the merits and the defendant cannot get the benefit of the exception contained in cl. (b) of Sec. 13, C. P. Code : *Gajanan Sheshadri v. Shantabai*, *supra*. A foreign judgment dismissing a suit by the creditor against the principal debtor for default, not being a judgment *inter partes* on the merits of the case, cannot be availed of by the surety to resist his liability to the creditor : *Bharat National Bank v. Thakar Das*, (1935) I. I. R. 16 Lah. 757.

PLAINT.

312.

FRAUD.

Ex parte Decree obtained by Fraud.

CLAIM to set aside an *ex parte* Decree obtained by Fraud. (q)

1. On, the defendant instituted a suit in this Court (Suit No.....of.....), hereinafter called 'the said suit', against the plaintiff for recovery of Rs..... as the alleged balance of price of goods sold and delivered by the defendant to the plaintiff and, on, obtained an *ex parte* decree against the plaintiff for Rs..... with interest on judgment 6 *per cent.* and costs.

2. The claim in the said suit was false and fictitious and the said decree was procured by the defendant by practising a fraud upon the Court.

Particulars of fraud :

(a) The plaintiff is a resident of village K. in the district of Burdwan, as the defendant at all material times well knew. In the plaint in the said suit the defendant described the plaintiff as residing in the village R. in the district of Khulna, and got a summons issued for service upon the plaintiff at village K. The said summons was returned unserved, and, on, the defendant made an application to the Court supported by an affidavit, alleging that the plaintiff was keeping out of the way for the purpose of avoiding service and that, consequently, the summons could not be served upon him in the ordinary way, and praying for substituted service. On the defendant procured an order for such service by publication in an issue of the "Statesman", a newspaper which has got no circulation in village Z. where the plaintiff resides.

- (q) **Cause of action :** A domestic judgment cannot be re-opened in a later action on the ground that it has been fraudulently obtained merely by reason of the fact that the previous suit was false or without any cause of action or merely because the decree was obtained by false representation or suppression or perjured evidence, provided the person so applying for a reversal of the decree in the original suit was not prevented by the fraud of the decree-holder from placing his case before the Court ;

(b) The procuring of the said summons for service on the plaintiff at village Z., the filing of the said false affidavit, and the procuring of the said order for substituted service were a premeditated and intentional contrivance for keeping the plaintiff in ignorance of his rights and from placing his case before the Court.

3. By reason of the fraud practised by the defendant as aforesaid, the plaintiff got no opportunity to appear and contest the defendant's claim in the said suit, and the defendant was enabled to procure a decree on a false claim supported by perjured evidence.

4. The plaintiff received a notice of execution of the decree in the said suit on and, after inspection of the records of the said suit, he discovered the said fraud on

The plaintiff claims :—

that the decree in the said suit be set aside.

Durgagati Banerjee v. Taharulla, (1939-40) 44 C.W.N. 849. The fraud alleged and proved must be actual positive fraud, a meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts of the case and obtaining that decree by that contrivance. The fraud must be extraneous to the suit which terminated in the decree: *Kunjabehari v. Krishnadhane*, (1939-40) 44 C.W.N. 912, 917, 918. For other cases, see 'Particulars', Part II, Chap. XX, p.490.

(q) **Particulars of fraud** : The allegation of fraud practised upon the Court must be clear, definite and specific : See 'Particulars', Part II, Chap. XX, p. 490 ; *Tom Boevey Barrett v. African Products, Ltd.*, A.I.R. 1928 P.C. 261.

(q) **Place of suing** : See 'Cause of Action', Pt. II, Chap. X, p. 295.

(q) **Limitation** : 3 years under Art. 93, Sch. I, Ind.Lim.Act.

(q) **Proof of fraud** : Mere non-service would not do : *Sagareswar Chattaraj v. Babulal*, (1938) 68 C.L.J. 75. But when the fact of non-service of summons and the fact that the claim on which the decree was passed are proved to be false, the Court may and should ordinarily infer deliberate and hence fraudulent suppression, for the last mentioned circumstance supplies the motive for the suppression, and indicates that the suppression is itself fraudulent : *Kunjabehari v. Krishnadhane*, *supra*.

(q) **Effect of setting aside an ex parte decree on the ground of fraud** : As to whether, when an *ex parte* decree is set aside in a subsequent suit, the original suit in which that decree was obtained is revived or not, depends upon the pleadings, the issues and the actual decision in the subsequent suit. If upon an issue properly raised and tried in the subsequent suit it is held that the claim itself of the plaintiff in the original suit was false and fraudulent, the effect of such a decision is to put an end to that suit, and the suit cannot be revived and retried. If, on the other hand, the *ex parte* decree is set aside on the ground that it was obtained by

PLAINT.

313.

FRAUD.

Consent Decree obtained by Fraud.

CLAIM to have a Consent Decree obtained by Fraud vacated or amended (r)

1. In 19..., the plaintiff instituted a suit against the defendant in this Court (Title Suit No..... of) for, amongst others, a declaration that the plaintiff was the owner of a certain land measuring $8\frac{1}{2}$ *cottas* situate to the south of premises No....., the property of the defendant.

2. On or about, the plaintiff and the defendant mutually agreed to settle the said suit upon the following terms :

(a) the plaintiff to give up his claim to the land in dispute ;

suppression of summons by means of fraud and the defendant in the original suit was prevented from appearing in the suit and defending it by reason of fraud committed by the plaintiff, the first suit is revived and the plaintiff of that suit is entitled to have it tried and disposed of in accordance with law in spite of the fact that in the subsequent suit the Court went into the question as to the plaintiff's claim being false as a ground for holding that there was reason for him to obtain stealthily a decree behind the back of the defendant by fraudulently keeping him out of the knowledge of the suit and preventing him from defending the action : *Nirsan Singh v. Kishuni Singh*, (1931) I.L.R. 10 Pat. 516. (In this case after the *ex parte* decree was set aside on the ground of fraud, the plaintiff in the first suit applied for restoration of his suit and the lower Court restored the suit. Upon revision, the High Court held that an issue as to the truth or falsity of the plaintiff's claim in the first suit was raised in the second suit and decided against the plaintiff in the first suit, and that the principle of *res judicata* would bar the determination of the same question and accordingly the lower Court's order restoring the suit must be set aside).

- (r) **Grounds for setting aside consent decree :** A consent decree is a mere creature of the agreement on which it is founded, and it may be set aside on any ground which would invalidate an agreement between the parties : *Huddersfield Banking Co. v. Henry Lister*, (1896) 2 Ch. 273 ; *Great North-West Central Ry. v. Charlebois*, (1899) A. C. 114 ; *Yusuf v. Abdullabhai*, (1932) I.L.R. 56 Bom. 231.
- (r) **Procedure : Regular suit or application under Sec. 151 or, O XLVII, r. 1, C.P. Code :** If a party desire to have a consent decree amended or vacated upon the ground that it was fraudulently procured, his proper course, and indeed his only course is to proceed by separate suit for the

(b) the defendant to convey to the plaintiff enough land abutting to equalise the area of the land in dispute, and, if he had not enough land there, then he should give what he had and pay the plaintiff for the shortage at Rs. *per cotta* ;

(c) each party to pay his own costs of the suit.

3. On, a petition of compromise stating the aforesaid terms was written out and an affidavit sworn. The plaintiff left

purpose..... Sec. 152 of the C.P. Code which is confined to clerical or arithmetical mistakes and to an accidental slip or omission is based upon this general principle and Sec. 151 is in no way intended as a violation of that principle. If relief can be properly obtained in a separate suit, it does not appear that there is any justification for invoking Sec. 151 at all. It is not competent under r. 1 of O.XLVII to obtain a review of a consent² decree on the ground that the consent decree was obtained by fraud. If mistake or error is *prima facie* intended to be beyond the scope of the r. 1 of O.XLVII, unless the mistake or error is apparent on the face of the record, it is curious, to say the least of it, that a party should employ this procedure for the purpose of making out a contentious case of fraud : *Per* Rankin C. J., in *J. C. Galstaun v. Kumar Pramotha*, (1928-29) 33 C.W.N. 883. In another case of the Calcutta High Court, B. B. Ghose J., sitting as a single Judge, held that fraud practised upon the Court or upon the party may be discovered after the order is made and it may be a new and important matter which could not be within the knowledge of the applicant at the time when the decree was passed and the order made, and accordingly one of the modes for setting aside a decree on the ground of fraud is by review of the judgment sought to be set aside : *Khitish Chandra v. Nagendra*, (1928-29) 33 C. W. N. 572. The Patna High Court has drawn a distinction between fraud practised on the Court and fraud practised upon the parties. In the case in which fraud is practised upon the Court it is always within the inherent power of the Court to correct its own proceeding. But where a consent was obtained by the practice of fraud between the parties, the remedy lies by way of suit and not by way of application. Review can only be granted on the grounds set out in O.XLVII, r. 1, C.P. Code : *Sheodhar Prasad v. Ramdeo Prasad*, (1934) I.L.R. 13 Pat. 165. If the decree is obtained by fraud an action can be brought to set it aside : *Mt. Fazal Jan v. Abdul Rahim*, (1934) I.L.R. 15 Lah. 626. If a decree is sought to be set aside on the ground of fraud, misrepresentation or mistake, then several complicated questions would arise and they have to be decided in a separate suit. If on the face of the record the compromise decree is proper, then the Court which passed the decree cannot set it aside in an application under Sec. 151 of the Code : *Keshav v. Subba Manga*, A.I.R. 1939 Bom. 490 ; cf. *Yusuf v. Abdullahai*, (1932) I.L.R. 56 Bom. 231.

for Nagpur the same day leaving the original petition with the defendant who undertook to file it in Court the next day.

4. On, the plaintiff obtained a certified copy of the consent decree made in terms of the compromise petition filed in Court on the and discovered—

(a) that the original compromise petition had been fraudulently tampered with by alteration of the words, which were in the original petition, into the words The effect of the said alteration was that the defendant instead of having to give enough land abutting to the plaintiff and to pay for the shortage only, was to pay money compensation only to the plaintiff for the entire $8\frac{1}{2}$ *cottas* ;

(b) that the defendant fraudulently procured the decree in terms of the compromise petition altered as aforesaid.

The plaintiff claims—

(1) That the consent decree dated...made in Suit No..... of.....be vacated ; or,

(2) The said decree be amended so as to bring it into conformity with the actual terms arrived at between the parties.

PLAINT.

314.

FRAUD.

Fraudulent Transfers under Sec. 53, T. P. Act, 1882.

CLAIM by a Creditor on behalf of himself and all other Creditors for a Declaration that a particular Transfer is void as against the Creditors of the Debtor. (s)

1. On, the plaintiff obtained a money decree against the defendant no. 1 in Suit No..... of 19...on the file of the Subordinate Judge of for Rs. 2,000/-.

(s) **Frame of suit :** A creditor in order to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transferor, must institute the suit on behalf of, or for the benefit of, all the creditors : Sec. 53, T.P. Act, 1882. This would be so even where the suit is brought under the provisions of O.XXI, r. 63, C.P. Code by an attaching creditor : *Maung Tun Thein v. Maung Sin*, (1934) I.L.R. 12 Rang. 670 ; *Ohidambaran Chettyar v. R. M. A. R. S. Firm*, A.I.R.

2. Two days before the date of the said decree, that is, on, the defendant executed a deed purporting to convey all his immovable properties of the value of Rs. 20,000/- in favour of his wife, the defendant no. 2, for a nominal consideration of Rs. 1,000/-. The said properties are specified in schedule "A" hereto annexed.

3. The said transfer was made by the defendant no. 1 with intent to defeat or delay his creditors.

4. This suit is instituted by the plaintiff on behalf of himself and all other the creditors of the defendant no. 1. A list of such other creditors together with their respective claims, as far as the plaintiff has been able to ascertain, is annexed hereto and marked "B".

The plaintiff claims—

A declaration that the aforesaid deed of sale dated is void as against all the creditors of the defendant no. 1.

1934 Rang. 302; *Madina Bibi v. Ismail Durga Association*, A.I.R. 1940 Mad. 789.

- (s) **Transfer with intent to defeat or delay the creditors of the transferor—**
nature of : A debtor, for all that is contained in Sec. 53 of the T. P. Act, may pay his debt in any order he pleases and prefer any creditor he chooses: *Mina Kumari v. Bijoy Singh Dudhuria*, (1916-17) L. R. 44 I.A. 72, 77. A mere preference of one creditor to another is not fraudulent under this section: *Maung San Gyaw v. Maung Kyaw*, A.I.R. 1937 Rang. 471. When it is found that the transfer impeached is made for adequate consideration in satisfaction of genuine debt, and without reservation of any benefit to the debtor, no ground for impeaching it lies in the fact that the plaintiff who also is a creditor is a loser by payment being made to the preferred creditor, there being no question of bankruptcy. The proper way to deal with such cases is to file a suit for administration: *Chettyar Firm v. Chettyar Firm*, A. I. R. 1937 Rang. 531. Cf. *Gharbhoya Bhimji v. Deodatta Bipary*, A.I.R. 1937 Nag. 400; *Lalit Mohan v. Anil Kumar*, (1938-39) 43 C. W. N. 1136. Where a creditor pleads that a deed of sale by a judgment-debtor is a sham and bogus transaction and the property which purported to be conveyed under the instrument of sale was never conveyed at all and remained the property of the vendor, there is no necessity to institute a suit under Sec. 53 of the T. P. Act, as there is in fact no transfer, there is nothing which can be avoided: *Parbhu Nath Prasad v. Sarju Prasad*, A. I. R. 1940. All. 407. Cf. *Sivu Shidda v. Lakhmichand*, A. I. R. 1939 Bom. 496, 498. A *bonafide* transferee even from a fraudulent transferee is protected under Sec. 53: *Firm Man Singh v. B. N. Sinha*, A. I. R. 1940 Lah. 198.

PLAINT.

315.

GUARANTEE.

CLAIM against Surety on a Guarantee of Debt. (t)

1. On or about, one J. B. D. approached the plaintiff for a loan of Rs. 2,000/- on a promissory note.

2. On....., the defendant wrote a letter to the plaintiff in which he agreed that if the plaintiff would lend J. B. D. Rs. 2,000/- on a promissory note bearing interest at 6 *per cent. per annum*, he would be responsible to the plaintiff for the due payment of the loan.

- (s) **Evidence necessary to establish fraud:** *Hashmat Begum v. Lala Mohan Lal*, A. I. R. 1937 Oudh 349; *Rattan Chand v. Firm Kishen Chand*, A. I. R. 1938 Lah. 136 (The subsequent and the prior conduct and the contemporaneous conduct of the transferors are all relevant.).
- (s) **Court Fees:** Art. 17A of Sch. II of the Court Fees Act. The same court fee is payable as in a suit to obtain a declaration where no consequential relief is prayed: *Vellayya Konar v. Ramaswami*, A. I. R. 1939 Mad. 894.
- (s) **Limitation:** Art. 120 of the Ind. Lim. Act: *Firm Man Singh v. B. N. Sinha*, A. I. R. 1940 Lah. 198; *Parkash Narain v. Raja Birendra Bikram Singh*, A. I. R. 1931 Oudh 333; *Lal Singh v. Jai Chand*, A. I. R. 1931 Lah. 70 (2); *Guntur Narasinhham v. Narayan Rao*, A. I. R. 1926 Mad. 66.
- (t) **Contract of guarantee—parties to:** A contract of guarantee involves three parties, the creditor, the surety and the principal debtor and a contract to which those parties are privy. There must be a contract, first of all, between the principal debtor and the creditor. That lays the foundation for the whole transaction. Then there must be a contract between the surety and the creditor, by which the surety guarantees the debt, and no doubt the consideration for that contract may move either from the creditor or from the principal debtor or both. But if those are the only contracts, the case is one of indemnity. In order to constitute a contract of guarantee there must be a third contract, by which the principal debtor expressly or impliedly requests the surety to act as surety. Unless that element is present, it is impossible to work out the rights and liabilities of the surety under the Contract Act: *Ramchandra v. Shapurji*, A. I. R. 1940 Bom. 315.
- (t) **Contract of guarantee must be proved strictly:** Though, under the Indian law, no writing is required to evidence such a contract as under the English law, the need for strictness of proof is as great as in England. Such contracts should be strictly proved and the consideration for the alleged contract should be stated and established: *Per Courtney-Terrel C. J. and Dhavle J.*, in *Janaki Nath v. Dhokar*

3. The plaintiff accordingly lent Rs. 2,000/- to J. B. D. on a promissory note dated repayable on demand with interest at 6 per cent.

4. Neither J. B. D. nor the defendant has paid any part of the sum due on the said promissory note.

Mall, A. I. R. 1935 Pat. 376. The terms of a surety bond should be interpreted in a manner favourable to the surety or guarantor : *Muhammad Yusaf v. Ram Govinda*, A. I. R. 1928 Cal. 177(2). It is not necessary that the thing done for the benefit of the principal debtor should be at the desire of the surety : *Ghulam Husain v. Faiyaz Ali*, A. I. R. 1940 Oudh 346.

(t) **Extent of liability of surety** : Under Sec. 128 of the Ind. Cont. Act, the liability of a surety is co-extensive with that of the principal debtor only when it is not otherwise provided for in the contract : *Ahmad Ali v. Raihan Raza*, A. I. R. 1931 All. 525. Cf., *C. T. A. C. T. Firm v. Maung Aye*, A. I. R. 1937 Rang. 197 ; *Dhirendra Nath v. Bonebary*, (1939-40) 44 C. W. N. 511. The said liability is co-extensive but not alternative. Both the principal debtor and the surety are liable at the same time to the creditors : *Jagannath v. Shinnarayan*, A. I. R. 1940 Bom. 247. The liability of the surety being co-extensive with that of the principal debtor is joint and several with the latter and, therefore, it is at the option of the creditor, in the absence of a clear intention to the contrary, to decide whether he shall proceed against the surety or the principal debtor : *Depak Datt v. Secy. of State*, A. I. R. 1929 Lah. 393. It cannot be laid down as a general proposition that a creditor cannot proceed against the surety unless he has first exhausted all his remedies against the principal debtor : *Swaminatha v. Lakshmana* A. I. R. 1935 Mad. 748. But he must do so if there is a special contract to that effect : *Radha Krishna v. Ajodhiya*, (1937) A. L. J. 1265. Unless it is otherwise provided for in the contract, a right of action against a surety will generally arise at the same time as a right of action against the principal debtor : *Diyalu Mal v. Nandu Shah* (1931) I. L. R. 13 Lah. 242.

(t) **Limitation** : Either Art. 65 or Art. 83 or Art. 155, (or Art. 116 if the contract of guarantee is in writing registered). Art. 66 has been held to apply to a case where a definite date is specified for payment : *Nihal Chand v. Khuda Bakhsh*, A. I. R. 1924 Lah. 534. Though the liabilities of the debtor and the surety arise out of the same transaction, the liabilities of the two persons are distinct for the purpose of the application of Sec. 20 of the Ind. Lim. Act. If the debts are deemed joint Sec. 21 (2) of the Limitation Act shows that the payment by one of them (debtor) does not extend the time ; on the other hand, if the debts are deemed distinct, the same result follows upon a true construction of Sec. 20 itself. A payment by one person cannot keep alive the remedy against another, unless the circumstances are such that the payment by the one may be

Particulars of claim :

Principal ...	...	...	Rs.
Interest from.....to.....	...	...	"
Nett amount due			...
The plaintiff claims—			"
Rs.....			

PLAINT.

316.

GUARANTEE.

CLAIM against Surety on a Guarantee of Debt. (t₁)

(Another Form).

1. On February 1st, 19..., one C. D. borrowed Rs. 1050/- from the plaintiff and gave the plaintiff in exchange a cheque for that

regarded as payment by the other. There is nothing in the relation of principal and surety itself which makes payment by the principal binding as a payment by the surety: *Brajendra Krishore v. Hindustan Co-op. Ins. Society* (1917) I. L. R. 44 Cal. 978, folld. in *U Ba Pe v. Ma Lay*, A. I. R. 1932 Rang. 88; *Raghavendra v. Mahipat*, A. I. R. 1925 Bom. 244. A contrary view has been taken by His Lordship Lord-Williams J., in *Ranjit Kumar v. Kisori Mohan*, A. I. R. 1940 Cal. 401 (In cases of principal and surety there are two distinct contracts in respect of one debt common to both. There cannot be two distinct debts, otherwise payments on account of principal or interest by the principal would not, *ipso facto*, reduce the debt due by the surety, and *vice versa*, as they do (Sec. 128, Contract Act). It follows that payments of principal or interest by either principal or surety, and acknowledgments in accordance with the provisions of Sec. 20 (1), Limitation Act, create a fresh period of limitation in respect of the common debt as against either the principal or the surety. Further, it seems to me that the principal or the surety is authorized by the other by implication, to make payments on account of the common debt, and in the manner provided by Sec. 20 (1), Limitation Act. Finally the form of the guarantee in the present case is such that the surety agrees that it shall remain in force until the debt due is fully and finally adjusted and will not be affected by any forbearance or arrangement for giving time to or other facilities to the principal debtor. By implication this amounts to an authority to the principal to make payments and acknowledgments in accordance with the terms of Sec. 20 (1), Limitation Act). The mere omission of a creditor to sue the principal debtor within the period of limitation does not discharge the surety from his liability: *Bireswar Chatterjee v. Saidpur Commercial Bank*, (1936-37) 41 C. W. N. 1361.

(t₁) See Notes under Form No. 315.

amount dated the, drawn upon the Bank, payable to the plaintiff.

2. The said cheque was presented for payment on the
...and was dishonoured.

3. On 19....., in consideration of the plaintiff agreeing to give time to C. D. for the payment of the amount of the said dishonoured cheque and to forbear from suing him for the same until the, the defendant on that date guaranteed in writing to pay to the plaintiff the said sum on the if the said C. D. failed to do so.

4. The plaintiff gave time to the said C. D. and forbore to sue him.

5. Neither C. D. nor the defendant has paid the plaintiff the said sum or any part thereof.

The plaintiff claims—

Rs.

PLAINT.

317.

GUARANTEE.

CLAIM against Surety on a Guarantee for the Payment of Rent and Fulfilment of Covenants of Lease. (t₂)

1. In consideration of the plaintiff accepting A. B., a near relative of the defendant, as his tenant in respect of premises No., the defendant, on....., guaranteed in writing the due and punctual payment by the said A. B. of the monthly rent of Rs. 100/- and the due fulfilment by him of the covenants of the lease.

2. The said A. B. has not paid nine months' rents and has committed the following breaches of the covenants of the said lease.

(Set out the breaches).

The plaintiff claims—

(1) Rs. rents in arrears.

(2) Rs. damages for the said breaches of covenants.

PLAINT

318.

GUARANTEE.

**CLAIM by Surety against Principal Debtor on a Guarantee
for the Price of Goods. (u)**

1. On, the plaintiff, at the oral request of the defendant, gave the following guarantee in writing to Messrs E. F. & Co., sugar merchants of, hereinafter called 'the said company'.
Dear Sirs,

If you supply 20 maunds of sugar to C. D. on credit I undertake to see you paid.

Yours etc.

A.B. (plaintiff).

2. Accordingly, on....., the said company sold 20 maunds of sugar to the defendant on credit.

- (u) **Cause of action :** Under the Ind. Cont. Act, Ss. 140 and 141, the surety's rights against debtor arise only if surety takes responsibility at the request of the debtor : *Periyamianna v. Banians & Co.*, (1926) I.L.R. 49 Mad. 156. Independently of Sec. 140, the surety has a right under sec. 145 to recover from the principal debtor whatever sum he has rightfully paid under the guarantee : *Anand Singh v. Collector of Bijnor*, (1932) I. L. R. 54 All. 1007 ; *Kanahai Missir v. Sukananan*, (1936) I.L.R. 14 Rang. 594. The payment which gives the surety a right of action against the principal debtor must be a payment of money or money's worth : thus where the surety has not paid the amount due by the principal debtor to the creditor but merely executes a bond for its future payment, a suit by the surety for recovery of the amount due by the principal debtor to the creditor is premature and he has no cause of action untill he pays the amount due under the bond : *Putti Narayanamurthi v. Marimuthu* (1903) 26 Mad. 322, relied on in *Mutuswamy v. Kayambo*, (1936) I. L. R. 14 Rang. 511. The word "payment" in Sec. 145 means a payment in money or by transfer of property and not merely the incurring of a pecuniary obligation in the shape of a bond, promissory note, or acknowledgement of liability : *Nur Samand Khan v. Fajja*, A. I. R. 1924 Lah. 657 (2) ; *Vinayakrao v. Shripatrao*, A. I. R. 1926 Nag. 429. Cf. *Shripatrao v. Shankarrao*, A. I. R. 1930 Bom. 331 (Section 145, Contract Act, does not debar a surety from making a claim against the principal debtor in cases where he has not made the payment under the guarantee but has become liable only in *praesenti* to do so), *folg.*, *Chiranjilal v. Naraini*, (1919) I. L. R. 41 All. 395. Cf. *Mohideen Batcha v. Sheik Dawood*, A. I. R. 1926 Mad. 1035 (A person who is merely a surety can be indemnified, in an appropriate case before actual payment, by an anticipatory action.).

3. The defendant did not pay the price of the said goods, whereupon the plaintiff was obliged to pay the said price, namely, Rs., to the said company on.....

The plaintiff claims—

Rs.....

DEFENCE.

319.

GUARANTEE.

GENERAL Defences by Surety in a Suit on a Guarantee of Debt. (v)

The surety may take one or more of the following defences :—

1. The defendant never gave the alleged or any guarantee to the plaintiff.

2. The defendant admits that he wrote a letter to the plaintiff on but denies that in that letter he gave any such guarantee as is alleged in paragraph of the plaint.

3. The defendant admits that he gave a letter of guarantee to the plaintiff on but states that the contents of the said letter have not been fully set out in the plaint. By the said letter of guarantee the defendant undertook to pay the amount to the plaintiff "after attempts have been made to realise the same from the principal debtor." The plaintiff did not take any steps before bringing the suit to recover the debt by proceeding against the principal debtor or his assets.

4. The defendant denies that the plaintiff lent the alleged or any money (or supplied the alleged or any goods) to the alleged principal debtor as alleged or at all.

5. The guarantee sued on was a continuing guarantee and was by the express terms thereof revocable by notice. On before the plaintiff made any advances to A. B., the principal debtor, the defendant revoked the said guarantee by notice in writing dated

(v) **Contracts of guarantee—must be strictly construed :** See notes under Form no. 315. In construing a guarantee the principle to be remembered is that a guarantee will only extend to a liability precisely answering the description contained in the guarantee: *Venkamma v. Sanyasayya*, A. I. R. 1938 Mad. 422.

6. This defendant admits that he gave the plaintiff the said letter of guarantee but states that A. B., the principal debtor, was a near relative of his and the plaintiff procured the signature of this defendant to the said letter by threatening that if he did not sign he would prosecute the said A.B. and have him imprisoned.

7. The consideration for the said guarantee was the withdrawal by the plaintiff of a non-compoundable criminal case against A.B. (the principal debtor).

8. The defendant was induced to give the said guarantee by the fraud of the plaintiff : (*here state particulars of fraud*).

9. The plaintiff discharged the defendant from all liability under the alleged guarantee by—(*here state the grounds*).

(v) **Special conditions of guarantee** : "Where a surety by his letter of guarantee undertakes to pay the creditor the amount which may become due to him under the letter of guarantee "after attempts have been made by the creditor to realise the same from the principal debtor," there is a special contract between the creditor and the guarantor to the effect that the creditor should not be entitled to recover from the guarantor until he had first attempted and failed to obtain satisfaction by some sort of proceedings against the principal debtor. The creditor's right to recover from the guarantor is restrained or postponed and does not accrue until the creditor has taken steps to recover the debt by proceeding against the principal debtor or his assets. It is not enough for the creditor to merely demand payment from the principal debtor, as that would not amount to an attempt to realise the debt from the principal debtor" : *Radha Krishna v. Ajodhya*, (1937) A. L. J. 1265 ; *Muhammad Yusuf v. Ram Gobinda* (1928) I. L. R. 55 Cal. 91.

(v) **Revocation of a continuing guarantee** : S. 130, Ind. Cont. Act.

(v) **Guarantee obtained by coercion** : S. 15, Ind. Cont. Act. See 'Coercion' under 'Particulars', Pt. II, Ch. XX, p. 473.

(v) **Guarantee obtained by fraudulent misrepresentation** : See *Jean Mackenzie v. Royal Bank of Canada*, A. I. R. 1934 P. C. 210.

(v) **Unlawful consideration for guarantee** : *Kessowji Tulsidas v. Hurjivan Mulji*, (1887) I. L. R. 11 Bom. 566 ; *Sudhindra v. Ganesh*, (1938-39) 43 C. W. N. 147.

(v) **Discharge of liability of surety** : Ss. 133-139, Ind. Cont. Act deal with discharge of surety from liability. For discharge of surety by variance of contract between creditor and principal debtor without his consent, see *Jugjivandas v. King Hamilton & Co.*, (1931) I. L. R. 55 Bom. 677 ; *Jowand Singh v. Tirath Ram*, A. I. R. 1939 Lah. 193 ; *Venkamma v. Sanyasayya*, A. I. R. 1938 Mad. 422 (It is immaterial whether the variation is substantial or material, because the contract ceases to be one he has undertaken to fulfil) ; *Nuserwanji Cursedji v.*

PLAINT.**320.****HIRE.****CLAIM by Owner of Goods against Hirer for Arrears of Rent. (w)**

1. By an agreement in writing dated, the plaintiff let on hire to the defendant certain household furniture, specified in Schedule "A" hereto, (hereinafter called 'the said goods'), from the day of for the term of months thence next ensuing, and the defendant agreed to deliver the said goods at the expiration of the said hiring, and, in the meantime, to pay to the plaintiff at his address and without any demand by way of rent for the hire of the said goods the monthly sum of Rs., the first payment to be made on the day of next and each subsequent payment on the day of each succeeding month during the said term.

2. The defendant redelivered the goods to the plaintiff at the expiration of the said hiring, but has not paid the rent for the hire of the said goods in full.

Particulars of rent in arrears :

The plaintiff claims—

Rs.

Mahamayi Ammal, A. I. R. 1938 Mad. 585. An agreement or undertaking not to sue principal debtor or to give him time, without actually releasing the debt, does not discharge the surety provided at the same time the rights against the latter are reserved: *Mahanth Singh v. U Ba Yi*, (1938-39) 43 C. W. N. 641 (P. C.); cf. *Kanahai Missir v. Sukananan*, (1936) I.L.R. 14 Rang. 594. Under S. 137, by giving time is meant not merely forbearance so sue, but entering into a binding engagement by which the creditor precludes himself from suing within a certain time: *T. N. S. Firm v. Md. Hussain*, A. I. R. 1933 Mad. 756.

(w) **Limitation** : Under Art. 50, Ind. Lim. Act, 3 years from the date when the hire becomes payable.

PLAINT.

321.

HIRE.

CLAIM by Owner of Goods against the Hirer for Hire and for Damages for Breaches of Agreement. (x)

1. The plaintiffs are dealers in household furniture.

2. By a contract in writing dated, the plaintiffs let on hire to the defendant certain household furniture, specified in schedule 'A' hereto, from the.....day of for the term of months at Rs.....*per* month payable in the manner following :

3. It was an implied term of the said contract that the defendant would take all proper and reasonable care for the preservation of the said furniture during the continuance of such hiring and restore the said furniture at the expiration of the term in as good order as he received them, reasonable wear and tear excepted.

4. The defendant redelivered the said furniture on at the expiration of the said hiring, but they were greatly damaged on account of the negligent manner in which they had been used by the defendant.

Particulars of damage :

The plaintiffs claim—

Rs., damages.

(x) **Care to be taken by bailee :** Under Sec. 151, Ind. Cont. Act, in all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed : *Shanti Lal v. Tara Chand* A. I. R. 1933 All. 158. Where goods are let to the bailee for hire, the bailee is only bound to use reasonable care and he is not liable for loss or injury unless caused by his negligence or that of his servants : *Sanderson v. Collins*, (1904) 1 K. B. 628 ; *Coupe' Co. v. Maddick*, (1891) 2 Q. B. 413. A hirer of goods is not responsible for depreciation arising from fair wear and tear during the continuance of the hiring : *Coupe' Co. v. Maddick*, *supra*.

(x) **Burden of proof :** In cases governed by Secs. 151 and 152, Ind. Cont. Act, the loss or damage of goods entrusted to bailee is *prima facie* evidence of negligence, and the burden of proof, therefore, to disprove negligence lies on the bailee : Pollock and Mulla's Ind. Cont. Act, 6th Edn., p. 521. In a contract of hiring there is an obligation upon the hirer to restore the chattel at the end of the bailment in as good condition as he received it, or, if he cannot do that, to show that he ex-

PLAINT

322.

HIRE.

CLAIM by Owner of Goods against Hirer for Arrears of Rent and Damages for Breaches of Agreement (x₁)

(Another Form)

1. By an agreement in writing, dated, the plaintiff let certain machinery, specified in Schedule "A" hereto, on hire to the defendant from the day of for the term of months thence next ensuing.

2. The said agreement *inter alia* provided as follows :—

(a) The hirer shall during the continuance of this agreement pay to the owner at his address for the time being and without previous demand by way of rent for the hire of the said machinery the monthly sum of Rs., the first payment to be made on the day of next and each subsequent payment on the day of each succeeding month during the said term.

(b) The hirer shall use the machinery in a skilful and proper manner and shall at his own expense keep the said machinery in good and substantial repair and condition, reasonable wear and tear excepted, and will keep the owner indemnified against all loss of or damage to the said machinery from whatever cause the same may arise.

(c) If the hirer shall make default in the punctual payment of the monthly sums so to be paid by him for hire

exercised reasonable care in the keeping of the chattel: *Dollar v. Greenfield*, (1905) Times, May 19, H. L. If the bailee gives *prima facie* evidence that he had acted with reasonable care the burden of proof is shifted to the person who seeks to make him liable: *Shields v. Wilkinson*, (1887) I. L. R. 9 All. 398. Where a person hires a specific thing for the purpose of using it, there is an implied contract on the part of the hirer that he will in the meantime keep the thing in repair, *i. e.*, he will not by want of reasonable care, after the contract is made, allow it to become worse than it was at the time the contract was made: *Robertson v. Amazon Tug & Lighterage Co.*, (1881) 7 Q. B. D. 598.

(x) Limitation: Art. 115 and not Art. 38, Ind. Lim. Act: *Holloway v. Holland*, A. I. R. 1933 Oudh 518.

(x₁) See Notes under Form No. 321.

of the said machinery this agreement shall forthwith determine without any previous notice and it shall thereupon be lawful for the owner to retake possession of the said machinery without prejudice to his right to recover from the hirer any moneys due under this agreement or damages for breach thereof.

3. The defendant duly paid the first two instalments of rent and thereafter made default, whereupon, on....., the plaintiff retook possession of the said machinery. At the time of retaking such possession it was discovered that the said machinery had been greatly damaged otherwise than by reasonable wear and tear.

Particulars of damage :

Particulars of claim :

Arrears of rent from to Rs.
lost of repairs of to the machinery „

The plaintiff claims—

Rs , arrears of rent, and Rs , damages,
aggregating Rs

PLAINT.

323.

HIRE PURCHASE.

CLAIM by Owner for Arrears of Rent payable under a Hire-purchase Agreement, after the Owner has retaken Possession on Default. (y)

1. The plaintiffs are dealers in motor cars.
2. By a hire-purchase agreement dated, (hereinafter called 'the agreement'), the plaintiffs agreed to let and the defendant agreed to take on hire a horse-power cylinder motor car made by upon *inter alia* the terms following :

(a) The hirer shall pay to the owner on the execution of

- (y) **Reference :** *Brooks v. Beirnsstein*, (1909) 1. K. B. 98 (deals with the right to sue for arrears of rent after the owner has retaken possession on default), *applied in South Bedford. Electrical Finance v. Bryant*, (1938) 3 All E. R. 580.

the agreement the initial hire rent of Rs, which shall become the absolute property of the owner, and punctually pay to the owner at his address for the time being and without previous demand 20 consecutive monthly rents of Rs....., the first payment to be made on the day of and each subsequent payment on the.....day of every subsequent month.

(b) The hirer may at any time terminate the hiring, on giving a week's notice, and returning at his own cost and risk the said motor car to the owner.

(c) If the hirer shall make default in any payment of any monthly instalment for days after the same shall have become due, then the hiring shall immediately determine (without any previous notice or demand on the part of the owners) and thereupon it shall be lawful for the owner without previous notice to retake and resume possession of the said motor car.

(d) In the event of the hiring being determined by the hirer, the hirer shall not be entitled to repayment of the said sum so paid by him on the execution of the said agreement or to any credit or allowance thereof or in respect of any other payments made by him to the owner under the terms of the said agreement but all such payments shall be considered as forfeited to the owner. And the determination of the said hiring as aforesaid shall not affect or prejudice any claim the owner may have against the hirer for arrears of hire payments or for damages for breach of the said agreement.

-
- (y) **Hire-purchase agreement—what is a :** A contract of hire-purchase is an agreement by which an owner lets out articles on hire to the hirer and agrees that the articles shall become the property of the hirer on completing payment of the purchase price. The articles are delivered to the hirer, who thus obtains possession and becomes a bailee of them. The property in the goods remains in the owner : *McEntire v. Crossley Bros.*, (1895) A. C. 457. The hirer has the option of purchase by completing the payment of the instalments, or to determine the hiring by returning the goods to the owner : *Modern Light Cars v. Seals*, (1933) 49 T. L. R. 503. If default is made in punctual payment of any of the periodical payments, the lender can at once recover back the articles ; a subsequent tender of the instalment in arrear will not displace his right to recover, for time is of the essence of the contract. The hirer has no equitable claim either upon the articles themselves or

(e) If the hirer shall duly perform and observe all the stipulations and conditions in the said agreement and shall duly pay to the owner monthly sums by way of rent amounting together with the said sum of Rs so paid on the execution of the said agreement to the sum of Rs, then the hiring shall come to an end and the said motor car shall become the property of the hirer but until all such payments as aforesaid have been made, the said motor car shall remain the property of the owner.

to recover back any of the past paid instalments : *Per Lopes, J.*, in *Cramer v. Giles*, (1883), 1 C. & E. 151.

- (y) **Hire-purchase agreement—construction of :** The true effect of the agreement depends upon the intention of parties as gathered from its terms : *Bhimji v. Bombay Trust Corpn.*, (1930) I. L. R. 54 Bom. 381.
- (y) **Contract of hire-purchase and contract of sale—distinction between :** The difference between a contract of sale at a price payable by instalments and a contract of hire-purchase is that in the former the purchaser has no option to terminate the contract and return the chattel whereas in the latter the hirer has. In the former there is an agreement to purchase, whereas in the latter there is none : *Mahabali Prasad v. Palmer*, (1932) I. L. R. 54 All. 781. Where the agreement imposes an obligation upon the hirer to buy the chattel the agreement is really an agreement of sale notwithstanding the use of words, such as hire-purchase agreement, lessor and lessee, hiring, rent, tenancy etc. If the hirer is not bound to pay the full amount of the purchase price or if he can terminate the hiring at any time by delivering the chattel to the other party the agreement is in fact as well as in form a true agreement for hire and all that the hirer has obtained is an option to purchase : *Bhimji v. Bombay Trust Corpn.*, (1930) I. L. R. 54 Bom. 381 ; *Mohamad Ismail v. Provincial Automobile Co.*, A. I. R. 1937 Nag. 198 ; *G. Mckenzie & Co. v. Md. Ali Haider Khan*, A. I. R. 1929 Oudh 155 ; *Tiwari v. Remington Rand*, A. I. R. 1934 Nag. 151 (where, in the agreement to purchase a typewriter, there is a clause by which the hirer is entitled to put an end to the contract by return of the machine at any time forfeiting payments, it is a contract of hire-purchase and not a contract of sale).
- (y) **Contract of hire-purchase and contract of sale with reference to rights of third parties :** If the contract is a contract of sale, the third party, if he acts in good faith, will be protected and obtain a good title against the original seller even though the instalments had not been paid : *Lee v. Butler*, (1893) 2 Q. B. 318, C. A., whereas if the contract is merely a contract of hiring with an option to purchase he will not, as the hirer under such a contract is not a buyer in the possession of goods under a contract of sale : *Helby v. Matthews* (1895) A. C. 471.

3. The defendant duly paid the said sum of Rs at the time of the execution of the agreement and obtained delivery of the said motor car from the plaintiffs.

4. Thereafter the defendant made default in payment of the 3rd and 4th instalments of monthly rent payable under the agreement, whereupon, on, the plaintiffs retook possession of the said motor car.

Particulars of rent in arrears :

The plaintiffs claim—

Rsrents in arrears.

PLAINT.

324.

HIRE PURCHASE.

CLAIM by Owner for Arrears of Rent and Damages payable under a Hire-Purchase Agreement, after Termination of Hiring by the Hirer. (z)

1. At all material times the plaintiffs carried on a hire-purchase business in bicycles.

2. On, the defendant hired from the plaintiffs a tandem bicycle, specified in the schedule hereunder, under the terms of a hire-purchase agreement of the same date made between them.

3. By the said agreement the defendant agreed with the plaintiffs as follows :

Cl. 2. I (hirer) enclose the initial hire rent of Rs. and agree to pay to you 52 further consecutive weekly rents of Rs. (unless the agreement is determined as hereinafter provided), the first rent to be paid one week from the date of this agreement and the remaining rents on the same day in each consecutive week thereafter.

(z) Reference : *Associated Distributors v. Hall*, (1938) 2 K. B. 83 : *Per* Lord Slesser L. J. at pp. 87, 88. Here the hirer, not the owner, terminated the hiring. He has exercised an option and the terms on which he may exercise the option are those set out in cl. 7. The question

Cl. 5. I may at any time terminate the hiring by returning the bicycle to you, but I shall remain liable for rent up to the date of such return and for all other sums payable under the agreement and damages (if any) for breach of any term or condition thereof.

Cl. 6. If I default in payment of any sums due hereunder or if I commit any breach of any term or condition of the agreement, you may determine the hiring forthwith and resume possession of the goods but nevertheless I shall remain liable to you for any sums due under this agreement and for any antecedent breach of any terms hereof.

Cl. 7. In the event of this agreement or the hiring being determined for any cause whatsoever, no allowance, return, credit or payment shall be allowed or paid to me but I will pay to you by way of compensation for depreciation of the goods in addition to any other sums payable hereunder such sums as with the amount previously paid for rent shall make up a sum equivalent to not less than one half of the total amount including the option purchase price payable under this agreement.

4. On or about, the defendant returned the bicycle to the plaintiffs in pursuance of clause 5 of the agreement after having only paid one instalment and thereby terminated the hiring.

5. The plaintiffs claimed Rs. from the defendant under clause 7 of the agreement, but the defendant refused to pay the same.

The plaintiffs claim—

(a) Rs.rents in arrears.

(b) Rs. the further sum under clause 7 of the agreement.

whether these payments constitute liquidated damages or a penalty does not arise in the present case. Cf. *Abdul Quadeer v. Watson & Sons*, (1930) I. L. R. 8 Rang. 236 (where it was held that the seizure clause in a hire-purchase agreement, however severe in its terms, is not a stipulation by way of penalty within the meaning of S. 74, Ind. Cont. Act). See Notes under Form No. 323.

PLAINT.

325.

HUNDI.

CLAIM by Indorsee against Drawer and Indorser. (a)

1. On19..., the defendant A. B. at Lucknow drew a hundi addressed to G. D. of Benares for Rs. 1000/- payable to the defendant C. D. or order, 60 days after date.

2. The defendant C. D. indorsed the said hundi to the plaintiffs, which said hundi was duly presented for payment to G. D. at Benares and was dishonoured, of which each of the defendants had notice in writing dated

Particulars of claim :

.....19..., Principal due	...	...	Rs.
Interest at 6 <i>per cent.</i> from.....	...		
to .....	...	...	"
	Total	...	Rs.

The plaintiffs claim—

Rs.....

- (a) **Hundis—What are :** Bills of Exchange in the vernacular languages are called 'hundis'. The Neg. Ins. Act does not affect the usages relating to them : See "Bhashyam & Adiga, Neg. Ins. Act, 7th Edn., pp. 21-23. A Bill of exchange may include a hundi but a hundi does not include a bill of exchange : *Biswanath v. Govinda*, (1919) 29 C. L. J. 305.
- (a) **Place of suing :** See *Firm Dalsukh Nathmal v. Motilal*, A. I. R. 1938 Nag. 262. See "Causes of Action", Pt. II, Chap. X, pp. 290-291.
- (a) **Interest :** Sec. 1, Neg. Ins. Act provides that the Act does not affect any local usage relating to any instrument in an oriental language. It is permissible to the plaintiff to set up and prove a usage for payment of interest at a rate exceeding 6 *per cent. per annum* notwithstanding the provisions of Sec. 80, Neg. Inst. Act : *Har Narain v. Bihari Lal*, (1932) I. L. R. 13 Lah. 800.
- (a) **Notice of Dishonour :** There is no provision in the Neg. Inst. Act making the notice of dishonour compulsory where a hundi payable at sight has been dishonoured : *Firm Khuda Bakhsh v. Yasin*, A. I. R. 1937 Pesh. 103, 106.
- (a) **Presentment where not necessary :** Where the drawer and the drawee are the same person, no presentment on due date is necessary. Presentment also is not necessary where the drawee has no residence or place of business or a known address at the place at which the hundi is due, nor is he to be found personally present there on that date. So also presentation is not necessary under Sec. 76 (b) as against the party sought to be charged therewith, if he has engaged to

PLAINT.

326.

HUNDI.

Shahjog Hundi.

CLAIM by Drawee against Shah for Refund of Amount paid, upon Discovery that the Hundi was a forged one. (b)

1. On.....19..., the defendant firm presented to the plaintiffs at maturity a hundi for Rs.....dated.....purporting to have been drawn by the firm of R.P. at.....upon the plaintiffs at Bombay with a direction to pay the amount of the hundi to a Shah.

2. The plaintiffs after assuring themselves that the presenters were a Shah duly paid the amount of the said hundi.

pay notwithstanding non-presentment : *Punjab Co-op. Bank v. Md. Yusuf*, A. I. R. 1939 Lah. 225.

- (a) **Delay in presentment** : Where a hundi which is not made payable at a specified period after date or sight thereof but is made payable on the same day, the hundi is not governed by Sec. 66, Neg. Inst. Act and must be presented to the drawee within a reasonable time : *Firm Harnam Singh v. Firm Nikka Ram*, A. I. R. 1938, Lah. 183.
- (a) **Presentment according to local usage** : Where a hundi has been dishonoured and returned, but a conditional payment is made, there is a custom in Bombay that the amount paid should be refunded unless the hundi is again presented within four days and consequently when the drawee of a hundi so dishonours and returns the hundi, and a conditional payment is made but the hundi is not presented again within four days, and the amount is refunded, the drawee cannot be made liable on the hundi : *Surajmal v. Kashi Prasad*, A. I. R. 1933 Nag. 389.
- (b) **Reference** : *Davlatram Shriram v. Bulakidas* (1863) 6 Bom. II. C. R. 24 (*Per* Arnould, J., "According to the mercantile usage among the Hindus, where a Shahjog hundi is paid at maturity to the Shah by the drawee and if such hundi afterwards turns out to be forged, the Shah, though a *bonafide* holder for value, is bound to repay to the drawee the amount of such hundi with interest from the date of payment, provided the drawee has not been guilty of laches in discovering the forgery and communicating the fact of such forgery to the Shah. The Shah however relieves himself from such liability by producing the actual forger), expld. in *Madhavadas v. Sitaram*, (1934) 36 Bom. L.R. 941 (In the absence of any evidence as to custom, the cause of action against a Shah, who received payment on a forged Shahjog hundi to reimburse the drawee, is for money had and received to the use of the plaintiff based either on the money having been paid under a mistake of fact, or without consideration, and does not arise upon any implied covenant

3. On....., the plaintiffs discovered that the drawer of the hundi was a fictitious person, and they at once communicated the fact of the forgery to the defendant firm and requested them to forthwith repay the amount of the hundi with interest as 6 *per cent.* from the date of payment.

Particulars of claim :

Amount of the hundi	...	...	Rs.....
Interest at 6 <i>per cent</i>			
from... ..to.....		...	Rs.....
Total ...			Rs.....

The plaintiffs claim—

Rs.....as money had and received to the use of the plaintiffs.

PLAINT. •

327.

HUSBAND AND WIFE.

(Hindu Law)

CLAIM against a Hindu married Woman on a Bond executed by her. (c)

1. The defendant is the wife of one C.B. of.....
2. On.....19..., the defendant borrowed Rs. 500/- from the plaintiff and executed a bond therefor in favour of the plaintiff, agreeing to repay the said loan on.....with interest at 6 *per cent. per annum.*
3. There is due from the defendant Rs.....for principal and Rs.....for interest aggregating Rs.....

The plaintiff claims—

Judgment for Rs.....against the defendant limited to the extent of her stridhan, if any.

for indemnity). Cf. *Madhabdas v. Devidas* (1934) I.L.R. 59 Bom. 97 (Suit by owner against drawee paying the amount of the hundi to a Shah having no title). Cf. *Murli Dhar v. Hukum Chand*, A.I.R. 1932 Lah. 312 (A Shahjog hundi is not a hundi payable to bearer and it ought not to be paid by the drawee unless it has endorsed on it, when presented, the name of the Shah by whom it is presented or rather by whom it is sent for presentation, although it is presented by a respectable person).

- (c) **Reference:** *Nathubhai v. Javher* (1876-77) I. L. R. 1 Bom. 121 (In this case one of the defences taken was that the defendant's coverture absolved her from all liability upon the bond sued on. *Held:* the defendant was liable.)

PLAINT.**328.****HUSBAND AND WIFE.**

(Suit under the Married Women's Ppty. Act III of 1874)

CLAIM against a Married Woman on a Contract entered into before her Marriage (d)

1. In.....19..., the defendant was married to one E. F. Both the defendant and her husband were and are Christians.

2. On.....19..., before her marriage, the defendant ordered of the plaintiff and the plaintiff sold and delivered to the defendant miscellaneous articles, specified hereunder, of the total value of Rs.....

3. The defendant has not paid the said sum of Rs.....or any part thereof.

4. The defendant is 'possessed of separate property independently of her husband.

The plaintiff claims—

Judgment for Rs.....against the defendant limited to the extent of her separate property.

PLAINT.**329.****HUSBAND AND WIFE.**

(Suit under the Married Women's Ppty. Act III of 1874).

CLAIM against a Husband for Necessaries supplied to his Wife. (e).

1. Mrs. A. B. is the wife of the defendant. She resided with her

(d) **Husband when not liable for wife's antenuptial debts:** Sec. 9, Married Women's Property Act, III of 1874, provides that a husband married after the thirty-first day of December, 1865, shall not by reason only of such marriage be liable to the debts of his wife contracted before marriage, but the wife shall be liable to be sued for, and shall, to the extent of her separate property, be liable to satisfy such debts as if she had continued unmarried.

(e) **Reference:** *Kanshi Ram v. Nisbett Shedman*, A. I. R. 1929 Lah. 18 (If the husband and wife are living separately by mutual consent and the wife has no other means of subsistence even then the husband can claim to be absolved from liability by proving *inter alia* that under the terms of the separation he had agreed to make her an allowance and that such allowance has been paid by him, otherwise his normal liability to maintain his wife continues). In the case of wife living apart from her husband the burden of proving that the circum-

husband at his house No.....Street until....., when she was deserted by her husband and was obliged to live separately from him at..... She has continued to live there since that date.

2. Since.....the defendant has failed and neglected to provide A.B. with any maintenance, although she has no separate estate or any means of support.

3. Between.....and the plaintiff supplied goods which were of the nature of necessities to A.B. amounting to the value of Rs..... Particulars of the said goods are set out in Schedule 'A' hereto.

4. The defendant has not paid the said sum or any part thereof in spite of demand made in writing on.....

The plaintiff claims—

Rs.....:.....

PLAINT. .

330.

HUSBAND AND WIFE.

CLAIM by Official Trustee to recover Sum secured by a Policy of Insurance effected by a Married Man for the Benefit of his Wife. (f)

The Official Trustee of Bengal Plaintiff.

Vs.

.....Life Insurance Company, Limited,
.....Defendants.

The plaintiff states :—

1. On..... 19..., one V. S. effected a policy of insurance, No....., with the defendant Company, upon his life, for a sum of Rs. 2,000. In the said policy, under the heading "For whose benefit and to whom payable" are the words "The assured or his wife R. S. if he predeceases her".

2. The said V. S. died on, leaving him surviving R. S., his widow.

stances are such as to render the husband liable is on the person seeking to make him so liable : *Johnston v. Sumner*, (1858) 3 H. & N. 261. See Bullen and Leake, 8th Ed. pp. 194, 195 (notes).

(f) **Reference** : S. 6, Married Women's Property Act, III of 1874. Cf. *Abhiramavalli v. Official Trustee*, (1932) I. L. R. 55 Mad. 171 (If on the reading of the words used in the policy it appears that the assured had intended, in the event of his death, that the policy should enure to the benefit of his wife, then the policy may be deemed to be a trust for her benefit); *Lalithambal v. Guardian of India Ins. Co.*, (1937) 1 M. L. J. 735 (where after effecting the policy the husband assigned the

3. Upon the death of the said V. S., a Statutory trust was created in favour of the said R. S.

4. No special trustees have been appointed to receive and hold the sum secured by the said policy.

5. On, the plaintiff demanded in writing of the defendant Company the amount payable under the said policy, yet the defendant Company have refused to pay the same to the plaintiff.

The plaintiff claims—

Rs.....

DEFENCE.

331.

HUSBAND AND WIFE.

(Suit under The Married Women's Ppty. Act, III of 1874).

DEFENCE by Husband to a Claim for alleged Necessaries supplied to his Wife. (g)

1. The defendant does not admit that the plaintiff supplied the said goods to his wife or that the same were of the nature of necessaries.

2. A. B. was not deserted by the defendant as alleged or at all. By mutual consent A. B. and the defendant have been living separately from each other since.....

3. In accordance with the terms of the separation the defendant has been paying A. B. a monthly allowance of Rs. 50/- which is sufficient to enable her to purchase necessaries.

benefits thereof to a third person and it was held upon the facts that he could assign the benefits being unfettered by any trust in favour of his wife); *Bengal Ins. and Real Prop. Co. v. Velayammal*, I. L. R. (1937) Mad. 990 (It was held that where the policy was intended for the benefit of the wife, the fact that such benefit to the wife was of a contingent character did not prevent it from being benefit within the Married Women's Property Act); *Krishnan Chettiar v. Velayee Ammal*, I. L. R. (1938) Mad. 509, F. B. (where the policy was expressed to be for the benefit of 'self or wife', and it was held that there was a trust created in favour of the wife in the event of the husband dying before the policy matured).

(f) *Note* : The provisions of S. 6 (1) of the Mar. Wom. Prop. Act has been made applicable by Sec. 3 of the Mar. Wom. Prop. (Amendment) Act, 1923, in the case of any policy of insurance such as is referred to therein which is effected by a Hindu, Mahomedan, Sikh or Jain, in Madras after 31st December, 1913, or in any other part of British India after the 1st day of April, 1923.

(g) This is a defence to Form No. 329. See notes under that Form.

4. Prior to the time at which it is alleged that the plaintiff supplied the goods to A. B., the defendant had on the..... forbidden his wife to pledge his credit and had publicly notified such prohibition by advertisement in.....and had also verbally (or, in writing, as the case may be) warned the plaintiff not to supply the said A. B. with goods on credit.

DEFENCE.

332.

HUSBAND AND WIFE.

(Suit under the Married Women's Pty. Act III of 1874).

DEFENCE by Insurance Company to Claim by Official Trustee to recover Sum assured by Husband for the Benefit of his Wife. (g¹)

1. The defendants do not admit that the assured had intended that in the event of his death the said policy should enure to the benefit of his wife.

2. Further, or, in the alternative, the defendants state that the assured during his life-time, by an endorsement on the back of the said policy, had assigned to one A. B. all the benefits thereunder, due notice whereof was given to the defendants by the assured. The sum assured is accordingly payable to the said A. B.

PLAINT

333.

IDOL.

CLAIM by Idol suing through a disinterested Next Friend for Administration of Debutter Property. (h)

The plaintiff through his next friend above-named states :—

1. In or about the year....., one B. S., a Hindu governed by the Dayabhaga, since deceased, installed the plaintiff at his family dwelling house No.....Street, and by a deed of endowment dated....., the said B. S. endowed certain immovable properties specified in Schedule 'A' hereto (hereinafter called 'the

(g¹) Reference : *Lalithmabal v. Guardian of India Ins. Co.*, (1937) 1 M. L. J. 735. See also notes under Form No. 330.

(g¹) Form and notice of assignment of life policies : S. 38, Ins. Act, IV of 1938.

(g¹) This is a defence to Form No. 330.

(h) Jurisdiction to frame scheme of private debutter : In the case of a private debutter a Civil Court has jurisdiction to frame a scheme for the management and administration of the debutter property : *Rabindra v. Chandi* (1931) 53 C.L.J. 621 ; *Manohar v. Raja Peary Mohan* (1919)

said properties") in favour of the plaintiff, and thereby provided that out of the income of the said properties the shebait for the time being of the plaintiff should meet the expenses of the daily worship and the periodical festivals therein mentioned of the plaintiff.

2. By the said deed of endowment the said B. S. also provided that he should be the first shebait and, after his death, his brother D. S. (the defendant in this suit) should act as shebait and, after the death of D. S., the office should devolve on the eldest lineal descendant of the said D. S. in the male line.

3. B.S. acted as the first shebait of the plaintiff until....., when he died.

4. After the death of B. S. the defendant has been acting as the shebait of the plaintiff.

5. The defendant has been guilty of gross misconduct, mismanagement and breach of duty in the administration of the said properties. The following are all the particulars of such misconduct etc., the plaintiff can give before discovery :—

6. The defendant is also neglecting to perform the worship of the plaintiff. Since.....the defendant has not performed the following periodical festivals of the plaintiff, namely,.....

The plaintiff claims—

(1) Administration of the said properties and the framing of a scheme in connection therewith.

(2) Appointment of a receiver of the said properties.

PLAINT.

334.

IDOL.

30 C. L. J. 177; *Biml Krishna v. Gunendra* (1936-37) 41 C. W. N. 728.

- (h) **Parties to such suits** : The idol represented by a disinterested next friend may sue the shebait guilty of mismanagement : *Sharatchandra Shee v. Dwarakanath*, (1931) I. L. R. 58 Cal. 619; *Rabindra v. Chandi* (1931) 53 C. L. J. 621 (where a pleader was appointed to represent an idol "as disinterested next friend"). Shebait may sue co-shebait when the suit relates to adjustment of their rights *inter se*. To such a suit the idol is not a necessary party unless its interests are affected : *Bimal Krishna v. Gunendra*, *supra*. For suits by idol through disinterested next friend, see 'Idol' under "Classes of Persons", Part II, Chap. IX, p. 154.

**CLAIM by Future Shebait to have a Sale of Debutter Property
declared void. (i)**

1. One J. M., a Hindu governed by the Dayabhaga, died February 6th, 19..., having made his will dated....., whereby he dedicated the properties specified in schedule 'A' hereto for the worship of the family deity, 'Thakur Sri Sri Govind Jiu (hereinafter called "the deity")', installed by him in his family dwelling house No....., and appointed his wife as the shebait of the deity.

2. By the terms of the said will the testator provided that after the death of his wife, her adopted son, M.M. (the defendant No. 1) would carry on the sheba of the said deity out of the income of the said properties and, after him, the shebaitship would continue in his line.

3. In....., the said M. M. mortgaged some of his personal properties to the defendants Nos. 2 and 3 who obtained a decree upon the mortgage and had the properties sold on or about.....

4. The entire debt under the mortgage not having been satisfied by the sale, the defendants Nos. 2 and 3 obtained a personal decree against the said M. M. under O.XXXIV, r. 6 of the Civil Procedure Code, and in execution of that decree, purchased the properties mentioned in schedule 'A' hereto which formed part of the properties dedicated to the deity by the will of J. M., deceased. The said defendants are in possession of the said properties since.....

5. The plaintiff No. 1 is the son, and the plaintiffs Nos. 2, 3, and 4, are the grandsons by....., a predeceased son, of the said M.M.

6. The plaintiffs are the members of the family for whose benefit the deity was installed and the endowment aforesaid was made and they are the future shebait of the deity. They are interested in the maintenance of the worship, and the preservation of the property, of the deity.

The plaintiffs claim—

(1) A declaration that the properties mentioned in schedule 'A' hereto belong to the deity.

(2) A declaration that the sale of the said properties as aforesaid is invalid.

(3) Possession of the said properties to the defendant M. M. as the shebait of the deity.

- (i) **Reference :** *Girish Ohandra v. Upendra*, (1930-31) 35 C. W. N. 768 (A suit of this character comes within the scope of Sec. 42 of the Sp. Rel. Act, as it appears from Illustrations (e) to (h) appended to that section. The words "as to right in the property" in that section have been inter-

PLAINT.

335.

IDOL.

CLAIM by a Creditor against Shebais for Recovery of a Debt. (j).

1. The defendants at all material times were and are the shebais of Idol Sri Sri Radha Madhav Jin.

2. On, the defendants as such shebais borrowed Rs. 1000/- from the plaintiffs on a bond for the purposes of carrying on the services of the said Thakur and agreed to repay the said loan on.....with interest at 9% per annum.

Particulars of claim :

The plaintiff claims—

Rs.....to be paid by the defendants personally or else realised from the debutter property.

preted in a wide sense and, however slight that right may be, it entitles the possessor of it to sue for a declaration to avoid infringement of such right). See "Idol" under "Classes of Persons", Pt. II, Ch. IX, p. 150 *et seq.* Cf. *Nanda Lal v. Arun Chandra*, (1936-37) 41 C. W. N 464 (The position of a shebait in relation to the next taker of that office is analogous to that of a Hindu female heir taking a limited estate in relation to the expectant reversioner). Cf. also *Panchkari v. Amode Lal*, (1936-37) 41 C. W. N 1349 (In the case of a private debutter or family endowment, no one who is not a member of the family, however much he may be interested in the welfare of the idol, is entitled to bring a suit for the recovery of any property alleged to belong to the debutter estate unless the founder had expressly given him such power. A *defacto* shebait, however, has a right to bring a suit to recover property alleged to belong to the debutter estate).

- (j) **Joinder of shebais :** The Idol may be sued represented by the shebais or the shebais themselves may be sued as representing the Idol. In either case all the shebais must be joined : See 'Idol' under "Classes of Persons", Part II, Chap. IX, p. 156.
- (j) **Form of decree :** *Prosunno Kumari v. Golab Chand*, (1874-75) L. R. 2 I.A. 145, folld. in *Niladri Sahu v. Chaturbhuj* (1925-26) L. R. 53 I.A. 253. Cf. *Vibhūdapriya v. Lakshmindra*, (1926-27) L. R. 54 I.A. 228, 237 (case where the deceased head of a muth borrowed money for the purposes of discharging duties for which he was responsible as head and it was proved that the money was legitimately applied to that purpose. Their Lordships remitted the case with the following directions : "That in case the guardian of the defendant does not pay within three months from the arrival of the record the sum sued for, plus interest at the contractual rate until payment, the trial Court should appoint a receiver for the rents and issues of the muth property and the proceeds from offerings, etc., and after payment of all expenses con-

PLAINT.

336.

INDEMNITY

CLAIM by a Company against a Shareholder for Indemnity against Costs of Action which he was allowed to defend in Company's Name (k)

1. The plaintiff Company (hereinafter called 'the Company') is incorporated under the Indian Companies Act VII of 1913.

2. The defendant at all material times was and is the registered holder of.....shares in the capital of the Company.

3. In December.....19..., one C.D. brought a suit against the Company in this Court (Suit No.....of.....) to recover a sum of Rs.....(state briefly the nature of the Claim in the suit).

4. The directors of the Company were not minded to defend the said suit.

5. On....., the defendant requested the directors of the Company to allow him to defend the said suit in the name of the Company and it was then agreed in writing between the said directors and the defendant that the defendant would defend the said suit in the name of the Company and would indemnify and keep indemnified the Company against all costs, charges and expenses which the Company might be liable for, pay, incur, or sustain in connection with the defence of the said suit and also against all sums of money whether for costs, charges, expenses, or otherwise howsoever which the Company might be ordered to pay to the plaintiff in the said suit.

nected with the muth and the performance of the ceremonies and festivals and a reasonable provision for the maintenance of the matadhipathi, the balance should be applied in discharge of the plaintiff's debt until such debt has been paid off.'').

(j) **Legal necessity for debt:** If the plaintiff wants to bind the debutter estate it is incumbent upon him to make enquiries and satisfy himself that there was actual pressure upon the debutter estate which could not be met otherwise than by borrowing money: *Himangsu Kumari v. Radha Madan* (1938-39) 43 C.W.N. 943.

(k) **Contract of indemnity:** For definition, see s. 124, Ind. Cont. Act. Indemnity may be either express or implied. By his purchase of the properties subject to a charge, the purchaser impliedly undertakes to indemnify the owner against the incumbrance affecting them and if by his default loss is caused to the owner by the proceedings taken by the incumbrancer, then the purchaser is bound to indemnify him: *Rama*

6. The defendant accordingly defended the said suit.

7. On....., the plaintiff in the said suit recovered judgment therein against the Company for Rs....., for their claim and Rs for costs.

8. The defendant has not indemnified the Company against any of the said costs, charges and expenses.

9. The Company incurred Rs.....as costs and expenses in and about defending the said suit. Particulars of such costs are set out in schedule "A" hereto.

10. On....., the Company paid Rs.....to the plaintiff in the said suit for costs.

The plaintiff Company claim—

Rs.....

Rayanimgar v. Venkatalingam, (1931) I.L.R. 57 Mad. 218. There is an implied contract to indemnify a person who accepted a bill of exchange for the accommodation of drawer and who is obliged to pay the amount of the bill : See notes under Form No. 145, p. 768.

(k) **Cause of action** : The cause of action for a claim against promisor accrues to promisee when the latter is actually damaged : *Shankar Nimbaji v. Laxman*, A.I.R. 1940 Bom. 161. The indemnified can only incur loss by making payment of the debt or by transfer of property which is taken as an equivalent of money and not merely by incurring pecuniary obligation in the shape of a bond, promissory note, or acknowledgment of liability : *Ranganath v. Puchusao*, A. I. R. 1935 Nag. 147 ; *Chand Bibi v. Santoshkumar*, (1931) I.L.R. 10 Cal. 761. But compare *Chiranji Lal v. Naraini*, (1909) I.L.R. 41 All. 395 (in which the passing of a mortgage decree against the plaintiff under the circumstances of the case was held equivalent to payment).

(k) **Contract of indemnity and contract of guarantee—distinction between** : See *Ramchandra v. Shapurji*, I.L.R. (1940) Bom. 552.

(k) **Right to indemnity and right to damages—distinction between** : A right to indemnity is given by the original contract whereas a right to damages arises in consequence of the breach of that contract. These two rights are confounded and one reason for the confusion is that when a contract is broken, indemnity is often found to coincide with the measure of damages. In these cases, whether the right is called right to indemnify or right to damages, practically the same result follows, and it is forgotten that these two words express two fundamentally different legal ideas : *Per Venkatasubba Rao, J.*, in *Krishnaswami v. Raghaviah*, A.I.R. 1928 Mad. 43.

(k) **Limitation** : Three years under Art. 83, Schedule 1, Ind. Lim. Act : *Shankar Nimbaji v. Laxman*, *supra* ; *Mehdattunnissa v. Elatimattunnissa*, (1939) I.L.R. 17 Pat. 751 ; *Tilak Ram v. Surat Singh*, I.L.R. (1938) All. 500. Cf. *Chand Bibi v. Santoshkumar*, *supra* (where Art. 116 was applied).

PLAINT.**337.****INJUNCTION.****Mandatory Injunction.****CLAIM by Landlord against Tenant for Mandatory Injunction. (1).**

1. The defendant holds agricultural land (Holding No.....), comprised in the plaintiff's Zamindary (Tauzi No.....) in the district of, with occupancy rights.

2. In 19..., the defendant began to erect a building on the said land which was in no way connected with agricultural purposes and was intended to be used as a dwelling house.

3. The plaintiff was not aware that the defendant was erecting the said building until19.... On coming to know of the same, the plaintiff through A.B., his manager, complained of the said erection and called upon the defendant to demolish the building which had already been erected to a height of..... feet.

4. Nevertheless the defendant did not desist and went on building and threatens and intends to continue to erect the same.

The plaintiff claims —

(1) An injunction to restrain the defendant, his contractors, servants and workmen from continuing to erect the said building or any building not connected with agricultural purposes on the said land.

(2) An order that the defendant do forthwith pull down and remove so much of the building as is erected on the said land.

- (1) **Reference :** *Ramanadhan v. Zamindar of Ramnadi*, (1893) I.L.R. 16 Mad. 407, 409 (In an agricultural holding the tenant is under an obligation not to alter the character of the holding and that the landlord is entitled to insist upon the tenant abstaining from doing anything inconsistent with the purpose for which the land was originally let. The right in question is an interest in immovable property and the Zamindar is, therefore, entitled to such specific relief as may be necessary to vindicate his right..... The injury cannot be adequately compensated for by an award of damages in as much as there is no definite standard by which the compensation that ought to be awarded for prospective injuries can be measured.).

- (1) **Injunction discretionary :** Under Sec. 54, Spec. Rel. Act, 1877, injury to plaintiff and hardship of defendant should be taken into consideration : *Paxundaung Bazar v. Ellerman's Trading Co.*, (1934) I.L.R. 12 Rang. 20.

- (1) **Court fee :** In suits coming under sub-cl. (c) or (d) of cl. (iv) of Sec. 7 of

DEFENCE.**338.****INJUNCTION.****1. Mandatory Injunction.****DEFENCE to a Claim by Landlord for Mandatory Injunction. (m).**

1. The defendant did the acts complained of with the plaintiff's leave :

(Set out particulars showing when and how the leave was granted).

Or,

The defendant commenced erecting the said building in.....
.....19..., to the knowledge of the plaintiff. Nevertheless the plaintiff stood by and saw the defendant erecting the building and expending money in connection therewith. The plaintiff has been guilty of laches and has acquiesced in the construction of the said building.

2. The defendant did not receive the alleged or any complaint from the plaintiff.

3. The defendant has expended Rs.....on the said building and the granting of the injunction would be oppressive and would inflict great hardship on the defendant.

PLAINT.**339.****INJUNCTION.****2. Prohibitory Injunction.****CLAIM by Landlord against Tenant for an Injunction to restrain a Breach of Covenant. (n)**

1. By a lease dated.....19..., the plaintiff demised to the

the Court Fees Act, the plaintiff is entitled to put his own valuation on the relief he seeks and pay court fees thereon : *Pannalal v. Abdul Gani*, (1929-30) 34 C. W. N. 321. Cf. *Maung Nyi v. Municipal Committee, Mandalay*, (1934) I.L.R. 12 Rang. 335 ; *In the matter of Kali Pada Mukherje*, (1929-30) 34 C.W.N. 870 ; *Bachhan v. Municipal Board of Mirzapur*, A.I.R. 1926 All. 423.

(l) Limitation : Art. 120, Sch. I, Ind.Lim.Act ; *Inambhai v. Rahimbhai*, (1925) I.L.R. 49 Bom. 586 ; *Waxiran v. Babu Lal*, (1904) I.L.R. 26 All. 391.

(m) Defence of acquiescence : See 'Acquiescence' under "Special Defences", Part II, Chap. XVII, pp. 383, 384.

(m) Court's power to grant injunction : See *Paxundaung Bazar v. Ellerman's Trading Co.*, (1934) I. L. R. 12 Rang. 200.

(n) For Court's power to grant injunction, Court fee and Limitation, see Notes under Form No. 337.

defendant a suite of rooms situate upon and forming part of the.....
 floor of the dwelling house known as.....
 in..... Street in the city of..... for a term of twenty years
 from..... at a monthly rent of Rs.....

2. By the said lease the defendant covenanted, *inter alia*, to use the said premises as a private residence only and not to do or permit to be done upon the said premises anything which in the opinion of the landlord might be or become a nuisance or annoyance to or in any way interfere with the quiet or comfort of the landlord or the other occupants of the said dwelling house, nor to use the same for any illegal, immoral or improper purpose.

3. The defendant has committed a breach of the said covenant by permitting the said premises to be so used as to cause annoyance and interfere with the quiet and comfort of the plaintiff and the other occupants of the said dwelling house :

Particulars :

4. On.....19..., the plaintiff and the other occupants of the said dwelling house complained to the defendant about the said annoyance but the defendant paid no heed to their remonstrance.

5. The defendant threatens and intends, unless restrained from so doing, to continue to commit the breach of covenant complained of.

The plaintiff claims —

An injunction to restrain the defendant from further committing the aforesaid or any other breach of the said covenant.

PLAINT.

**340.
INJURY.**

(Personal Injury). •

**CLAIM by Wife for Personal Injuries sustained in the Act of
 saving her Husband. (o)**

1. On....., the plaintiff and her husband were out shopping and happened to be in the shop of G. & Co. at..... as customers.

(o) **Reference :** *Brandon v. Osborne, Garrett* (1924) 1 K. B. 548 (As regards the wife's claim to damages, it was contended on behalf of the defendants that no danger was threatening her and that what brought about her injury was her own voluntary act in trying to assist her husband. *Held*, by Swift J., at p. 555 : If in this case the female plaintiff has been standing in a place of perfect safety,

2. At the time material hereto the defendants by their servants were engaged in carrying out repairs to the glass roof of the said premises and they negligently allowed a piece of wood to fall on to glass roof which they had not protected as they ought to have done.

3. The result was that, while the plaintiff and her husband were there, a portion of the skylight forming part of the roof, fell and a piece of glass struck the plaintiff's husband causing him a severe shock. At the moment, the plaintiff, on seeing the glass falling, immediately and instinctively clutched her husband's arm and tried to pull him away from the spot. In this effort to pull him out of danger, which the plaintiff reasonably believed to exist, she sustained injuries.

Particulars of injuries :

4. By reason of the premises the plaintiff has suffered damage.

Particulars of special damage :

The plaintiff claims—

Rs.....damage.

PLAINT.

341.

INJURY.

(Personal Injury)

**CLAIM for Damage for Personal Injuries, sustained in
the Act of saving a Child. (p)**

(Another form).

1. On.....19....., a horse owned by the defendant was seen by the plaintiff bolting along.....Street, followed by the driver.

2. On seeing his child aged three years in imminent peril in the street, the plaintiff instinctively dashed out and held the run-

and saw the "glass running down upon her husband" and had time to think what was the wisest thing to do, it might possibly be said that she was guilty of negligence by going into the danger; but having regard to the place she was in and the frightening nature of the accident, acting instinctively as she did in clutching her husband's arm and trying to drag him out of danger, she did nothing wrong or anything that can be called contributory negligence. The plaintiffs are entitled to damages). See *Cutler v. United Dairies* (1933) 2 K. B. 297, 306 where Brandon's case has been referred to and distinguished.

(p) Reference : See *Brandon v. Osborne, Garrett* (1924) 1 K. B. 548 reld. to in *Cutler v. United Dairies, supra*.

away horse's head in order to save the child and in the act was thrown down and sustained injuries.

Particulars :

3. The plaintiff has suffered damages.

Particulars of special damage :

The plaintiff claims—

Rsdamages.

PLAINT.

342.

INJURY.

(Personal Injury).

CLAIM by a Child for Damage for Personal Injury. (q).

1. On19..., at about 10 P.M., the plaintiff, an infant aged 4 years, was crossing Road with his grandfather who was holding his hand.

2. At the time material hereto a motor omnibus bearing registered No....., owned by the defendant, was being driven by the defendant's servant, one T.D., along the said road from north to south.

3. When the plaintiff and his grandfather had reached the middle of the road, the plaintiff's grandfather was startled by the approach of the said omnibus and he released the plaintiff's hand and jumped aside. But the plaintiff was knocked down by the said omnibus and thereby sustained injuries.

Particulars of injuries :

4. The said injuries were caused by the negligent driving of the said omnibus.

Particulars of negligence :

5. By reason of the premises the plaintiff has suffered damage.

Particulars of special damage :

The plaintiff claims—

Rsas damages.

-
- (q) **Reference :** *Oliver v. Birmingham Motor Omnibus* (1933) 1. K. B. 35 : (In this case it was contended on behalf of the defendant company that the grandfather was guilty of contributory negligence and that the doctrine of identification of a child with the person in whose care he is, rendering the defence of contributory negligence of the person in charge, available against the child as laid down in *Waite v. North Eastern Ry.* (1859) E.B. & E. 719, should apply to the case. It was held that *Waite v. North Eastern Ry.* was no longer good law. The view of the law taken in that case has been superseded in consequence

PLAINT.

343.

INJURY.

(Personal Injury.)

CLAIM by a Child for Personal Injury caused by a concealed Danger. (r)

1. The defendant at the time material hereto was the owner of a motor lorry and trailer, bearing registered No.....

2. On the.....19..., at about 4-30 P.M., the said lorry and trailer loaded with bags of sugar was being driven by a driver of the defendant, a man named....., and was passing in front of the gate of.....School along... ..Street.

3. The plaintiff, aged six, who was standing on the footpath near the said gate, on noticing that sugar was leaking from some of the said bags instinctively ran into the roadway to the side of the lorry in order to catch some of the escaping sugar, when he was injured by the rear offside wheel of the trailer running over his left foot.

of the decision in *Mills v. Armstrong*, (1833) 13 A. C. 1. *Per* Swift J. at p. 39, 40 :—"An infant a day old has rights. Nobody has any right to injure him by negligence, and I cannot see any difference between an infant a day old and a man aged 50. If a man who is 50 years of age is entitled to recover against a wrong-doer, notwithstanding the fact that some one else has contributed to his injury, why should not an infant who has been maimed for life, as the infant in this case has been, recover against the defendant?"

(q) **Ownership of car—proof of :** In a suit for damages for injury caused to the plaintiff on the ground that he was knocked down by a motor car owned by the defendant and driven negligently, the plaintiff has to prove that the motor car was owned by the defendant and that at the time of the accident the driver of the car was either the defendant or a servant of the defendant. But on proof by the plaintiff that at the time of the accident the car which knocked him down belonged to the defendant, a presumption arises that the person who drove the car was the defendant or a servant or agent of the defendant; and it is for the defendant to displace that presumption and to prove that at the time of the accident the car was not under his control : *Liladhar v. Harilal* I. L. R. (1937) Bom. 268.

(r) **Reference :** *Culkin v. McFie* (1939) 3 All E. R. 613 (In this case it was found as a fact that the driver was not driving negligently or too fast, that there was no failure on the part of the driver or the look-out men to keep a proper look out. But it was found that there was a cargo of sugar from which sugar was leaking, to the knowledge of the defendants by their servants. *Held* : the lorry was an allurements

Particulars of injury :

4. At the time the accident happened the driver knew that some of the bags were leaking, and that there were many children in or about the said street to whom the escaping sugar was an inducement and an opportunity to run into danger.

5. The lorry and the trailer was an allurements to the plaintiff and a concealed danger to him.

6. The defendant had done nothing to cover or protect the bags in any way or to prevent the sugar from escaping to the roadway and therefore failed in his duty to prevent such inducement or opportunity from resulting in danger.

7. By reason of the accident the plaintiff has suffered damage.

Particulars of special damage :

The plaintiff claims—

Rs.....damage.

PLAINT.**344.****INJURY.**

(Personal Injury.)

CLAIM by Licensee against Licensor for Damage**for Personal Injury. (s)**

1. The defendant corporation are the owners of a public park known as....., which they have provided for the inhabitants of the town of.....

2. In this park the defendant corporation had constructed and

to the infant plaintiff, and a concealed danger to him. The infant plaintiff was lawfully on the highway, and in collecting the sugar he was merely indulging the natural instincts of a child of his age, and was not guilty of contributory negligence. The defendants had placed a manifest allurements to the children upon the highway with an insufficient number of look-out men, and were liable in damages for the injury to the infant plaintiff.)

(s) **Reference :** *Ellis v. Fulham Borough* (1938) 1 K.B. 212 (*Per Greer L.J.* at p. 227 : The plaintiff was a licensee. There is a liability on the licensors to protect licensees from dangers which are known to the licensors and which are not likely to be known to the licensee, say, to a child, as in this case, who is not likely either to have read notices or performed the mental operation of considering whether or not there are likely to be danger in the pond. *MacKinnon L.J.* at p. 231 pointed out the distinction between a licensee and an invitee thus : The invitor says "I ask you to enter upon my business." The licensor says, "I permit you to enter on your own business.").

maintained a paddling pool for children to paddle in and had placed loads of sand at the side of the pool to provide the attraction of playing in the sand.

3. On....., the plaintiff, then 6 years old, went to the park and paddled in the pool and played in the sand.

4. While he was in the pool the plaintiff stepped upon a piece of glass and cut the great toe of his left foot, severing the main ligament of the great toe. He was taken to the hospital by one of the persons in charge of the pool and the wound was dressed.

5. The said injury was caused by the negligence of the defendant corporation and their servants in that they permitted broken glass to lie at the bottom of the pool and thereby created a danger or trap of which they knew or ought to have known, and that they failed to give warning that the pool contained in it broken glass and also failed to take adequate precautions to prevent the piece of glass from remaining in the pool.

The plaintiff claims—

Rs..... damages.

PLAINT.

345.

INJURY.

(Personal Injury.)

CLAIM for Damage for Personal Injury, illustrating the Doctrine of Alternative Danger. (t)

1. The defendant at all material times was a coach proprietor.
2. The plaintiff was a passenger for reward from to in a coach of the defendant driven by one of defendant's servants, a man named K.N., on

(t) **Reference :** *Jones v. Boyce*, (1816) 1 Stark. 493 (The case enunciates the doctrine of alternative danger: The plaintiff was placed by the negligence of the defendant (on the circumstance of the rim being defective) in a perilous alternative—to jump or not to jump. He jumped and was injured. He was entitled to recover because he did use proper caution and prudence in extricating himself from the apparently impending peril. The question is, whether he was placed in such a situation as to render what he did a prudent precaution, for the purpose of self-preservation. The plaintiff will not succeed if the defect in the rim was not the constituent cause of the injury or the plaintiff's act was the measure of an unreasonably alarmed mind). The principle of this case has been extended to action taken on emergency to save another person from reasonably apprehended danger: *Brandon v. Osborne, Garrett* (1924) 1 K.B. 548; *Haynes v. Harwood*, (1935) 1 K.B. 146.

3. Soon after the coach set off along Road the coupling rim which was defective broke, and, one of the leaders being ungovernable, the coachman drew the coach to the left side of the road where the front wheel of the coach dashed against a post with great violence, and the plaintiff who was seated on the back part of the coach was jerked forward and, being alarmed, jumped down to avoid what seemed an imminent overturning of the coach, and thereby sustained injuries to his leg and left arm.

Particulars of injury :

4. By reason of the premises plaintiff has suffered damages.

Particulars of special damage :

The plaintiff claims—

Rs.....damages.

PLAINT.

346.

INSOLVENCY.

CLAIM by Official Assignee for a Debt due to the Insolvent before the Insolvency (u)

A.B., Official Assignee, and the assignee of the estate and effects of C.D., insolvent.....Plaintiff.

Versus.

E.F., residing at.....
.....Defendant.

The plaintiff states—

1. The plaintiff is the assignee of the estate and effects of C.D., abovenamed, who was adjudicated an insolvent on the.....

2. The sum of Rs.....is due and owing from the defendant as the price of goods sold and delivered to the defendant by the said C.D. before he became insolvent.

Particulars of claim :

The plaintiff claims :—

Rs.....

PLAINT.

347.

INSOLVENCY.

(u) **Right of suit relating to the property of the insolvent :** See 'Insolvent' under "Classes of Persons", Pt. II, Chap. IX, pp. 182, 183 ; *Abdul Rahman v. Nihal Chand*, A I.R. 1935 All. 675 (F.B.).

CLAIM by Official Assignee for Damages for a Breach of Contract made with the Insolvent before his Insolvency. (v)

1. By a contract made between A.B., above-named, before he became insolvent, and the defendant in writing and dated the.....19..., the defendant agreed to purchase and accept from A.B. 100 maunds of.....to be delivered by A.B. to the defendant on or before.....at the price of Rs... ..per maund, payable 30 days after delivery.

2. The defendant did not accept the said goods or any part thereof or pay the price of the said goods.

3. A.B. was adjudicated an insolvent on.....and his estate and effects have since vested in the plaintiff.

Particulars of claim :

Difference between the said contract price and the market price of the goods on the.....of viz., Rs.....per maund on 100 maunds..... Rs.....

The plaintiff claims—

Rs.....

PLAINT.

348.

INSOLVENCY.

CLAIM by Official Assignee and a Solvent Partner of the Insolvent for a Debt due to the Firm (w)

1. The plaintiff A.B. used to carry on business in partnership with C.D., before he became insolvent, under the name of G.D. & Co., hereinafter called 'the said firm'.

2. On.....19..., the said firm sold and delivered goods of the value of Rs.....to the defendant on credit.

3. The said C.D. was adjudicated an insolvent on.....19..., whereupon the said firm was dissolved.

4. The plaintiff E.F. is the assignee of the estate and effects of C.D., the insolvent,

5. The defendant has not paid the said sum of Rs.....or any part thereof.

The plaintiffs claim—

Rs.....

(v) See 'Insolvent' under 'Classes of Persons', Pt. II, Ch. IX, pp. 182, 183.

(w) Where a firm is dissolved upon the insolvency of a partner, the assignee or receiver in insolvency becomes tenant-in-common with the solvent partners of the partnership property : See 'Insolvent' under 'Classes of Persons', Pt. II, Chap. IX, p. 186.

PLAINT.**349.****INSOLVENCY.****CLAIM by Secured Creditor against Insolvent and Receiver of the mortgaged Properties. (x)**

1. The plaintiffs are the mortgagees of certain immovable properties belonging to one A.B., a Hindu governed by the Dayabhaga.
2. The following are the particulars of the mortgage :--
3. The said A.B. died September 20th., 19..., intestate, leaving him surviving the defendant C.B., his son and legal representative.
4. The defendant C.B. was adjudicated an insolvent on.....
...19... by an order of the District Judge of.....who, by the same order, appointed the defendant E. F., receiver of the insolvent's estate and effects.

Particulars of claim :

The plaintiffs claim—

- (1) Payment of the said sum of Rs....., together with subsequent interest and costs within a specified time.
- (2) In default, sale of the said properties and payment of the plaintiff's dues out of the sale proceeds.

PLAINT.**350.****INSURANCE.**

-
- (x) **Parties to suit :** See *Kala Chand v. Jugannath*, (1926-27) L.R. 51 I.A. 190, 193 (That the rights of a secured creditor over a property are not affected by the fact that the mortgagor or his heir has been adjudicated an insolvent, is, of course plain, but that does not in the least imply that an action against him may proceed in the absence of the person to whom the equity of redemption has been assigned by the operation of law. The latter alone is entitled to transact in regard to it, and he, and not the insolvent, has the sole interest in the subject-matter of the suit. To him, therefore, must be given the opportunity of redeeming the property).
 - (x) **Leave of Court :** See 'Insolvent' under 'Classes of Persons', Pt. II, Ch. IX, pp. 190, 191.
 - (x) **Notice under S. 83, C.P. Code :** See 'Insolvent' under 'Classes of Persons', Pt. II, Ch. IX, p. 192. No such notice is necessary : Cf. *Revati Mohan v. Jatindra Mohan*, (1933-34) L. R. 61 I. A. 171 ; *Skippers & Co. v. David*, (1926) I.L.R. 48 All. 821.

1. Life Insurance.

CLAIM by an Assignee of a Life Policy against an Insurance Company. (y)

1. The defendants are an insurance company registered under the Insurance Act IV of 1938, as amended by Insurance (Amendment) Act XX of 1940, whose registered office is at

2. On the19..., one A. B. insured his life with the defendants for Rs. 5000/- and the defendants, in consideration of the payments made and to be made to them as therein mentioned, granted him a Policy No....., agreeing to pay to the executors, administrators or assigns of the said A. B. the said sum together with all bonuses which might accrue upon the said policy, within three months of due notice received by them of the death of the said A. B.

3. On.....19..., the said A. B. assigned the said policy by an endorsement thereon (or by a separate instrument, as the case may be) to the plaintiff who, on, gave to the defendants at, their principal place of business in British India, a notice in writing of the said assignment, together with a copy of the said endorsement duly certified.

4. The said A. B. died on.....while the policy was still in force and, on, the plaintiff gave the defendants notice in writing of his death.

5. Yet the defendants have not paid the plaintiff the sum payable on the said policy or any part thereof.

The plaintiff claims—

(1) Rs. 5000/-.

(2) Rs.....for bonuses accrued on the said policy.

- (y) **Registration of Insurance companies :** Sec. 3, Insurance Act IV of 1938, as amended by the Insurance (Amendment) Act XX of 1940.
- (y) **Assignment and transfer of insurance policies :** Sub-sec. (6) of the Insurance (Amendment) Act XI of 1939 provides : "Any rights and remedies of an assignee or transferee of a policy of life insurance under an assignment or transfer effected prior to the commencement of this Act shall not be affected by the provisions of this section."
- (y) **Form and notice of assignment :** Sec. 38, Insurance Act IV of 1938, as amended by Sec. 14 of the Insurance (Amendment) Act XI of 1939.
- (y) **Assignment subject to a condition :** Under sec 38 (7) of the Insurance Act IV of 1938, as amended by Act XI of 1939, "Notwithstanding any law or custom having the force of law to the contrary, an assignment

DEFENCE.**351.****INSURANCE.****1. Life Insurance.**

DEFENCE that the Policy was obtained by the fraudulent Concealment and Mis-statement of Material Facts. (z)

1. Previously to effecting the insurance, the assured delivered to the defendants a proposal and a declaration which by the conditions of the policy formed the basis of the insurance effected by the policy.

2. The said proposal and declaration contained certain untrue statements of material facts and did not disclose certain facts then material to be known to the defendants and of which they were ignorant.

Particulars : .

(a) The deceased untruly stated that, and omitted to state the material fact that

(b) The deceased untruly stated that whereas
.....

3. The deceased omitted to state, and made mis-statements of, the material facts aforesaid fraudulently to induce the defendants to issue to him the policy sued upon, and the defendants upon the faith of the said false and fraudulent statements issued the said policy.

4. By reason of the promises the said policy became and is wholly void.

In favour of a person made with the condition that it shall be inoperative or that the interest shall pass to some other person on the happening of a specified event during the life-time of the person whose life is insured and an assignment in favour of the survivor or survivors of a number of persons, shall be valid." Cf. *Sadiq Ali v. Zahida Begam*, I. L. R. (1939) All. 957 (A gift of insurance policy by a Mahomedan to his wife is not invalid on account of the *proviso* that in the event of his wife pre-deceasing him, the assignment would become null and void as if it had not been made.).

(y) **Place of suing :** See "Causes of Action", Part II, Chap. X, pp. 288-289.

(y) **Limitation :** Art. 86, Sch. I of the Limitation Act. This Art. was amended by Sec. 122 of Ins. Act IV of 1938 but the latter section has been repealed by Sec. 34 of The Ins. (Amendment) Act XI of 1939.

(z) This is a defence to Form No. 350.

(z) **Defence of false information invalidating policy :** Before the Insurance Act IV of 1933 came into force, it was held that any false statement in

PLAINT.
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INSURANCE.

2. Fire Insurance.

CLAIM on a Policy of Insurance against Fire. (a)

1. By a policy of insurance dated19..., the defendant company, hereinafter called 'the company,' in consideration of the premiums paid and to be paid by the plaintiff, insured the plaintiff against loss or damage by fire and/or lightening upon the plaintiff's house No Street in for the sum of Rs., and agreed that if the said house be so lost or damaged at any time after and before four o'clock in the afternoon of the it would pay to the assured his executors, administrators or assigns the value of the property at the time of its destruction or the amount of such damage or at its option re-instate or replace the said property or any part thereof, provided that the liability of the company should in no case exceed in the whole the total sum insured thereby.

the proposal and declaration forming the basis of a contract of insurance would reduce the policy void irrespective of the question of its materiality: *Light of Asia Ins. v. Karatoya* (1935-36) 40 C. W. N. 1016. Cf. *Manufacturers' Life Ins. v. Haridasi* (1937-38) 42 C. W. N. 833 (case of fraudulent mis-statements and concealment of material facts); *Asian Assur. Co. v. Asa Ram*, A. I. R. 1914 Oudh. 212; *Allianz Und Stuttgarter v. Hemanta* (1937-38) 42 C. W. N. 855 (Where proof of age is required to be given before the issuing of the policy and such proof is given and admitted, it cannot afterwards be disputed for any purpose.). Where the age is admitted, it is for the insurance company to prove that the admission of age was procured by fraud: *Maneklal v. Yorkshire Ins. Co.*, A. I. R. 1939 Bom. 161. Under Sec. 45 of the Ins. Act IV of 1938, "No policy of life insurance effected before the commencement of this Act shall, after the expiry of two years from the date of commencement of this Act, and no policy of life insurance effected after the coming into force of this Act, shall after the expiry of two years from the date on which it was effected, be called in question by an insurer on the ground that a statement made in the proposal for insurance or in any report of the insured, or in any other document leading to the issue of the policy was inaccurate or false, unless the insurer shows that such statement was on a material matter and fraudulently made by the policy-holder and that the policy-holder knew at the time of making it that the statement was false."

- (a) A policy of fire insurance is a contract of indemnity: Life assurance is not a contract of indemnity. It may be regarded as in effect a form

2. On the, the said house was damaged by fire.

3. The estimated amount of the said loss and damage to the plaintiff is Rs., particulars whereof were delivered to the company on

The plaintiff claims—

Rs.

of investment: *Gould v. Curtis*, (1912) 1 K. B. 635, 640. But a policy of fire insurance is a contract of indemnity. As a rule, the assured cannot recover more than the amount of the loss occasioned to him by the event: *Chapman v. Pole*, (1870) 22 L. T. 306, N. P.; *Briton v. Royal Insee. Co.*, (1866) 4 F. & F. 905. But insurance does not necessarily give a perfect indemnity, but gives sometimes more, sometimes less. This may happen in several cases, but particularly in the case of a valued policy, where the measure of indemnity is fixed by the value: *T. Maurice v. Goldsborough, Mort & Co.*, A. I. R. 1939 P. C. 195. A policy of fire insurance being a contract of indemnity, the insurer is entitled to recover from the assured not merely the value of any benefit received by him by way of compensation from other sources in excess of his actual loss, but also the full value of any rights or remedies of the assured against third parties which have been renounced by him and to which, but for such renunciation, the insurer would have a right to be subrogated: *West of England Fire Insee. Co. v. Isaacs*, (1897) 1 Q. B. 226.

- (a) **Loss or damage by fire** — means a fire of accidental origin: *Austin v. Drewe*, (1816) 2 Marsh. 130.
- (a) **Commencement and duration of risk**: The risk commences as soon as a binding contract of insurance is concluded, although it is always open to the parties to the contract to come to an agreement as regards the time from which the risk will commence: *Hari Kishan v. Guardian Assurance*, A. I. R. 1933 All. 900. Cf. *Isaacs v. Royal Insee. Co.*, (1870) L. R. 5 Exch. 296.
- (a) **Insurable interest**: The first requisite of a contract of insurance is that the assured must have an insurable interest in the subject-matter of insurance. But insurable interest is not synonymous with legal interest as defined in Sec. 51, T. P. Act. Thus where P. insures certain properties against fire, and where subsequently the same premises are sold, but on the day of sale parties enter into another contract under which the purchaser agrees to sell and P. agree to purchase the same premises, such agreement to purchase gives P. an insurable interest in the property which he can enforce till the agreement is in force: *Gnana Sundaram v. Vulcan Ins. Co.* (1931) I. L. R. 9 Rang. 452.
- (a) **Onus of proof**: In fire insurance as a matter of agreement between parties the onus of proof of any particular fact or of its non-existence may be placed on either party in accordance with the agreement made between them: *Samuel v. Assicurazioni Generali*, A.I.R. 1940 P. C. 199.
- (a) **Limitation**: Art 86, Sch. I, Ind. Lim. Act.

DEFENCE.

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INSURANCE.

2. Fire Insurance.

GENERAL DEFENCES to a Claim on a Policy of Fire Insurance. (b)

The defendants may take one or more of the following defences :

1. The plaintiff had no interest in the subject-matter of the insurance.

2. The policy was subject to a condition that it should be void if the plaintiff made any material misdescription of the property thereby insured or made any mis-statement of or omitted to give any information material to be known for estimating the risk. The proposal on the basis of which the said policy was effected contained certain untrue statements and did not disclose certain material facts then known to the plaintiff but unknown to the defendants, the particulars of which are as follows : (*Here give the particulars*).

- (b) **Insurable interest** : Where the assured effects an insurance on his own property there is no question as regards the existence of an insurable interest. Questions of difficulty arise where the insurance is effected by the assured for his own benefit upon the property of another. In such cases, his interest, to be insurable, must be of a pecuniary nature, the measure of his interest being the amount of the loss : *Halford v. Kymer*, (1830) 10 B. & C. 724, folld. in *Hebdon v. West*, (1863) 3 B. & S. 579, and consd. in *Griffiths v. Fleming*, (1909) 1 K. B. 805. See notes under Form No. 352.
- (b) **Payment of premium as condition precedent** : See *U San Dun v. New Zealand Insee. Co.*, A. I. R. 1934 Rang. 343.
- (b) **Proof of misrepresentation and fraud** : The burden is on the insurer to prove very clearly that such misrepresentation has been made : *Davies v. National Fire and Marine Insc. Co.*, (1891) A.C. 485, 489 (P. C.), For what is material mis-statement, see *Dawsons v. Bonnin*, (1922) 2 A. C. 413. Cf. Sec. 38, Ind. Insc. Act, IV of 1938. Where an excessive or exaggerated claim is made by a policy-holder, such a claim will not preclude the policy-holder from recovering the real value of the goods burnt or damaged, unless the claim is fraudulently made by the policy-holder in the sense of endeavouring to obtain from the company money he has no right to : *Norton v. Royal Fire & Life Assur. Co.*, (1885) 1 T. L. R. 460, O. A. For misdescription of property, see *Dawsons Bank v. Vulcan Insee. Co.*, (1934-35) 39 C. W. N. 270 (P. C.).
- (b) **Claim containing particulars** : Where delivery of particulars is a condition precedent, see *Mason v. Harvey*, (1853) 8 Ex. 819 ; *Hiddle v. National Fire & Marine Insc. Co.*, (1896) A. C. 372 ; *Roper v. London*, (1859) 1 E. & E. 825.
- (b) **Property burnt between date of expiry and date of renewal** : Company

3. The policy was subject to a condition that if after the insurance had been undertaken by the defendants anything whereby the risk was increased be done to, in, or upon the property insured without the sanction of the defendants signified by indorsement on the policy, the insurance as to the said property should cease to attach. After the insurance was undertaken by the defendants the plaintiff without the sanction of the defendants did the following acts whereby the risk was greatly increased: (*Here give the particulars*).

4. The policy was subject to the condition that the insurance should not be in force until, nor should the defendants be liable for any loss or damage by fire happening before, the premium or a deposit on account thereof was tendered to, and accepted by, the defendants. The said loss or damage by fire happened before any such premium or deposit was tendered to or accepted by the defendants.

5. The policy was subject to a condition that the plaintiff should within fifteen days of the happening of any loss or damage by fire deliver to the defendants a claim in writing for the loss or damage containing as particular an account as might be reasonably practicable of the items of property damaged or destroyed, stating in respect of the each the amount of the damage and the estimated value at the time of the loss or damage. The plaintiff did not comply with the said condition.

6. The policy was subject to the condition that all benefit under the said policy would be forfeited if the plaintiff or any one acting on his behalf made any fraudulent claim or used any fraudulent or false book, account, entry, voucher etc., or any fraudulent means or devices to obtain any benefit under the policy. On the plaintiff delivered to the defendants a fraudulently exaggerated claim supported by false entries in books of accounts, particulars of which are as follows :

not liable: *Ram Sing v. Century Insc. Co.* (1931-32) 36 C. W. N. 1101. Cf. *Universal Fire and General Insc. v. Shup Shin* (1934) I. L. R. 12 Rang. 312.

(b) **Condition limiting time for enforcement of claim:** *A. N. Ghose v. Reliance Insc. Co.*, A. I. R. 1934 Rang. 15.

(b) **Avoidance of policy by assignment of assured's interest:** Policies of insurance against loss or damage by fire, are not in their nature assignable; nor can the interest in them be transferred from one person to another without the express consent of the insurer: *Lynch v. Dalzell*, (1729) 2 E. R. 292, H. L.

7. The policy was subject to the condition that it would cease to be in force as to any of the property thereby insured which should pass from the assured, to any other person otherwise than by will or operation of law, unless notice thereof be given to the defendants, and the insurance be declared to be continuing in favour of such other person by a memorandum indorsed thereon by, or on behalf of, the defendants. The assured assigned the policy to the plaintiff without giving any notice thereof to the defendant.

8. The policy was subject to the condition that the defendant should not be liable for any loss or damage after the expiration of 12 months from the happening of the loss or damage unless the claim was the subject of pending action or arbitration. The suit was filed more than 12 months after the fire and there had been no reference to arbitration.

9. The policy was subject to the *proviso* that in all cases where the policy would be void or would cease to be in force all moneys paid to the defendants in respect thereof should be forfeited.

PLAINT.

354.

INSURANCE.

3. Marine Insurance.

CLAIM against an Underwriter on a Policy of Marine

Insurance on a Ship for Total Loss. (c)

1. On 19..., the defendants, in consideration of Rs., paid to them by the plaintiff, issued in favour of the plaintiff a policy of marine insurance for Rs. on the ship called

- (c) **Constructive Total Loss:** The loss may be "total" or "partial", or what is termed a "constructive total loss". A "constructive total loss" as defined by Sec. 6 of the English Marine Insurance Act, 1906, is "where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred". "Constructive total loss" of a ship is only established when, on the true facts at the time of abandonment, and not on the facts as they are known or appear at that time, it appears to a reasonable man the balance of probabilities is against the recovery of the ship: *Marstrand Fishing Co. v. Beer*, (1937) 1 All E. R. 158. In such a case the assured, by giving notice within a reasonable time to the assurers of abandonment is entitled to recover against them as for a "total loss": *Adams v. MacKenzie*, (1863) 13 C.B.N.S. 442; *Knight v. Faith*, (1850) 15 Q.B. 649;

Particulars :

1. Valued or Open :—Valued at Rs.
 2. Voyage :—At and from Calcutta to Rangoon.
(or, Time :—From P.M. of to
P.M. of).
 3. Premium to defendants :—Rs. *per cent.*
 4. Perils insured against :—Of the seas, man-of-war, fire,
enemies, etc.
 5. Loss :—Total.
2. The said ship, while on the said voyage was, on,
totally lost by the perils of the seas.
(*Here specify the perils.*)
3. The plaintiff at all material times, was interested in the said
ship to the amount insured.
The plaintiff claims—
Rs.

PLAINT.**355.****INSURANCE.**

4. Insurance against Accidents.

CLAIM by Assured on an Accident Policy.

1. The plaintiff at all times material hereto was a medical
practitioner of
2. By a policy of insurance dated 19..., made
between the defendants and the plaintiff, the defendants, in con-
sideration of the sum of Rs. paid to them as premium,
insured the plaintiff in the sum of Rs. 10,000/- against, *inter alia*,
any accidental personal injury totally disabling and incapacitating
him from attending in any way to his usual business or occupation.
3. On..... 19..., at about P.M., the plaintiff met
with an accident, that is to say, he was knocked down and run over
by a tram-car at the crossing of and Streets in
..... and suffered severe injuries to both his legs.

Cf. Kaltenbech v. Mackenzie, (1878) 3 C. P. D. 467. *Cf. Soc. Belys etc. v. London & Lancashire Insee. Co.*, (1938) 2 All E. R. 305 (a case of a loss by restraint of peoples and therefore a constructive total loss, since recovery within a reasonable time was unlikely).

- (c) **Insurable interest** : See notes under Forms Nos. 352, 353, and *T. Maurice v. Goldsborough, Mort & Co.*, A. I. R. 1939 P. C. 195 ; *Papadimitriou v. Henderson*, (1939) 3 All E. R. 908.
- (c) **Measure of indemnity** : See notes under Form No. 352, and *T. Maurice v. Goldsborough, Mort & Co.*, *supra*.

Particulars of injuries :

4. As a result of the injuries the plaintiff was removed to the Hospital where both his legs were amputated on
, and the plaintiff has thereby been totally disabled and incapacitated from attending in any way to his usual business or occupation.

5. In compliance with the conditions of the said policy, the plaintiff, on 19..., gave to the defendants notice in writing of the accident and, on 19..., forwarded to them a full report of the accident together with a report and certificate from a registered medical practitioner : yet the defendants have not paid the plaintiff the said sum or any part thereof.

The plaintiff claims—

Rs.

PLAINT.**356.****INSURANCE.****5. Insurance of Motor Car against Third Party Risks.****CLAIM by Injured Person against Owner of Car who lent his Car to a Person uninsured against Third Party Risks. (d)**

1. The defendant was the owner of a motor car bearing registered No.

2. The defendant lent the car to one K., on whose behalf it was being driven at the time material hereto by one M.

-
- (d) **Reference :** *Monk v. Warbey*, (1935) 1 K.B. 75 (a case arising under Sec. 35 of the Eng. Road Traffic Act, 1930, which is substantially the same as Sec. 94 of the Indian Motor Vehicles Act IV of 1939. It was held that where a person uninsured against third party risks is permitted by the owner to use a car, and injury is caused by his negligent driving to a third party, the latter may, where the uninsured person is without means, sue the owner of the car directly for damages for breach of his Statutory duty and need not first sue the uninsured person. To prosecute for a penalty is no sufficient protection and is a poor consolation to the injured person though it affords a reason why persons should not commit a breach of the Statute (p. 81). The plaintiff's cause of action is that the Statute has been broken and that the damage has been caused to the plaintiff. All that has to be shown is that the person primarily liable is in such a financial position that nothing is obtainable from him, and that nothing can be effected by bankruptcy proceedings against him, as being an uninsured person, there can be no recourse against an insurance company. In those circumstances the plaintiff might have brought his action without joining K. and M. (p. 93)).

3. The defendant was insured against third party risks, but neither K. nor M. was insured against those risks.

4. On, at about, at the crossing of, the said car driven by the said M. collided with the plaintiff's carriage. The said collision was caused by the negligent driving of the car by the said M.

Particulars of negligence :

5. As a result of the collision the plaintiff sustained personal injuries and damage to his carriage.

Particulars of injuries :

Particulars of damage :

6. The defendant by permitting the car to be used by the said K. and M., as aforesaid, committed a breach of the duty imposed by Sec. 94 of the Motor Vehicles Act IV of 1939.

7. Neither K. nor M. is in a position to pay the damage suffered by the plaintiff.

The plaintiff claims—

Rs..... damages.

PLAINT.

357.

INTERPLEADER.

CLAIM by Bailee against Rival Claimants. (c)

(Form No. 40, App. A, Sch. I, C.P. Code.)

1. Before the date of the claims hereinafter mentioned G. H. deposited with the plaintiff [describe the property] for [safe keeping].

2. The defendant C. D. claims the same under an [alleged assignment thereof to him from G. H.].

3. The defendant E. F., also claims the same [under an order of G. H., transferring the same to him].

4. The plaintiff is ignorant of the respective rights of the defendants.

(d) **Note :** Sec. 94 of the Ind. Motor Vehicles Act IV of 1939 shall not take effect until the 1st day of July, 1943.

(e) **Interpleader suit—conditions of :** See Sec. 88 and O. XXXV, C. P. Code. Cf. *Shelley Bonnerjee v. Raj Chandra*, (1910) I.L.R. 37 Cal. 552, 556, 557; *Hari Karmakar v. Robin*, (1927) I. L. R. 4 Rang. 465; *Asan Ali v. Sarada Charan*, A. I. R. 1922 Cal. 138. In an interpleader suit all contesting defendants are in the position of plaintiffs: *Maharaja of Kolhapur v. Sundaram Ayyar*, (1925) I. L. R. 48 Mad. 1.

(e) **Collusion—meaning of :** See *Murietta v. South American etc. Co.* (1893) 62 L. J. Q. B. 396, and notes under Form No. 359,

5. He has no claim upon the said property other than for charges and costs, and is ready and willing to deliver it to such persons as the Court shall direct.

6. The suit is not brought by collusion with either of the defendants.

7. [Facts showing when the cause of action arose and that the Court has jurisdiction].

8. The value of the subject-matter of the suit for the purpose of jurisdiction is..... rupees and for the purpose of Court-fees is rupees.

9. The plaintiff claims—

(1) that the defendants be restrained by injunction from taking any proceedings against the plaintiff in relation thereto ;

(2) that they be required to interplead together concerning their claims to the said property ;

(3) that some person be authorized to receive the said property pending such litigation ;

(4) that upon delivering the same to such [person] the plaintiff be discharged from all liability to either of the defendants in relation thereto.

PLAINT.

358.

INTERPLEADER.

CLAIM by a Railway Company against Rival Claimants. (f)

1. In 19..., defendant A. B. consigned 500 bags of

- (e) **Interpleader suit—when agents and tenants may not institute :** O. XXV, r.5; C. P. Code. A tenant cannot compel his landlord to have his title determined as against a stranger. An interpleader suit is, however, maintainable if the landlord, subsequent to the letting, does anything whereby his right to recover the rent is entangled : *Sadashiv Govind v. Yeshwant Bhikaji*, A. I. R. 1939 Bom 249. Cf. *Shelley Bonnerjee v. Raj Chandra*, (1910) I.L.R. 37 Cal. 552. A railway company by accepting goods for carriage does not become the agent of the consignor within the meaning of O. XXXV, r.5, C. P. Code, and may file an interpleader suit against the consignor and a third party claiming adversely to the consignor : *Chhaganlal v. B. B. & C. I. Ry.*, (1915) 17 Bom. L. R. 339.

(e) **Limitation :** Art. 120, Sch. I, Ind. Lim. Act.

(e) **Costs :** See O. XXXV, r 6, C. P. Code. Cf. *Duear v. McIntosh*, (1834) 2 Dowl. P. C. 734 ; *Pitchers v. Edney*, (1837) 4 Bing. N. C. 721.

(f) **Reference :** *Bombay, Baroda and C. I. Ry. v. Jacob Elias Sassoon*,

rape seed to one K.D. of Bombay and delivered the goods to the plaintiff company at for carriage to

2. While the goods were in transit, A. B. instructed the plaintiff company by letter dated to deliver the goods to his agent R. F., instead of to the consignee.

3. On the May, 19..., the said R. F. requested delivery of the goods from the plaintiff company.

4. Before the goods could be delivered, however, the defendant C. D. claimed the goods, alleging that they had been assigned to him by A. B. for valuable consideration.

5. The plaintiff company are ignorant of the respective rights of the defendants.

6. The plaintiff company claim no interest in the subject-matter in dispute other than for freight, warehouse rent and costs.

7. There is no collusion between the plaintiff company and any of the defendants.

8. The plaintiff company's charge for freight comes to Rs. and they claim Rs. *per* day as reasonable warehouse rent for the time the goods remained and will continue to remain in their possession.

The plaintiff company claim—

(1) An injunction to restrain each of the defendants from suing the plaintiff company.

(2) That the defendants be required to interplead together concerning their respective claims.

(3) That upon delivering the said goods to such person or persons as the Court should direct, subject to the plaintiff company's claim for freight, warehouse rent, other charges and costs of the suit, the plaintiff company be discharged from all liability to the defendants, or any of them, in relation thereto.

(4) That, if necessary, liberty be given to the plaintiff company to sell the said rape seed and to deposit the sale proceeds, less freight, warehouse rent, other charges, and costs as aforesaid into Court to await the decision of this suit.

(1894) I. L. R. 18 Bom. 231. (The personal relief asked for is nothing more than an injunction restraining the defendants from suing the plaintiff.). Cf. *Secretary of State v. Mir Muhammad*, (1862-63) 1 M. H. C. R. 360. (An interpleader suit is not improperly constituted merely because one of the defendants does not claim the whole of the subject-matter.).

DEFENCE.

359.

INTERPLEADER.

GENERAL DEFENCES by one of the Claimants to an Interpleader Suit. (g)

1. The plaintiff has retained possession of the subject of the suit under an indemnity from the defendant No..... and has thereby identified himself with, and must be taken to collude with, the said defendant.

Or,

The plaintiff has entered into an agreement in writing with the defendant No..... by which he has agreed to pay over to the said defendant, if the latter succeeded, less than what he would have to pay, if this defendant succeeded. The plaintiff has accordingly a personal interest in the subject of the suit other than for charges or costs and has identified himself with the said defendant and is not in a real position of impartiality between the co-defendants.

2. Further, or, in the alternative, a suit is pending in this Court (Suit No..... of) between the parties wherein the respective rights of the defendants as regards the subject of the suit can properly be decided.

- (g) **Collusion :** *Muriel v. South American, etc. Co.* (1893) 62 L.J.Q.B. 396 (Where an applicant for relief by way of interpleader, although he lays no claim to any specific portion of the sum in dispute, has yet agreed with one of the two opposing parties to do what he legally can to defeat the claim of the other, he so far identifies himself in interest as to come within the express terms of R. S. C., Ord. 57, r. 2 (b), and disentitles himself to relief on the ground of collusion. Collusion in the sense in which it is used in this order, does not necessarily involve anything morally wrong, but, under such circumstances, an applicant fails to bring himself under the condition by which alone he is entitled to relief. Colluding may be said to be an equivalent for playing the same game. That is the literal meaning of the word. Here applicant has identified himself in interest. He has a strong interest that one side should succeed rather than the other. In my opinion one of the things intended when these rules were drawn was that the stakeholder who claimed the benefit of the Act should be in a real position of impartiality between the parties.), fold. in *Hari Karmakar v. Robin*, (1927) I. L. R. 4 Rang. 465. Upon the hearing of an interpleader bill, evidence is admissible to show that plaintiff has retained possession of the subject of the suit under an indemnity from some of the defendants : *Statham v. Hall*, 37 E. R. 1004. The objection that a stakeholder has, by merely taking an indemnity from one of two rival

PLAINT.

360.

JOINT HINDU FAMILY.

Debts by Karta.

**CLAIM by Creditor against Members of a Joint Hindu Family
for Money borrowed by Karta. (h)**

1. The defendants at all material times were and are members of a joint Hindu family governed by the Mitakshara. Defendant No. 1 at all material times was the manager or karta of the said joint family.

2. Defendants Nos. 1 and 2 are full brothers, and defendant No. 3 is the minor son, of defendant No. 1.

3. On 19..., the defendant No. 1 as such manager or karta borrowed Rs. from the plaintiff for payment of land revenue and taxes in respect of the joint family properties and verbally agreed to repay the said loan with interest at 9 *per cent.* *per annum.*

Particulars of claim :

Principal sum	...	...	...	...	Rs.
Interest up to.....			...	...	"
Total					Rs.

The plaintiff claims —

(1) A personal decree against defendant No. 1 for Rs.

(2) Decree against defendants Nos. 2 and 3 for the said sum limited to the extent of their interest in the joint family properties.

claimants to property in his hand, disentitled himself to relief under Interpleader Acts because he has identified himself with and must be taken to "collude" with claimant who gave indemnity, cannot be raised by that claimant himself: *Thompson v. Wright*, (1894) 13 Q.B.D. 632.

(g) **Effect of a pending suit :** The *proviso* to Sec. 88, C. P. Code, says that "Where any suit is pending in which the rights of all parties can properly be decided, no such suit of interpleader shall be instituted."

(h) **Implied authority of manager to borrow for family purposes :** If it is proved that money was borrowed for family purposes, the defendant No. 1 being a party to the contract will be personally liable, but the other defendants will be liable to the extent of their interest in the family property. To make the said defendants, who are adults, personally liable it must be shown that the contract sued upon, though purporting to have been entered into by the manager alone, is in reality one to which they are actually contracting parties, or one to which

PLAINT.

361.

JOINT HINDU FAMILY.

Debts by Karta.

**CLAIM for Personal Decree against a Junior Coparcener
for Money borrowed by Karta. (i)**

1. The defendants at all material times were and are members of a joint Hindu family governed by the Dayabhaga.

they can be treated as being contracting parties by reason of their conduct, or one which they subsequently ratified: *Sirikant Lal v. Sidhesicari Prosad*, (1937) I.L.R. 16 Pat. 441; *Sheo Ram v. Lala Ram*, A. I. R. 1937 Lah. 6; *Shiv Charan v. Ilari Ram*, (1936) I. L. R. 17 Lah. 395; Cf. *Alagumai v. Palaniappa*, A. I. R. 1940 Mad. 580. To make a coparcener, who was a minor at the time of the loan liable, it must be shown that he on attaining majority ratified the loan: *Ganpat Rai v. Badri Nath*, (1936) 165 I.C. 921. If it is proved that defendant No. 1, the karta, contracted the debt not for family purposes but for his personal benefit, defendant No. 3, the son of defendant No. 1, will be liable because of the obligation of religion and piety which is placed upon the sons under the Mitakshara law to discharge the father's debts, where the debts are not tainted with immorality. But the liability is not personal and will be limited to his interest in the joint family property: *Venkanna v. Sreenivasa*, (1918) I.L.R. 41 Mad. 136; *Bissessor v. Ramkant* (1934) I.L.R. 13 Pat. 7; *Devi Dass v. Jada Ram*, (1934) I.L.R. 15 Lah. 50.

(h) **Onus of proof:** The lender who seeks to render the whole family property including the shares of other members of the family liable for the debt, is not entitled to a decree against the whole family property, unless he shows that there was a necessity for the loan, or that he made reasonable inquiry as to the necessity for the loan and that the facts represented to him were such as, if true, would have justified the loan: *Kesar Singh v. Santokh Singh*, (1936) I.L.R. 17 Lah. 824. All that is necessary for the creditor to see is that the money is really required for the proper purpose of the business and there is no element of speculation or gambling in the transaction: *Ram Nath v. Chiranji Lal*, (1935) I. L. R. 57 All. 605 (F. B). Where in a suit against the father and the sons a personal decree is passed against the father alone, the decree cannot be executed against the share of the son in the joint family: *Prahlad Das v. Dasarathi* (1939) I.L.R. 18 Pat. 783.

(i) **Reference:** *Firm Harchandrai v. Firm Kedarnath*, A. I. R. 1940 Pat. 353 (Where a family of brothers governed by the Dayabhaga school has started a business and a son of one of them takes an active part in the business from its commencement he must be treated as a partner in the business and after his father's death he is liable for the debts of the

2. In.....19..., the defendant A.B., and his brother C.B., since deceased, both Hindus governed by the Dayabhaga, started a joint family business and carried on the said business for the benefit of the joint family consisting of themselves and the defendant E.B., the son of C.B.

3. On 19..., the defendant A.B. and the said C.B. borrowed Rs. from the plaintiff for paying the debts of the said business, promising to repay the loan with interest at 6 per cent. per annum.

4. C.B. died on 19..., and, on his death, the said business was continued by the defendants.

5. At all material times the defendant E.B. took an active part in the conduct of the said business.

The plaintiff claims—

Rs.

PLAINT.

362.

JOINT HINDU FAMILY.

Debts by Karta.

CLAIM to enforce a Mortgage of Joint Family Properties executed by Karta.

1. One A. B., a Hindu governed by the Mitakshara, died March, 5th., 19....., leaving him surviving five sons, namely, the adult defendant No. 1 and the minor defendants Nos. 2, 3, 4 and 5.

2. The defendants at all material times were and are members of a joint Hindu family.

3. At all material times the defendant No. 1 was the karta of the said joint family and carried on an ancestral business for the benefit of the said joint family.

4. On 19....., the defendant No. 1 as karta of the said joint family borrowed for purposes of the said business Rs. 2000

business not only to the extent of his interest in the family property but also personally.). Cf. *Chennana v. Official Receiver*, A. I. R. 1940 Mad. 241; *Alagamai v. Palaniappa*, A. I. R. 1940 Mad. 580 (The whole question whether a coparcener who takes part in the conduct of the family business is personally liable, and, if so, on what legal basis, is essentially one of fact depending for its decision upon the nature and extent of participation as disclosed by the evidence in the particular case).

- (j) **Liability of minor members :** A manager of an ancestral joint family trading business has full authority to take loans and make alienations

from the plaintiff on mortgage of certain joint family properties. The following are the particulars of the said mortgage :

5. The sum of Rs. is due for principal and interest on the said mortgage.

Particulars of claim :

The plaintiff claims —

(1) An account of what is due to the plaintiff for principal, interest and costs.

(2) Payment of the amount to be found due together with subsequent interest and costs within a time to be specified by the Court.

(3) In default of such payment, the mortgaged property or a sufficient part thereof be sold and the sale proceeds, after defraying thereout the costs of and incidental to sale be applied towards payment of the plaintiff's dues aforesaid.

(4) In case of deficiency, liberty be given to the plaintiff to apply for a personal decree against the defendant No. 1 for the amount of the balance.

PLAINT.

363.

JOINT HINDU FAMILY.

Debts by Karta.

to raise money for the purpose of that business. Such a transaction will be binding on the entire joint family including the minor members. But where the business to finance which money has been borrowed by mortgage is a new business, the sons are not liable for the payment of the loan contracted by the father for the business unless the transaction was for the benefit of the family and to the benefit of the estate and it was supported by legal necessity : *Ram Nath v. Chiranjilal*, (1935) I. L. R. 57 All. 605 (F. B.), folld. in *Ganesh Prasad v. Sheogobind*, (1937) I. L. R. 16 Pat. 719. Cf. *Banares Bank v. Hari Narain*, (1931-32) L. R. 59 I. A. 300 ; *Sanyasi Charan v. Krishadhan*, (1921-22) L. R. 49 I. A. 108.

- (j) **Onus of proof :** In a suit by mortgagee the onus of proof on the question whether there was no consideration, or whether the full consideration stated in the mortgage had in fact passed, is wholly on the mortgagors and it is not for the mortgagee to prove this matter affirmatively : on the other hand when the question is whether there was legal necessity for the borrowing, the onus of proving that there was legal necessity is on the mortgagee : *Bhagwan Singh v. Bishambar*, A. I. R. 1940 P. C. 114. A creditor need not see to the application of the money lent ; *Lalla v. Avadh Naresh*, A. I. R. 1940 Oudh 59.

**CLAIM on a Mortgage of Joint Family Property executed
by Father for Payment of Antecedent Debt. (k)**

1. The defendant No. 1 and his minor sons, the defendants Nos. 2 and 3, at all material times were and are members of a joint Hindu family governed by the Mitakshara.

2. On 19..., the defendant No. 1, as Karta of the said joint family, executed a mortgage in favour of the plaintiff in respect of certain joint family properties. The following are the particulars of the said mortgage : (Here give particulars).

3. The said mortgage was executed to pay off a prior mortgage dated for Rs. executed by the said defendant No. 1 in favour of one

4. The sum of Rs. is due to the plaintiff on the said mortgage executed in his favour.

The plaintiff claims—

(1) An account of what is due to the plaintiff for principal, interest and costs.

(2) Payment of the amount to be found due together with subsequent interest and costs within a time to be specified by the Court.

(3) In default of such payment, the mortgaged property or a sufficient part thereof be sold and the sale proceeds, after defraying thereout the costs of and incidental to sale, be applied towards payment of the plaintiff's dues aforesaid.

(4) In case of deficiency, liberty be given to the plaintiff to apply for a personal decree against the defendant No. 1 for the amount of the balance.

PLAINT.

364.

JOINT HINDU FAMILY:

(k) **Antecedent debt—what is :—**Antecedent debt means antecedent in fact as well as in time, that is to say, that the debt must be truly independent and not part of the transaction impeached: *Brij Narain v. Mangla Prasad*, (1923-24) I. L. R. 51 I. A. 129. To constitute a debt an "antecedent debt" all that is necessary is that the two transactions must be dissociated in time as well as in fact: *Bhuratpur State v. Sri Kishen* (1936) I. L. R. 58 All. 804 (F. B.); *Ramkaran Thakur v. Baldeo* (1938) I. L. R. 17 Pat. 163.

(k) **Burden of proof :** It is for the alienee to prove that the antecedent debt in fact existed or that he made enquiries and was satisfied that it existed: *Bal Rajaram v. Maneklal* (1932) I. L. R. 56 Bom. 36.

Debts by Karta.

**CLAIM by Minor Coparceners of a Mitakshara Joint Family to
have a Sale of Joint Family Property set aside on the
Ground that the Debt incurred by their
Father was immoral. (1)**

1. The plaintiffs and their father, the defendant A.B., at all material times were and are members of a joint Hindu family governed by the Mitakshara.

2. On 19..., the defendant A.B. executed a mortgage of a certain joint family property specified in schedule "A" hereto, (hereinafter called 'the said property'), in favour of the defendant C.D. for a consideration of Rs. 2,000/-.

3. The defendant C.D. instituted a suit on the said mortgage in this Court (Suit No. of) and obtained a preliminary decree and a final decree on and respectively, and purchased the said property at the Court sale held in execution of the said final decree, on

4. The plaintiffs were not parties to the said suit or to any of the proceedings therein.

- (1) A transferee from the manager of a joint Hindu family is bound to show legal necessity for the transfer before he can bind the family. Where however, property has passed out of the joint Hindu family under an execution sale, it is no longer incumbent on the purchaser to prove legal necessity and the sons cannot set aside the sale without showing illegality or immorality. But there is no distinction between a secured and an unsecured debt so far as auction-purchasers are concerned, but there is a distinction between a stranger purchaser and a mortgagee purchaser, namely, that in the case of a stranger the sons must further show that he had notice that the debt was tainted with illegality or immorality, whereas in the case of the mortgagee, constructive notice is presumed. Further, whether delivery of possession has taken place or not, so long as the property has passed to the auction-purchasers by virtue of the sale and its confirmation, they are entitled to protect themselves unless it is established that they had notice. And in order to show that the debt had been incurred for immoral or illegal purposes, it is incumbent on the sons not only to show that the father was of an immoral character or that he was in need of money for gambling transactions, but that the money raised was actually applied for such purposes so as to become tainted : *Jahan Singh v. Hardat Singh*, (1935) I. L. R. 57 All. 357, *reid.* to in *Jainarayan v. Sonaji*, I. L. R. (1938) Nag. 136 ; *Rajeshwar v. Mangniram*, A. I. R. 1933 Nag. 89 ; *Devanandan v. Harihar*, A. I. R 1935 Pat. 140. See Mulla's Hindu Law, 9th Edn., pp. 347, 351.

5. The defendant A.B. had borrowed the said sum of Rs. 2,000/- on the said mortgage for an immoral purpose, viz., for keeping and maintaining a concubine, a woman named, and applied the said money for the said immoral purpose. Without incurring the debt it was impossible to gratify his immoral propensities.

The plaintiffs claim—

(1) A declaration that the mortgage deed aforesaid was not binding on the said joint family.

(2) A declaration that the said property was not liable to be sold in execution of the decree dated made in Suit No. of

(3) That the said sale be set aside.

(4) An injunction to restrain the defendant C.D. from obtaining possession of the said property on the strength of the aforesaid sale.

DEFENCE.

365.

JOINT HINDU FAMILY.

Debts by Karta.

DEFENCE by Minor Coparceners of a Mitakshara Joint Family to a Claim on Mortgage of Joint Family Property executed by Karta. Plea : Want of Legal Necessity. (m)

1. The business mentioned in paragraph 3 of the plaint was not an ancestral business but one started by A. B. father of the defendants.

2. The defendants do not admit the loan mentioned in paragraph 4 of the plaint.

3. If, which is not admitted, the said A. B. borrowed Rs. 2000/- from the plaintiff, the said loan was not for the benefit of the joint family or to the benefit of the estate and was not for any legal necessity.

DEFENCE.

366.

JOINT HINDU FAMILY.

Debts by Karta.

DEFENCE by Minor Coparceners of a Mitakshara Joint Family to a Claim on Mortgage of Joint Family Property executed by Karta. Plea : Debt immoral.

1. A. B., father of the defendants, was a man of vicious habits.

(m) See notes under Form No. 362.

2. The said A. B. borrowed the said sum from the plaintiff with the object of buying a house for a concubine, a woman named R. S., and applied the said sum in buying a house, No. Street, in, for the said sum in her name, which he could not have done except by borrowing.

PLAINT.

367.

JUDGMENT.

CLAIM on a Judgment. (m¹.)

1. The plaintiff is the widow of one A.B., deceased, who in his life-time was a Hindu governed by the Mitakshara.

2. On.....19..., in the Suit No.....of 19..., brought by the plaintiff in this Court against the defendants, the surviving brothers of the deceased, for maintenance, the plaintiff recovered judgment declaring her right to claim arrears of maintenance and also future maintenance at the rate of Rs..... per month from the defendants, and, by the said judgment, a charge was also declared on certain properties specified in Schedule "A" hereto for payment of such maintenance.

3. The decree in the said suit did not provide for, and is not capable of, execution.

4. The sum of Rs.....is due from the defendants to the plaintiff on the said judgment as arrears of maintenance.

Particulars of claim :

The plaintiff claims—

(1) Rs.....arrears of maintenance.

(2) Decree under O. XXXIV, r. 4 of the Code of Civil Procedure in Form No. 5A in Appendix D to the First Schedule thereto.

(m¹) **Suit on judgment when maintainable:**—In India no separate suit can be brought on the basis of an executable judgment. The judgment-creditor is left to his remedy by execution. But where a new obligation is created by a judgment without provisions for execution, a suit can be brought on the basis of the judgment: *Ramaswami v. Muthiah Chetti*, (1925) I.L.R. 48 Mad. 462; *Annoda Prasad v. Nobo Kishore* (1906) I. L. R. 33 Cal. 500. The right to sue for enforcement of rights declared in a former judgment or decree is not restricted to cases where the former judgment or decree fixed a definite amount as payable by one party to another: *Rathan Chand v. Amichand*, A.I.R. 1934 Mad. 665.

(m¹) **Limitation:** Under Art. 122, Ind. Lim. Act, the period of limitation for a suit upon a judgment obtained in British India is 12 years

PLAINT.

368.

LANDLORD AND TENANT.

CLAIM by Landlord against Tenant for Rent. (n)

1. The plaintiff and the defendants Nos. 2 and 3 are joint owners of the house and premises No..... Street, in, hereinafter called 'the said premises'.

2. Under a verbal agreement made on....., the defendant No. 1 became a monthly tenant to plaintiff and to defendants Nos. 2, and 3, in respect of the said premises at the rent of Rs..... per month and has been in occupation of the said premises as such tenant since.....

3. The defendant No. 1 has not paid the rent for the months of.....

4. The defendants Nos. 2 and 3 refused to join as co-plaintiffs in this suit although thereunto verbally requested by the plaintiff on.....

The plaintiff claims—

Judgment for Rs.....as rent in arrear in favour of the plaintiff and defendants Nos. 2 and 3.

from the date of the judgment : *Ramaswami v. Muthiah Chetti*, (1925) I.L.R. 48 Mad. 482 ; *Jogemaya v. Thackomoni*, (1896) I.L.R. 24 Cal. 473 ; *Attermony v. Hurry Doss*, (1881) I.L.R. 7 Cal. 74.

(m¹) See notes under Form No. 214, pp. 843, 844.

(n) **Parties** : All joint owners of the property must ordinarily join as co-plaintiffs. If a joint owner refuses to join as a co-plaintiff he may be added as a defendant. Cf. *Jadunandan v. Mt. Muho*, A. I. R. 1939 Pat. 428. But the co-owner suing must sue for the whole rent. He cannot sue for his share of rent : *Radhabinode v. Naba Kishore*, (1925-26) 30 C. W. N. 413. See 'Joinder of plaintiffs', Pt II, Chap. VII, pp. 56, 57. But even if some of the co-tenants are left out, the landlord is not disentitled to a money decree : *Hari Prasad v. Lal Behari*, 1940 Pat. 328 (F. B.), follg. *Jayan Mohan v. Brojenra*, (1926) I. L. R. 53 Cal. 197. Where several tenants are joint promisors, a rent suit can be instituted against one or more of them and decreed for the entire sum due : *Inderjit Nath v. Prutap*, (1940) I. L. R. 18 Pat. 378.

(n) **Onus** : In a suit for rent the burden is on the plaintiff to establish relationship of landlord and tenant : *Maharaja Srish Chandra v. Harendra Lal*, I. L. R. (1939) 2 Cal. 446.

(n) **Claim for rent** : The whole rent in arrear up to the date of suit must be claimed, otherwise O. II, r. 2, C. P. Code will operate as a bar to subsequent suit for any portion of such arrear.

(n) **Place of payment** : The place for payment of the rent is a matter of

PLAINT.**369.****LANDLORD AND TENANT.****CLAIM by Landlord for Rent against Lessee and his Assignee. (o).**

1. By a registered lease dated.....19..., the plaintiff let to the defendant No. 1 the house and premises No..... Street in....., hereinafter called 'the said premises', at a monthly rent of Rs. 150/- payable in advance on the.....of every month.

2. By a deed of assignment dated....., the defendant No. 1 assigned his leasehold interest to the defendant No. 2.

3. The sum of Rs..... is due as arrears of rent in respect of the said premises.

Particulars of claim :

The plaintiff claims—

Rs.....rent in arrear.

PLAINT.**370.****LANDLORD AND TENANT.****CLAIM by Landlord against Tenant for Damages for Breach of Covenant to repair. (p).**

1. By a registered lease dated....., the plaintiff let to the defendant the house No.....Street....., for the term of fifteen years.

contract, and in the absence of express provisions, is to be implied from custom, and, if there is no custom, it is normally the duty of the debtor to seek out the creditor : *In the matter of Maung Pyu*, A. I. R. 1940 Rang. 84.

(n) **Limitation :** Art. 110 of the Ind. Lim. Act. In case of a registered lease, the limitation is 6 years under Art. 116 : *Tricomdas v. Gopinath*, (1917) I L.R. 44 Cal. 759 (P. C.).

(o) **Liability for rent :** After assignment by lessee both the lessee and the assignee are liable for rent, the lessee on privity of contract and the assignee on privity of estate : *Ram Kinkar v. Satya Charan*, (1938-39) L.R. 66 I.A. 53. The liability of the assignee for rent arises from the date of the assignment and not from the date of his taking possession : *Monica v. Subraya*, (1907) I.L.R. 30 Mad. 407 ; *Bengal National Bank v. Junaki*, (1927) I.L.R. 54 Cal. 813 ; *Jyoti Prasad Singh v. Samuel Henry Seddon*, A.I.R. 1940 Pat. 516.

(p) **Cause of action :** Where a lessee has covenanted to repair and to keep in repair the demised premises during the continuance of the term he

2. By the said terms of the said lease the defendant covenanted to keep the demised buildings in good and tenantable repair during the continuance of the said term.

3. The defendant has not kept the said buildings in tenantable repair.

Particulars of non-repair :

4. By reason of the breach of covenant aforesaid, injury has been caused to the reversion.

The plaintiff claims—

Rs. damages for the breach aforesaid.

must have them in repair at all times during the term and an action may be maintained for breaches committed before the term has expired : *Luxmore v. Robson*, (1818) 1 B. & A. 584. Breach of covenant to repair will not be restrained by injunction or specific performance. The remedy is damages : *Hill v. Barclay*, (1810) 16 Ves. 402. Damages recovered in former action is no bar to a subsequent suit on a continuing breach although it is a matter in mitigation of damages : *Coward v. Gregory*, (1866) L.R. 2 C.P. 153. "A good tenantable repair is such repair as, having regard to the age, character, and locality of the house would make it reasonably fit for the occupation of a reasonably minded tenant of the class who would be likely to take it." *Proudfoot v. Hart*, (1890) 25 Q.B. D. 42, 52.

A general covenant to repair is satisfied by the lessee keeping the premises in substantial repair : *Harris v. Jones*, (1832) 1 Moo. & R. 173, N. P.

In case of old premises and the tenant's obligation under repairing covenants, see *Lurecott v. Wakely*, (1911) 1 K. B. 905 and *Lister v. Lane*, (1893) 2 Q. B. 212.

- (p) **Measure of damages :** The proper measure of damages is not the amount that would be required to put the premises into repair, but the amount to which the reversion is injured by the premises being out of repairs : *Doe d. Worcest. v. Rowlands*, (1841) 9 C. & P. 734 N. P. ; refd. to in *Debendra Lal v. Cohen*, (1927) I. L. R. 54 Cal. 485 ; *Conquest v. Ebbetts*, (1896) A. C. 490. (The proper measure of damages is the difference in value between the reversion with the covenant performed and the value of that reversion with the covenant unperformed) ; *Smith v. Peat*, (1853) 9 Exch. 161 (The measure of damages for breach of contract to repair, during the existence of the term is the difference between the price for which the reversion would sell, if the covenant were broken). In estimating this loss it is proper to take into account the length of the residue of the term, and if the lessor is himself a lease-holder, the liability under which he stands to the superior landlord : *Conquest v. Ebbetts*, (1896) A. C. 490 ; *Ellis v. Torrington* (1920) 1 K. B. 399. See Woodfall on Landlord and Tenant, 23rd. Edn., pp. 773, 774 ; Mulla's Tr. of Ppty. Act, 2nd. Edn., pp. 624-627.

- (p) **Limitation :** The obligation to keep the building in repair during the

PLAINT.

371.

LANDLORD AND TENANT.

CLAIM by Landlord for Possession and Mesne Profits upon
Determination of Tenancy by a Notice to quit. (q)

1. Under a verbal agreement made on or about the 31st December, 19..., the defendant occupied the dwelling house No..... Street, in....., from the 1st day of January 19..., as a monthly tenant to plaintiff at the rent of Rs.....*per* month, until such time as hereinafter mentioned.

2. On.....19..., the plaintiff gave the defendant a notice in writing to quit and deliver up possession of the said house at the expiry of the 1st day of.....19...; yet the defendant continues to be in occupation of the said house.

The plaintiff claims—

- (1) Possession of the said house.
- (2) Rs..... as mesne profits at Rs. a day from up to the date of suit.
- (3) Further mesne profits until possession is delivered.

term is a continuous obligation and hence a suit may be filed at any time during the term : Sec. 23, Ind. Lim. Act, 1908. After the expiration of the term the obligation to repair ceases and hence the suit must be brought within three years under Art. 115, in case of an unregistered lease and within six years under Art. 116 in case of a registered lease, from the time when the continuing breach ceased.

(q) **Incidents of lease from month to month :** *Anwarali Bepari v. Jamini*, I. L. R. (1939) 2 Cal. 254.

(q) **Notice to quit :** In the absence of a contract or local law or usage to the contrary, a lease of immovable property for non-agricultural or non-manufacturing purposes shall be deemed to be a lease from month to month terminable, on the part of either lessor or lessee by 15 days' notice expiring with the end of a month of the tenancy : Sec. 106, T. P. Act, 1882. The contract may provide for the length of notice for the determination of the tenancy : *Bhola Nath v. Raja Durga*, (1907-08) 12 C.W.N. 724 ; *Sahib Dayal v. Dhanpat*, (1923) 75 I. C. 438. If the period of notice is enlarged or reduced, such notice must expire with a month of tenancy : *Baidyanath v. Onkermull*, (1937-38) 42 C. W. N. 598. In Bombay there is a usage requiring a month's notice to quit : *Bhojabhai v. Hayem Samuel*, (1893) I. L. R. 22 Bom. 754. There is no such usage in Calcutta : *Profulla Chandra v. Nanda Lal*, (1934-35) 39 C. W. N. 1069 ; *Prahladrail Chooreewalla v. Commrs. for the Port of Calcutta*, A.I.R. 1939 P.C. 11. In the Punjab where the T. P. Act is not in force, 15 days' notice terminating with the month of the tenancy is held sufficient :

PLAINT.

372.

LANDLORD AND TENANT.

CLAIM by Landlord for Possession and Mesne Profits after
Determination of Tenancy by Efflux of Time. (r)

1. By a registered lease, dated 19..., the plaintiff let to the defendant the house and premises No. Street

Rattan Sen v. Krishna Kaur, (1933) 141 I. C. 513. Where the time limited by a lease of immovable property is express as commencing from a particular day, in computing that time such day shall be excluded : Sec. 110 of T. P. Act, 1882 : *Susil Chunder v. Birendrajit*, (1933-34) 38 C.W.N. 782 (In this case the lease was for a term of 3 years commencing from 1st April 1918. After the expiry of the lease the defendant held over and on the 24th September 1932 the landlord served on him a notice to quit by the last day of the month of October. It was held that the notice was bad). Cf. *Deb Das v. Abdul Gani*, A. I. R. 1938 Cal. 358 (A lease for 7 years commenced on the 1st Baisakh 1318, but there was an express stipulation in the lease that the time limited by the lease was up to the end of 1324. The lessee held over and the lessor served a notice on the lessee to vacate the land by the end of the month of Asar : *Held*, that the notice was valid. In view of the express agreement the lease lasted only up to the last day of 1324). Cf. *Charu Chandra v. Bankim* (1937-38) 42 C. W. N. 1115 (A notice to quit terminating a monthly tenancy "computed from the first day of a month" on the last day of a month is invalid under Sec. 110, T. P. Act). Cf. also *Rahmat Ullah v. Md. Husain*, A. I. R. 1940 All. 444 (Where the time limited by a lease is a year or number of years, then in the absence of an express agreement to the contrary, the lease must be deemed to last during the whole anniversary of the day from which the time commences.). *folg. Benoy Krishna v. Salsiccioni*, (1931-32) L. R. 59 I. A. 414. Cf. also *Sudhansu v. Narayan*, (1938) 68 C. L. J. 411 (*Per R. C. Mitter. J.* : "The validity of a notice to quit ought not to be determined on the splitting of a straw").

- (q) **Limitation** : 12 years under Art. 139, Ind. Lim. Act.
- (q) **Stay of suit** : By the Bengal Non-agricultural Tenancy (Temporary Provisions) Act IX of 1940, ss. 1 and 3, such a suit will be stayed in Bengal other than Calcutta for the period during which this Act would continue in force, that is, from 30th May, 1940 to 30th May, 1942.
- (r) **Causes of action, Joinder of** : A claim for mesne profits may be joined with claim for recovery of land : O. II, r. 4 and O. XX, r. 12, C. P. Code.
- (r) **Notice to quit, if necessary** : Unless there is an earlier assent on the lessor's part to the continuance of the lessee's possession after the determination of the lease, the lessee after the determination of the lease is bound to surrender possession to the lessor and on default he and his undertenant may be ejected without notice. In such a case the

in the town of, hereinafter called 'the said premises', for the term of 5 years from at the monthly rent of Rs. 200/- payable in advance on the day of every month. The said lease contained a covenant that at the determination of the tenancy the tenant should deliver up the demised premises to the landlord.

2. The said term expired on, yet the defendant has not delivered up the said premises to the plaintiff.

The plaintiff claims—

(1) Possession of the said premises.

(2) Rs..... as mesne profits from up to the date of suit.

(3) Future mesne profits until possession is delivered.

lessee is a tenant-at-sufferance as being one "who came in by right and held over without right": *Kundan Lal v. Deep Chand*, A. I. R. 1933 All. 756 (2), 758; *Kanthappa v. Sheshappa*, (1898) I. L. R. 22 Bom. 893; *Rahmat Ullah v. Md. Husain*, A. I. R. 1940 All. 444. Cf. *Banwari Lal v. Mt. Hussaini*, A. I. R. 1940 Lah. 410.

- (r) **Re-entry**: Under the English law, a landlord may re-enter if he can effect a peaceable entry. But the law in this country is different. The tenant has a right to retain possession until dispossessed in due course of law. Thus, if the tenant-at-sufferance is evicted otherwise than in due course of law he may recover possession under Sec. 9 of the Sp. Rel. Act: *Emperor v. Haji Gulam*, (1919) I. L. R. 43 Bom. 531, 534 (where the landlord was convicted for preventing the tenant holding over from going to the demised premises).
- (r) **Parties**: A sub-tenant is not a necessary party and need not be added as a party in a suit for ejectment by the landlord against the tenant: *Ramkissendas v. Binjraj*, (1923) 50 Cal. 319 (a suit by a sub-tenant to restrain the superior landlord from obtaining vacant possession by executing a decree for ejectment obtained by the superior landlord against his original tenant), appld. in *Sheikh Yusuf v. Jyotish Chandra*, (1932) I. L. R. 59 Cal. 739 (A sub-tenant is liable to be evicted in execution of a decree under O. XXI, r. 35, C. P. Code.); *Jairam v. Nowroji*, (1922) I. L. R. 46 Bom. 887, folld. in *Appa Rao v. Venkappa* A. I. R. 1931 Mad. 534. Cf. the earlier case of *Ezra v. Gubbay*, (1920) I. L. R. 47 Cal. 907 (in which Rankin J., pointed out that the risk taken by omitting to join a sub-lessee is the risk that after decree he may set up a right to possession independently of the lease which has become forfeited, whether by equity against the lessor or by other adverse title). All the above cases have been distinguished in the recent case, *Sukumar v. Nagendrabala*, A.I.R. 1940 Cal. 393, in which it was held that where in a suit for ejectment against the tenant, the permanent sub-lessee is not

PLAINT.

373.

LANDLORD AND TENANT.

**CLAIM by Landlord against Tenant for Possession on Forfeiture
of Lease for Non-payment of Rent in Breach of Express
Covenant. (s).**

1. By a registered lease, dated..... 19..., the plaintiff let to the defendant the house and premises No..... Street in....., hereinafter called 'the said premises', for the term of three years from the.....19...at the monthly rent of Rs. 300/- payable in advance on or before the.....day of each month.

2. The said lease contained the following *proviso* for re-entry :

"Provided always that if the said rent or any part thereof shall be unpaid for the space of twenty one days next after the day hereinbefore appointed for the payment thereof (whether the same shall have been legally demanded or not), then it shall be lawful for the landlord or any person or persons duly authorised by him in that behalf to re-enter and the same to have again repossess, and thereupon the term hereby created shall cease without prejudice to any right of action or remedy of the landlord in respect of any antecedent breach of any of the covenants by the tenant contained in the lease."

3. The defendant made default in the payment of rent for the month of....., whereupon the plaintiff, by letter dated....., called upon the defendant to yield up possession of the said premises forthwith, but the defendant has not complied with the said demand and is continuing in wrongful occupation thereof.

made a party, the decision in such suit is not binding on the sub-lessee and he is not liable to ejection.

(r) **Mesne profits :** *Nand Kishore v. Parameshwar*, A. I. R. 1935 Pat. 80 ; *Gulam Mohiuddin v. Daya Bhai*, A. I. R. 1923 Bom. 398.

(r) **Limitation :** Twelve years from the determination of the lease, under Art. 139 of Ind. Lim. Act, 1908. See *Kanthappa v. Sheshappa*, (1898) I. L. R. 22 Bom. 893 ; *Chandri v. Daji Bhau*, (1900) I. L. R. 24 Bom. 504 ; *Gopinath v. Moti Chiwa*, A. I. R. 1934 Nag. 67.

(r) **Stay of suit :** See notes under Form No. 371.

(s) See S. 111 (g) and S. 114, Tr. of Pty. Act, 1882.

(s) **Waiver of right to claim forfeiture :** It is true that if after the landlord is aware of a cause of forfeiture he, by some act, recognizes the lease, he waives his right to claim forfeiture for that particular breach. For example, if there is a right of forfeiture in the lease for non-payment of rent

The plaintiff claims—

- (1) Rs.....rent in arrear.
- (2) Rs....., mesne profits from.....to.....
..., the date of suit.
- (3) Future mesne profits until possession is delivered.

PLAINT.

374.

LANDLORD AND TENANT.

CLAIM by Landlord for Possession and Mesne Profits upon a Breach of Covenant involving Forfeiture. (t)

1. By a registered lease, dated.....19..., the plaintiff let a three-storeyed house No.....Street, in....., herein after called 'the said house', to the defendant for a period of five years at the monthly rent of Rs.....

2. The said lease *inter alia* provided as follows :

(a) The tenant shall not assign or sublet or part with the possession of the demised premises without the consent in writing of the landlord for that purpose first had and obtained.

(b) If at any time any of the stipulations on the tenant's part shall not be performed, the landlord may immediately or at any time afterwards enter upon the demised property and determine the said term.

3. On.....19..., the defendant with the consent of the plaintiff sublet the top floor of the said house for three years from...

4. On.....19..., the defendant without the knowledge or consent of the plaintiff, entered into another agreement for a sub-lease, and that was for a yearly tenancy of all the rest of the said house in favour of one.....from.....19..., with an option to him to continue his tenancy until the expiration of the lease.

and after the right to claim forfeiture has arisen, the landlord demands the rent and thus acknowledges that the lease is subsisting, it can be said that the landlord has waived the forfeiture. That, however, does not mean that he for ever waived his right to claim forfeiture. Waiver would only operate in respect of a particular breach : *Muhammad Hassan v. Baidya Nath*, A.I.R. 1940 Pat. 140.

(s) **Stay of Suit** : See notes under Form No. 371. Such a suit will not be stayed under Bengal Act IX of 1940.

(t) **Reference** : *Chatterton v. Terrell*, (1923) A.C. 578 (It was held in this case that, although the underletting had been effected by two separate tran-

5. The plaintiff came to know of the said agreement on....., and, on....., he sent a notice in writing to the defendant determining the tenancy and requesting him to forthwith surrender possession of the said house. The defendant has not complied with the said notice and is continuing in wrongful occupation of the said house through his said tenants.

The plaintiff claims—

(Same as in Form No. 373).

PLAINT.

375

LANDLORD AND TENANT.

CLAIM by Landlord for Possession and Mesne Profits upon a Breach of Condition, involving Forfeiture, where Tenant was required to remedy the Breach but failed to do so. (a)

sactions, the defendant had in fact underlet the whole of the premises without the consent of the landlord to the underletting of the whole ; therefore the covenant had been broken so as to involve a forfeiture of the lease.). Cf. *Sreedhar Chandra v. Kusum Kumari*, A. I. R. 1938 Cal. 478.

- (t) **Forfeiture** : A breach of condition does not involve the forfeiture unless the lease expressly so provided : *Allah Ditta v. Mt. Farz Bibi*, (1914) P.R. 33 ; *Nil Madhab v. Narattam*, (1890) I.L.R. 17 Cal. 826. The *proviso* for re-entry gives the lessor the option whether he will exercise the right to determine the lease : See Mulla's Tr. of Pty. Act, 2nd Edn., pp. 643, 644.
- (t) **Relief against forfeiture** : Sec. 114A, Tr. of Pty. Act, 1882, (which section was inserted by the Amending Act XX of 1929), does not apply to breaches of covenants which have the effect of creating a subordinate interest such as assigning, underletting, parting with possession, or disposing of the property leased : Mulla's Tr. of Pty. Act, 2nd Edn., p. 657. Therefore, no notice need be given by the landlord under the said section requiring the lessee to remedy the breach.
- (t) **Notice of intention to determine the lease** : After the Transfer of Property (Amendment) Act of 1929, the lessor or his transferee must give notice in writing of his intention to determine the lease : *Saheb Din v. Gauri Shankar*, A.I.R. 1940 Oudh 92 ; *Pravat Chandra v. Bengal Central Bank* I.L.R. (1938) 2 Cal. 434 (where one written notice under Ss. 111(g) and 114A, Tr. of Pty. Act was held sufficient.). Before the said Amending Act the only requirement of Sec. 111, Cl. (g), Tr. of Pty. Act was that the lessor did something showing his intention to determine the lease : *Prokash Chandra v. Rajendra*, (1931) I.L.R. 58 Cal. 1350.
- (t) **Stay of suit** : See notes under Form No. 371.
- (u) See notes under Form No. 373.
- (u) **Relief against forfeiture** :—Under Sec. 114A, Tr. of Pty. Act, no suit

1. By a registered lease, dated, the plaintiff let to the defendant the house and premises No. Street, in, hereinafter called 'the said premises', for the term of 15 years from upon terms and conditions therein contained.

2. By the said lease the defendant covenanted to paint all the external wood and iron work of the said premises in the year..... and every succeeding third year of the said term with two coats of paint mixed in oil in a workmanlike manner.

3. The said lease contained a *proviso* to the effect that in case of default in the performance or observance of any of the covenants, conditions or agreements on the part of the tenant therein contained, the term of the lease thereby created should cease and determine and it should be lawful for the landlord immediately or at any time afterwards to enter upon the said premises and repossess the same.

4. The defendant committed a breach of the said covenant.

(Here specify the breach).

5. On 19..., the plaintiff gave the defendant a notice in writing that the term of the lease would cease and determine unless the defendant remedied the breach complained of within one month from the date of receipt of the said notice.

6. The defendant has not remedied the breach in terms of the said notice.

The plaintiff claims :—

(Same as in Form No. 373.)

for ejectment shall lie where a lease of immovable property has determined by forfeiture for breach of an express condition entitling the lessor on breach thereof to re-enter, until the lessor has served on the lessee a notice in writing, (a) specifying the particular breach complained of; and (b) if the breach is capable of remedy, requiring the lessee to remedy the breach; and the lessee fails, within a reasonable time from the date of the service of the notice, to remedy the breach, if it is capable of remedy. Sec. 114A is modelled on sec. 146 of the Eng. Law of Property Act, 1925.

- (u) **Notice under Ss. 111(g) and 114A, Tr. of Pty. Act, 1882** :—One notice is sufficient: *Pravat Chandra v. Bengal Central Bank*, I. L. R. (1938) 2 Cal. 434. See notes under Form No. 373.
- (u) **Pleading notice** : In a case under the Eng. Law of Pty. Act, 1925, it has been held that the service on the lessee of the notice required by that section, and his non-compliance therewith, is a condition precedent to the lessor's right of action to recover possession, and the due perfor-

PLAINT.

376.

LANDLORD AND TENANT.

CLAIM by Landlord for Possession on Forfeiture of Lease upon Denial of Title by the Tenant. (v)

1. The defendant was a monthly tenant to plaintiff in respect of premises No.....Street in, hereinafter called 'the said premises'.

2. In 19..., the plaintiff brought a suit against the defendant in this Court (Suit No..... of 19...) for recovery of Rs.....as arrears of rent in respect of the said premises.

3. In the written statement filed by the defendant in the said suit, he denied the plaintiff's claim alleging that the plaintiff was not his landlord. The said suit was decreed with costs on.....

4. After his denial of title as aforesaid, the plaintiff, by letter dated, gave the defendant notice determining the lease and called upon him to deliver up vacant possession of the said premises to the plaintiff. Yet the defendant has not delivered up possession of the said premises.

The plaintiff claims—

(1) Possession of the said premises.

(2) Rs.....as mesne profits from up to the date of suit.

(3) Future mesne profits up to the date of delivery of possession.

mance by the lessor of the statutory condition is implied and need not be specially pleaded in the statement of claim : *Gates v. Jacobs*, (1920) 1 Ch. 567. In India the same rule would apply. But under sec. 111(g) the lessor must give notice in writing of his intention to determine the lease and this notice is part of his cause of action and must be pleaded, and where one notice is given under sec. 111(g) and 114(A), the second notice although a condition precedent has necessarily got to be pleaded.

(u) **Stay of suit** : See notes under Form No. 371.

(v) **Forfeiture by denial of landlord's title** : A tenant who has been let into possession cannot deny his landlord's title : *Bilas v. Desraj*, (1915) I. L. R. 37 All. 557 (P. C.) ; *Krishna Rao v. Sanyasi*, (1932) I. L. R. 55 Mad. 601. A tenant who denies his landlord's title renders the lease liable to forfeiture, whether the lease is permanent or otherwise : *Mela Ram v. Sandhi*, (1933) I. L. R. 13 Lah. 796. The denial must be unequivocal : *Prag Narain v. Kadir Bakhsh*, (1913) I. L. R. 35 All. 145 ; *Sardar Singh v. Man Singh*, A. I. R. 1927 All. 806. The denial must

PLAINT.

377.

LANDLORD AND TENANT.

CLAIM by Lessee against Lessor for Breach of Covenant for Quiet Enjoyment. (w)

1. By a registered lease, dated 19..., the defendant demised to the plaintiff the dwelling house No. Street, in, for the term of nine years from 19..., and the defendant thereby covenanted that the plaintiff paying the rents thereby reserved and performing and observing the covenants, conditions and agreements therein contained on his part should peacefully and quietly hold the said demised premises for the said term without any interruption from or by the defendant or any person lawfully claiming through, under, or in trust for him.

2. On or about, that is, during the continuance of the said tenancy, one C.D., lawfully claiming the said house through the defendant under a deed of assignment, dated, entered into the said house and evicted the plaintiff therefrom, whereby the plaintiff has lost the use and enjoyment of the said house for the remainder of the said term.

Particulars of loss :

The plaintiff claims—

Rs. damages.

also be made to the knowledge of the landlord: *Md. Mahmud Khan v. Laja Mal*, (1934) I. L. R. 15 Lah. 683; *Raman Nair v. Mariyomma*, (1920) I. L. R. 43 Mad. 480. Cf. *Hatimullah v. Mahamad Arju*, (1927-28) 32 C. W. N. 391. The disclaimer of the landlord's title must have been made before the suit in ejectment is instituted: *Maharaja of Jeypore v. Rukmini*, (1919) I. L. R. 42 Mad. 589 (P. C.) The denial of the landlord's title in a previous suit for rent makes the lessee liable to have his tenancy forfeited: *Gopal Ram v. Dhakeswar*, (1908) I. L. R. 35 Cal. 807; *Madho Lal v. Lal Bahadur*, A. I. R. 1934 All. 103.

(v) Notice of intention to determine lease: See notes under Form No. 373.

(w) Covenant for quiet enjoyment: Where a lease contains no covenant for quiet enjoyment a covenant to this effect will be implied: See 108 (c) Tr. of Pty. Act, 1882. This section secures to the lessee the benefit of an unqualified covenant for quiet enjoyment: *Gajadhar v. Rambhau*, A. I. R. 1938 Nag. 439. A covenant for quiet enjoyment is implied from the relationship of landlord and tenant: *Bandy v. Cartwright*, (1853) 8 Ex. 913. In practice a lease always contains a covenant for quiet enjoyment. The covenant does not extend to tortious acts of persons claiming under the lessor: *Nash v. Palmer*, (1816) 5 M. & S.

PLAINT.

378.

LANDLORD AND TENANT.

CLAIM by Lessee against Lessor on a Covenant by
Way of Warranty. (x)

1. By a patta, dated 19..., the defendants, the registered holders of a holding paying revenue to Government, gave a lease of the said property to the plaintiffs for the term of 99 years from on a yearly rent of Rs. 16. The said property is specified in the schedule hereunder,

2. The defendants by the said lease, *inter alia*, covenanted with the plaintiffs that at no time during the currency of the lease the Government revenue payable on the demised property would fail to be paid so as to produce a loss by revenue sale, and that if such a contingency happened, the defendants would indemnify the plaintiffs.

374, 379; *Vithilinga v. Vithilinga*, (1891) I. L. R. 15 Mad. 111, 121; folld. in *Naorang Singh v. A. J. Meik*, (1923) I. L. R. 50 Cal. 68, 74; *Indu Bhushan v. Chowdhury Moaxam*, (1928-29) 33 C. W. N. 106; *Ayyanna v. Gangayya*, A. I. R. 1933 Mad. 465. *Keshav Chander v. Sher Singh*, A. I. R. 1937 Lah. 930. (The principle underlying the section is applicable to the Punjab although the Act is not in force there). Even where the word 'lawful' is inserted, the covenant is construed as protecting the lessee against any interruption by the lessor whether lawful or not: *Crosse v. Young*, (1685) 2 Show. 425, 427; *Nuorang Singh v. A. J. Meik*, *supra*. A breach of covenant occurs when there is a substantial interference with enjoyment, even if it does not amount to dispossession: See Woodfall on Landlord and Tenant, 23rd Edn. pp. 882, 888. The breach must consist in some physical interference with the premises, *Jenkins v. Jackson*, (1888) 40 Ch. D. 71.

(w) **Damages**: See Woodfall on Landlord and Tenant, 23rd Ed., p. 877. Cf. *Keshav Chander v. Sher Singh*, A. I. R. 1937 Lah. 930. Cf. *Lock v. Furze*, (1866) L. R. 1 C. P. 441, follg., *Williams v. Burrell*, (1845) 1 C. B. 402. *Child v. Stenning*, (1879) 11 Ch. D. 82 (where there was disturbance of enjoyment but not eviction).

(x) **Reference**: *Kshirodamoyi v. Kashi Lal* (1929-30) 34 C.W.N. 951 (*Per Rankin, C. J.*, "The covenant was not merely a covenant: that the lessors would pay the Government revenue in their time or as long as they would retain the property without assigning it, but the covenant is intended to be a covenant that, at no time during the currency of this lease shall such an event happen as is herein set forth and, if that does happen, the lessors would indemnify the plaintiffs). Cf. *Keshav Chander v. Sher Singh*, *supra*.

3. In 19..., the defendants ceased to be entered in the Collectorate as the holders of this property and, in their place, one B. S. came to be recorded as the proprietors.

4. The said B. S. made default in payment of Government revenue and, on....., there was a revenue sale at which one E. F. purchased the said property for Rs.

5. On 19..., the said E. F. took possession of the said property and dispossessed the plaintiffs therefrom.

6. By reason of the facts hereinbefore stated the plaintiffs have been deprived of the use and enjoyment of the said property for the remainder of the term of the lease and have suffered loss.

Particulars of loss :

The plaintiffs claim—

Rs. damages.

DEFENCE.

379.

LANDLORD AND TENANT.

GENERAL DEFENCES to a Claim for Rent. (y)

The defendant denies that he used or occupied the said house as tenant to plaintiff as alleged or at all.

Or,

The defendant occupied the said house as tenant to plaintiff from.....and no rent had become due or payable at the commencement of the suit.

Or,

By the lease, dated, the plaintiff covenanted with the defendant to bear and discharge all rates and taxes imposed on or payable in respect of the demised premises. The plaintiff made default in payment of the occupier's share of municipal taxes for the quartersand.....amounting to Rs....., and the defendant was obliged to pay and paid the said taxes on 19... The defendant claims to set off the said sum against the plaintiff's claim.

- (y) **Defence that the tenant was not put in possession of the demised property in whole or in part :** *Jogesh Chandra v. Emdad Meah*, (1931-32) L. R. 59 I. A. 29 ; *Surendra Nath v. Bhudar* (1938) 67 C. L. J. 136 ; *Dhirendra Nath v. Ramlal* (1937-38) 42 C. W. N. 1030 ; *Abhoy Charan v. Hem Chandra*, (1928-29) 33 C. W. N. 715 ; *Katyayani v. Uday Kumar*, (1924-25) L. R. 52 I. A. 160.
- (y) **Defence of suspension of rent :** The basis of the doctrine of the suspension is that the rent due is an entire sum in respect of the land demised;

Or,

The defendant admits the lease mentioned in paragraph of the plaint but says that the plaintiff failed to give possession of the demised property or any part thereof to the defendant.

Or,

The defendant admits the lease mentioned in paragraph of the plaint, but says that the plaintiff did not put the defendant in possession of the whole of the demised property but put him in possession of part only of the said property (here specify) and the defendant is accordingly entitled to a proportionate abatement of rent.

Or,

The defendant admits the lease mentioned in paragraph of the plaint, but says that after he occupied the demised property as tenant to the plaintiff he was physically dispossessed by the plaintiff as to a part thereof on....., and, for that reason, the defendant is entitled to a proportionate abatement of rent as from that date. Particulars of the property from which the defendant was so dispossessed are set out hereunder.

Or,

The defendant admits the lease mentioned in paragraph of the plaint, but says that after the making of the said lease and during the said term one A. B. then lawfully claiming the demised property through and under the plaintiff (state the nature of the claim), and having a good title to the same and to the possession thereof through and under the plaintiff evicted the defendant therefrom on 19...

Or,

At the time of the lease mentioned in paragraph of the plaint, the plaintiff had no title to the property demised thereby. The real title was in one C. B. who instituted a suit against the defendant for ejectment in this Court (Suit No..... of.....) and in execution of the decree obtained by him in that suit obtained possession of the said property on 19...

DEFENCE.

380.

Sajjad Ahmad v. Trailakhya (1927-28) 32 C. W. N. 472, follg.
Katyayani v. Uday Kumar, (1924-25) L. R. 52 I. A. 160; *Deoki Kuar v. Shiva Prosad*, A. I. R. 1939 Pat. 356.

(y) Defence of eviction by title paramount: See *Amritlal v. Uttam Lal* I. L. R. (1938) 2 Cal. 559.

LANDLORD AND TENANT.**DEFENCE to a Claim by Landlord for Possession and Mesne Profits upon Determination of Tenancy by Notice to quit. (z)**

1. The defendant did not receive the alleged or any notice to quit.

2. If, which is not admitted, the plaintiff served the alleged notice on the defendant, the defendant says that the tenancy commenced from the 15th day of January 19..., and not from the 1st day of January 19....., as alleged in paragraph 1 of the plaint, and the said notice is invalid in that it did not purport to expire with a month of the tenancy.

Or,

Further, or, in the alternative, after the said notice, the plaintiff accepted rent from the defendant for the month of and has thereby waived the said notice.

DEFENCE.**381.****LANDLORD AND TENANT.****DEFENCE to a Claim by Landlord for Possession and Mesne Profits after Determination of Tenancy by Efflux of Time. (a)**

1. The defendant admits that the term of the lease expired on, but says that after the expiry of the said term it was verbally agreed between the plaintiff and the defendant on or about, that the defendant should occupy the said pre-

(z) **Validity of notice to quit** : See notes under Form No. 371.

(z) **Waiver of notice to quit** : Sec. 113, Tr. of Prop. Act; *Manicklal v. Kadambini*, (1926) 43 C. L. J. 272. A claim for arrears of rent due prior to ejectment proceedings, even though such claim is made after the notice to quit was served does not constitute a waiver of the notice to quit : *Shah Wali v. Hussaini Begam*, (1917) 2 P. L. J. 595. Acceptance by landlord of rent for period after the institution of the suit for ejectment, paid by the tenant under a consent order of Court, does not constitute waiver of notice to quit, although the payments are made out of Court, and cannot nullify the proceedings or prejudice the landlord's rights : *Susil Chunder v. Birendrajit*, (1933-34) 38 C. W. N. 782.

(a) **Effect of holding over** : If a lessee under a lease (for non-agricultural or 'for non-manufacturing purposes) granted for a term of years was allowed to hold over after the expiry of the term of the lease, the renewed lease would not be a lease from year to year, but from month to month under Sec. 106, Tr. of Prop. Act and terminable by 15 days' notice : *Troilokya v. Sarat Chandra*, (1905) I. L. R. 32 Cal. 123.

mises as a monthly tenant to the plaintiff on payment of the rent that he used to pay before under the said lease.

2. The plaintiff accepted rent from the defendant as such tenant for the month of

DEFENCE.

382.

LANDLORD AND TENANT.

DEFENCE to a Claim by Landlord for Possession and Mesne Profits upon a Breach of Covenant involving Forfeiture. (b)

1. The conditions of the lease have not been fully or accurately set out in the plaint. The defendant will refer to the lease for the terms and conditions contained therein at the time of hearing.

2. The defendant denies that he committed the alleged or any breach of the covenant of the lease.

3. If, which is not admitted, the defendant committed the alleged breach, the said breach was capable of remedy and the plaintiff before action brought had not given the defendant any notice under Sec. 114A of the Transfer of Property Act, 1882, requiring him to remedy the breach.

4. The defendant denies that the plaintiff made the alleged or any demand for possession or that the said demand, if any, is valid or sufficient in law.

DEFENCE.

383.

LANDLORD AND TENANT.

DEFENCE by Lessor to a Claim by Lessee for Breach of Covenant for Quiet Enjoyment.

1. At the time of the making of the lease the defendant had a good title to the said house and to the possession thereof.

2. C. D. did not evict the plaintiff from the said house on the19..., or on any other date, as alleged or at all.

3. At the time when it is alleged that the said C. D. evicted the plaintiff from the said house, the said C. D. had no lawful claim or title to the said house through or under the defendant as alleged or at all.

Ramsundar v. Bataso, A. I. R. 1935 Pat. 271 ; *Badal v. Ram Bharosa*, A. I. R. 1938 All. 649. In Bombay by usage the notice required is of one month : *Meghji v. Dayalji Lal* (1924) I. L. R. 48 Bom. 341 ; Cf. *Secretary of State v. Madhu Sudan*, (1931-32) 36 C. W. N. 918.

(b) **Relief against forfeiture** : See notes under Form No. 374.

(b) **Notice of intention to determine lease** : See notes under Form No. 373.

PLAINT.

384.

LIBEL.

CLAIM by Manufacturers for Damage for a Libel published in a Newspaper of them and in the way of their Business.^(c)

1. The plaintiffs carry on business as manufacturers of chemicals and drugs at.....

2. The defendant is the proprietor, editor and publisher of a weekly newspaper in English called, "The Business Magazine". The said magazine has a large and extensive circulation throughout the province of.....

3. In the issue of the said magazine for July 20th, 19..., the defendant contriving and intending to injure the plaintiffs in the way of their business falsely and maliciously printed and published of the plaintiffs and of them in the way of their said business the following words :

(Here set out the exact words).

4. By the said words the defendant meant and was understood to mean that the chemicals and drugs manufactured by the plaintiffs were worthless and unfit for use and ought not to be purchased by the public.

(c) **Defamatory meaning of words :** *Per Lord Atkin, in Sim v. Stretch, (1936) 2 All E. R. 1237, 1240, H. L. (The test to be applied is, "Would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally ?")*, appld. in *Holdsworth v. Associated Newspapers, Ltd., (1937) 3 All E.R. 872, C. A. Cf. Lachhmi Narain v. Shambhu Nath, A. I. R. 1931 All. 126. Words must be taken in their natural sense. It is unreasonable that when there are a number of good interpretations the only bad one should be seized on to give defamatory statement to the document : Hales v. Smiles, A. I. R. 1937 Rang. 105. The evidence of the defendants is irrelevant on the question of the innuendo, which depends on the meaning which the words would be understood by ordinary persons to bear and not whether the defendant intended them to bear that meaning : Gerald Lord Strickland v. Carmelo, A. I. R. 1935 P. C. 34 ; Union Benefit Co. v. Thakorlal, A. I. R. 1936 Bom. 114.*

(c) **Libel actionable without proof of special damage :** *Ratcliffe v. Evans, (1892) 2 Q. B. 524, 529 ; South Helton Coal Co. v. N. E. News Association, (1894) 1 Q. B. 133, 144. See Fraser on Libel, 7th Edn., p. 24 ; Krishnappa v. S. Akhanda Nanda, (1937-38) 42 C. W. N. 1045, 1049.*

(c) **Malice :** Malice is implied from defamatory words and need not be expressly alleged, but it is the invariable practice to allege that the

5. The defendants threaten and intend to continue the publication of the said or similar words of and concerning the plaintiffs and in the way of their said business.

6. By reason of the facts hereinbefore complained of, many old customers of the plaintiffs have ceased to deal with them and certain other persons who would have bought the chemicals and drugs of the plainliffs were induced to refrain from buying the same, whereby the plaintiffs have been greatly injured in their credit and reputation in their said business and in the sale of chemicals and drugs manufactured by them, and the sale thereof has been much diminished and the plaintiffs have lost profits which they otherwise would have made.

Particulars :

(Here give names of customers who have ceased to deal with the plaintiffs and particulars of loss).

The plaintiffs claim—

(1) Rs. damages.

(2) An injunction to restrain the defendant from further publishing the said words or any similar words affecting the plaintiffs in their said business.

defendant published the words 'falsely and maliciously': See 'Libel' under "Particulars", Pt. II, Chap. XX, p. 496; *Gidney v. Anglo-Indian Assocn.*, (1930) I.L.R. 8 Rang. 250; *Ghulam Rasool v. Ibrahim Beg*, A.I.R. 1934 Oudh 8; *Ogilvie v. Punjab Akhbarat Co.*, (1930) I.L.R. 11 Lah. 45. Cf. *Union Benefit Guarantee Co. v. Thakortal*, A.I.R. 1936 Bom. 114. A man may be liable though he has not a particle of malice against the person defamed: *Munshi Ram v. Mela Ram*, (1936) I.L.R. 17 Lah. 322. Cf. *The Englishman, Ltd. v. Hon'ble Antonio Arrivabene*, (1930-31) 35 C.W.N. 271.

- (c) **Proof of identification of persons defamed :** It is enough if those who know the plaintiff can make out that he is the person meant: *Munshi Ram v. Mela Ram*, *supra*; cf. *Ogilvie v. Punjab Akhbarat Co.*, *supra*.
- (c) **Particulars :** *Brijlal Prasad v. Mahant Laldas*, A.I.R. 1940 Nag. 125 (The plaintiff ought to allege not only the publication, and set out not only the words, but that they were published or spoken to, at any rate some named individuals at a particular time and place.). For particulars to be given in case of a newspaper libel, see 'Libel' under "Particulars", Pt. II. Chap. XX, pp. 493, 494.
- (c) **Special damage—pleading of :** Special damage must be specifically pleaded: See *Fraser on Libel*, 7th Edn., p. 249. A general loss of custom, flowing generally and in the ordinary course of things from a libel, may be alleged and proved generally: *Ratcliffe v. Evans*, (1892) 2 Q.B. 524.

PLAINT.

385.

LIBEL.

CLAIM for Damages for a Libel published in Newspaper of the Plaintiff and in the Way of his Business. (d)

(Another Form.)

1. At all material times the plaintiff was the owner of a ship called the, and the master and commander thereof.

- (c) **Measure of damages** : A libel by the invasion of a legal right gives a right to damages. Such damages may be punitive or contemptuous, or, in an ordinary case, may be such as would recompense the plaintiff for the wrong done to his reputation. That is altogether apart from any question of special damage : *English & Scottish Co-op. v. Odhams Press*, (1940) 1 All E.R. 1, 8; *Atthill v. Soman*, (1866) 15 L. T. 36, N. P.; *Anderson v. Calver*, (1908) 24 T. L. R. 399, C. A. Substantial damages may be awarded in the case of a newspaper libel : *Munshi Ram v. Mela Ram*, (1936) I. L. R. 17 Lah. 322. In assessing the damages, the whole conduct of the defendant from the time libel was published down to the very moment of the verdict should be considered : *Ogilvie v. Punjab Akhbarat Co.*, (1930) I. L. R. 11 Lah. 45.
- (c) **Parties to suit** : The person defamed alone can sue : *Brahmanna v. Ramakrishnama*, (1895) I. L. R. 18 Mad. 250; *Daya v. Param Sukh*, (1889) I. L. R. 11 All. 104. But, compare, *Sukhin Teli v. Bipad Teli*, (1907) I. L. R. 34 Cal. 48 (Where the husband was held entitled to sue because the libellous words used against his wife were also defamatory of him.). The editor, printer and publisher are each individually liable and they need not all be joined in the same suit but there can be no several suits on one cause of action : *Makhanlal v. Panchamlal*, A. I. R. 1934 Nag. 226. The proprietor of a newspaper is liable to the person defamed though he has no knowledge of the publication : *Munshi Ram v. Mela Ram*, *supra*; *Dina Nath v. Sayad Habib*, (1929) I. L. R. 10 Lah. 816. For liability of publisher, see *Hales v. Smiles*, A. I. R. 1937 Rang. 105. (Publisher cannot escape liability on the ground that he did not believe what he published to be true).
- (c) **Limitation** : Art. 24, Sch. I, Ind. Lim. Act. The starting point of limitation is the date of publication of the libel : *Dhiraj Bala v. Gopal*, (1913) 18 C. L. J. 352. But such publication (e.g. in a newspaper) gives rise to a fresh cause of action : *Duke of Brunswick v. Harmer*, (1849) 14 Q. B. 185.
- (c) **Place of suing** : See *Geffert v. Ruckchand*, (1888) I. L. R. 13 Bom. 178.
- (d) **Reference** : *Ingram v. Lawson*, (1840) 9 C. & P. 333 (The defences to this action were twofold : (1) The libel was an imputation, not on the character of the plaintiff, but of the plaintiff's ship; (2) in order to sustain an action of libel for disparagement of title, or of any chattel, the plaintiff must prove that the defendant was actuated by malice.

2. In September 19..., the said ship was in the docks in, and the plaintiff intended to sail within... months in and with the said ship from Calcutta to London and advertised for freight and passengers on 31st September, 19...

3. The defendant is the proprietor and editor of "The.....", a daily newspaper which is widely read in

4. In the issue of the said newspaper for March 15th, 19..., the defendant falsely and maliciously printed and published of and concerning the plaintiff, and of and concerning him in the way of his said business and occupation, and of and concerning the said ship and the intended voyage the words following, that is to say :—

(Here set out the libel in full).

5. The said words meant that the ship was unseaworthy and unfit for the reception of goods or freight or passengers of respectability.

6. The plaintiff has been thereby *greatly prejudiced and injured in his credit and reputation and in his said business, and brought into public scandal, hatred and ridicule.

The plaintiff claims—

Rs. damage.

PLAINT.

386.

LIBEL.

Innuendo.

CLAIM for Libel published in a Newspaper. (e)

1. The plaintiff married one F. H. in 19..., and lived with him in.....as his wife and had one child by him.

Held, by Maule J., "The libel is an imputation on the plaintiff in his business as a ship-owner and master mariner, and not a mere disparagement of the qualities of his ship." *Held*, by Bosanquet J., "The plaintiff is entitled to damages though no proof of malice was given at the trial. He was not bound to wait until actual damage had been incurred). Cf. *Ratliffe v. Evans*, (1892) 2 Q. B. 524 (In the case of libel the plaintiff is entitled to maintain an action, 'even though he does not and cannot prove that he has suffered any definite temporal loss or actual damage, or, as it is technically called, special damage.'). *fold*. in *Manjappa v. Ganapathi* (1911) 21 M. L. J. 1052. Cf. *Shoobhagee v. Bokhori Ram*, (1906) 4 C. L. J. 390, 396.

(e) Reference : *Hough v. London Express Newspaper*, (1940) 3 All^o E. R. 31, C. A. (In the case of words defamatory in their ordinary sense, the plaintiff has to prove no more than that they were published. He cannot call witnesses to prove what they understood by the words,

2. In February 19..., the said F. H. deserted the plaintiff, and, in June 19..., he was ordered to pay maintenance for the child.

3. The defendant No. 1 is the proprietor, and the defendant No. 2, the printer and publisher, of a daily newspaper called "The....." The said newspaper has a large and extensive circulation throughout the district of

4. In the issue of the said newspaper for 10th September, 19..., the defendants published an article containing the following words : (Here set out the exact words).

5. The said words were falsely and maliciously printed and published by the defendants of and concerning the plaintiff and by innuendo meant and were understood to mean that the plaintiff was a dishonest woman falsely representing herself to be and passing as the wife of the said F. H. and that the said F. H. was not her husband and that she had cohabited with and had children by the said F. H. without being married to him.

6. By reason of the said publication the plaintiff has been greatly injured in her character and reputation and has been brought into public scandal, hatred and contempt.

The plaintiff claims—

Rs.....damage.

PLAINT.

387.

LIBEL.

CLAIM for publishing a Libellous Letter.

1. On 19..., the defendant falsely and maliciously published to one C.D. of and concerning the plaintiff, the words following, that is to say, (Here set out the libellous words).

nor will it avail the defendant to call any number of witnesses to say that they did not believe the imputation. The only question is whether reasonable people might understand them in a defamatory sense. Thus, when circumstances are proved which will clothe with defamatory meaning words which are otherwise innocent, the question must equally be whether reasonable people who know the special circumstances might understand them in a defamatory sense. It is not necessary for the plaintiff to prove that one or more persons understood the words in a defamatory sense). Cf. *Union Benefit Guarantee Co. v. Thakortai*, A. I. R. 1936 Bom. 114; *English & Scottish Co-op. v. Odhams Press*, (1940) 1 All E. R. 1. See notes under Form No. 384.

(e) **Pleading innuendo** : See Pt. II, Ch. XX, pp. 491, 492.

2. The said words were contained in a letter which was received by the defendant from one E.F. and which he showed to the said C.D. on

3. The said words mean and were understood by the said C.D. to mean that the plaintiff was a dishonest person.

4. In consequence of the said publication, C.D., who had decided to employ the plaintiff as his manager at a salary of Rs. 100/- a month for one year from, refused to do so.

The plaintiff claims—

Rs..... damages.

PLAINT.

388.

LIBEL AND SLANDER.

CLAIM for Damages for Libel contained in a Letter and for Slander. (f).

1. The plaintiff is a chartered accountant. He is the liquidator of G.D. & Co. in liquidation, hereinafter called 'the said company'

2. The defendant is a solicitor of

3. On January 25th, 19..., the defendant falsely and maliciously wrote and published of the plaintiff and of him in relation to his said occupation and employment in a letter dictated by him to J.D., his clerk, in the presence and hearing of the other clerks of his office, and typed by the said J.D., and sent through post addressed to one B.C., of the words following, that is to say, (Here set out the words).

4. By the said words the defendant meant and was understood to mean that the plaintiff was (Here set out the innuendo).

5. By reason of the facts hereinbefore complained of, the plaintiff has been greatly injured in his credit and reputation and in relation to his occupation and employment.

The plaintiff claims—

Rs.....damages.

-
- (f) **Special Damage** : In an action for slander, where no special damage is proved, the words must have been uttered in relation to the plaintiff's occupation : *De Stempel v. Dunkels*, (1938) 1 All E. R. 238, C.A., follg. *Jones v. Jones*, (1916) 2 A.C. 481. For other cases where slander is actionable without proof of special damage, see Fraser on Libel, 7th. Ed., p. 25. Cf. *Keshab Lal v. Probhat Chandra*, A.I.R. 1938 Cal. 667. (Where a communication is made in the ordinary course of business to a typist, there is no publication such as will justify an action for alleged defamatory statements, more so when the communication is made on

DEFENCE.**389.****LIBEL.****DEFENCE to a Claim by Manufacturers for Libel
published in a Newspaper. (g)**

1. The defendant admits that he is the proprietor, editor and publisher of the weekly newspaper called the "Business Magazine".

2. The defendant admits that he printed and published in the said magazine the words set out in paragraph 3 of the plaint, but denies that the said words were reasonably capable of a defamatory meaning or any of the meanings ascribed to them by the plaintiffs.

3. In so far as the said words consist of allegations of fact, they are in their natural and ordinary meaning, true in substance and in fact, and in so far as the said words consist of expressions of opinion they are fair comments made in good faith and without malice upon the said facts on a matter of public interest.

4. The defendant does not admit any of the allegations in paragraphs 5 and 6 of the plaint.

DEFENCE.**390.****LIBEL.****DEFENCE to a Claim for publishing a Libellous Letter,
setting up Qualified Privilege. (h)**

1. The defendant denies that the said words were capable of the alleged or any other defamatory meaning.

privileged occasion, being made by an attorney in reply to serious charges made against his client).

(f) **Limitation** : Arts. 24 and 25, Ind. Lim. Act.

(g) This is a defence of fair comment and not of justification : See Fraser on Libel, 7th Ed., p. 104-116 ; *Union Benefit Guarantee Co. v. Thakortal*, A. I. R. 1936 Bom. 114. For defence of 'Justification', see Pt. II, Ch. XVII, pp. 430-432 ; for defence of 'Privilege', see Pt. II, Ch. XVII, pp. 434, 436.

(g) This is a defence to Form No. 384.

(h) **Privileged communication** : In order that the occasion upon which a defamatory statement is made may be privileged, it is necessary that the person to whom such statement is made, as well as the person making it, should have an interest or duty in respect of the subject-matter of such statement. It is for the defendant to prove that the occasion was

2. The said C. D. wanted to employ a manager of certain businesses in which both he and the defendant were interested, and when the said C. D. made enquiries of the defendant with reference to the plaintiff, the defendant forwarded to the said C. D. the letter he had received from E.F. of and concerning the plaintiff, without malice towards the plaintiff and in the honest belief that every statement contained in the said letter was true, and with an honest desire to protect the interest of himself and the said C.D. The occasion of the alleged publication was therefore privileged.

3. The defendant does not admit that the plaintiff would have been employed by the said C.D. as manager but for the alleged publication.

PLAINT.

391.

LICENCE. *

CLAIM by Licensor against Licencee for Possession. (i)

1. One A.M. died January 5th, 19..., leaving him surviving the plaintiff, his widow.

2. On 19..., the plaintiff obtained a grant of letters of administration to the estate of the deceased.

3. A.M., at the time he died, owned among other properties a house, No. Street in, hereinafter called 'the said house'.

4. Sometime before the death of A.M., the defendant came to live with him in the said house and was allowed to live there.

5. After the death of A.M., the plaintiff allowed the defendant at his request to continue to live in the said house.

privileged. If the defendant does so, the burden of showing actual malice is cast upon plaintiff, but unless defendant does so, plaintiff is not called upon to show actual malice : *Per* Lord Esher, M.R., in *Hebditch v. McIlwaine*, (1894) 2 Q. B. 54. Where a libel contains defamatory matter not referable to the duty or interest which gives rise to the privileged occasion, such matter is outside the occasion and is not protected ; and such excess of privilege in part of a defamatory publication may also be evidence of malice as to the whole of it : *Adam v. Ward*, (1917) A. C. 309. *Cf. Hunt v. Great Northern Ry.*, (1891) 2 Q. B. 189, *folld. in Moti Lal v. Indra Nath*, (1909) I. L. R. 36 Cal. 907 ; *Toogood v. Spyring*, (1834) 1 C. M. & R. 181. The privilege may be lost if it is made to an unnecessarily large number of persons : See *Fraser on Libel*, 7th Edn., p. 154.

- (i) **Reference :** *Ma Gyi v. Maung Tet*, A. I. R. 1934 Rang. 291 (A license can always be revoked by the grantor, or in this case, by his administratrix,

6. On or about, the plaintiff verbally requested the defendant to leave the said house within a week ; yet the defendant is continuing to stay in the said house.

The plaintiff claims—

(1) Decree directing the defendant to quit and vacate the said house.

(2) Rs. damages at the rate of Rs. per day for use and occupation of the said house from up to the date of suit.

(3) Further damages at the aforesaid rate until the defendant delivers up possession of the said house.

PLAINT.

392.

LICENCE .

CLAIM by Licencee against Licensor for Revocation involving Breach of Contract. (j)

1. By an agreement in writing, dated, the defendant agreed with the plaintiffs to allow the flank wall of his building,

and, therefore, provided there was some notice to quit, from the time of the receipt of that notice the defendants become no more than trespassers.).

- (i) **Lease and license—distinction between :** In the case of a license there is no interest in immovable property transferred to a licensee ; while in the case of a lease, there is a transfer or carving out of such interest in favour of the person in whose favour the lease is granted : *Acting Secretary, Board of Revenue v. Agent, South Ind. Ry.*, (1925) I. L. R. 48 Mad. 368 (F. B.). Cf. *In re Burmah Oil Co.*, (1933) I. L. R. 55 All. 874 F. B. (The Court has to look into the substance of the terms agreed upon and not to the nomenclature given by the parties) ; *Bengal North Western Ry. v. Janki Prasad*, A. I. R. 1936 Pat. 362 (The essence of the matter is whether the intention of the parties was to transfer any interest in the land.).
- (i) **Notice to quit :** A licensee, unlike a lessee, is not entitled to a notice to quit : *Gobinda Chandra v. Nanda Dulal*, (1918) 27 C. L. J. 523. But it has been held that he is entitled to some notice to quit, i.e., some time to vacate : *Ma Gyi v. Maung Tet*, A. I. R. 1934 Rang. 291 ; *Wilson v. Taverner*, (1901) 1 Ch. 578 ; *Cornish v. Stubbs*, (1870) L. R. 5 C. P. 334. Cf. Sec. 63 of the Easements Act (V of 1882), "Where a licence is revoked, the licensee is entitled to a reasonable time to leave the property affected thereby and to remove any goods which he has been allowed to place on such property."
- (i) **Reference :** *King v. Allen & Sons*, (1916) 2 A. C. 54 (The agreement created no estate or interest in the land nor an easement to which the

No. Street in for bill-posting for a period of four years, at Rs. a year, with liberty to the plaintiffs to erect a hoarding for the said purpose.

2. By a registered lease, dated, the defendant let the said building to one A. B. The said agreement with the plaintiffs was not referred to in the said lease and no assignment of the interest of the plaintiffs in the said building was made to the lessee.

3. On, the said A.B. refused, and he is still refusing, to allow the plaintiffs to post any bills upon the said wall or to erect any hoarding.

4. By reason of the facts hereinbefore complained of, the plaintiffs have suffered and are suffering damages.

Particulars of damage :

The plaintiffs claim—

Rs. damages. .

PLAINT.

393.

LICENCE.

CLAIM by Licencee against Trespasser. (k)

1. From September, 19... until such time as is hereinafter mentioned, the plaintiffs were in possession of a piece of land specified hereunder with the leave and license of....., the owners thereof, and which they used as their courtyard and over which they had cattle troughs and a platform.

2. On, the defendants forcibly removed the said cattle trough and platform and took possession of the land by erecting buildings upon it.

3. By reason of the premises the plaintiffs have been deprived of the use of the said land and have suffered damages :

Particulars of damages :

The plaintiffs claim—

(1) Possession of the said land.

(2) Mandatory injunction directing the defendants to remove the buildings they have erected upon the said land.

(3) Rs..... damages.

land was subject, but was only a license for a certain time, creating a personal obligation on the part of the licensor, and that he was liable in damages for the breach of it.). Cf *Kerrison v. Smith*, (1897) 2 Q. B. 445. Cf. Sec. 64, Easements Act (V of 1882).

(k) Reference : *Kanta Tewary v. Sheo Narain*, A. I. R. 1935 All. 123, follg.

PLAINT.

394.

LIGHT AND AIR.

CLAIM for Mandatory Injunction to remove Obstruction to the Access of Light and Air to a House. (1).

1. The plaintiff was and is the owner and occupier of a dwelling house, No..... Street, in the town of Calcutta, having windows

Northam v. Bowden, (1855) 11 Ex. 70 and distg. *Manbhal Rai v. Ram Ghulam*, A. I. R. 1927 All. 633.

- (1) **Acquisition of right to easement**: Sec. 26, Ind.Lim.Act. But cases arising within the territories to which the Easements Act, 1882, has been extended (viz., to the Presidencies of Madras and Bombay, Coorg, and to the United Provinces of Agra and Oudh, Central Provinces and North Western Provinces) must be determined by the provisions of that Act, *vide* Sec. 29, Cl. 4 of the Ind. Lim. Act, 1908. The Ind. Lim. Act, unlike the English Prescription Act, places light and air on the same footing; and the object of the Prescription Act and of the provisions of the Ind.Lim.Act is not to operate an enlargement of the easement, but to provide another and more convenient way of acquiring such easements—a mode independent of legal fiction and capable of easy proof in a Court of law. The only amount of light for a dwelling house which can be claimed by prescription or length of time, without an actual grant, is such an amount as is reasonably necessary for the convenient and comfortable habitation of the house. The right of air is co-extensive with the right to light. The obstruction with the access of air must be such as to cause what is called a nuisance to the house; in other words, to render the house unfit for the ordinary purposes of habitation or business. There is no such right as a right to the uninterrupted flow of south breeze as such. The “45-degree rule” is not a positive rule of law but is a circumstance which the Court may take into consideration and is specially valuable when the proof of the obstruction is not definite or satisfactory: *Delhi and London Bank v. Hem Lall Dutt*, (1887) I.L.R. 14 Cal. 839; *Paul v. Robson*, (1913-14) L.R. 41 I.A. 180 (The owner or occupier of a tenement in respect of which an easement of light has been acquired by prescription is entitled to a quantity of light the measure of which is what is required for the ordinary purposes of inhabitation or business of the tenement, according to the ordinary notions of mankind. The question in an action for obstruction is whether the obstruction amounts to a nuisance.); *Ganga Charan v. Satkari*, (1931) 53 C.L.J. 604; *Bahri Ralla Ram v. Shiv Ram*, A.I.R. 1935 Lah. 79. Under Sec. 33, Easements Act, 1882, Expl. III, in case of obstruction to free passage of air, damage is substantial if it interferes materially with the physical comfort of the plaintiff, though it is not injurious to health, that is, although it may not amount to a nuisance. In considering the sufficiency of the light

on the east side thereof, viz., 2 dining room windows on the ground floor, and one drawing room window and one bed room window on the first floor, as shown in the plan hereto annexed and marked 'A'.

2. The plaintiff and his predecessors in title enjoyed the access and use of light and air to and for the said house through the said windows peaceably as an easement and as of right without interruption for 20 years prior to the disturbance hereinafter complained of, ending within two years next before the institution of this suit.

3. The defendant, in 19..., erected a wall on the adjoining land belonging to him near to the said windows up to a height of.....feet and has thereby materially interfered with the access of light and air heretofore enjoyed by the occupants of the said house and has rendered the said house unwholesome and unfit for the ordinary purposes of habitation.

The plaintiff claims :—

To have the said wall pulled down.

the locality and light coming from other quarters should be considered, but light to which the plaintiff may be deprived at any time ought not to be taken into account : *Colls v. Home & Colonial Stores*, (1904) A.C. 179, folld. in *Mt. Jadooie v. Mt. Kisun Kuer*, A.I.R. 1928 Pat. 106 ; *Sarojini v. Krishna Lal*, (1922) 36 C.L.J. 406 (There is no easement for free access of wind.). The right under Sec. 26 of the Lim.Act can be acquired even where one of the walls of the dominant tenement through the aperture of which light comes belongs to the owner of the adjoining servient tenement : *Jotindra v. Probodh*, (1932) I.L.R. 59 Cal. 260.

- (1) **Reliefs** : When an easement right to light has been proved and its enjoyment has been interfered with, the defendant cannot ask to make compensation in the form of damages and thus purchase compulsorily the right to make the dominant premises dark. Specially when the amount of compensation would be much larger than the expenses of alterations so as to restore the light, an injunction requiring him to make such alterations should not be interfered with : *Jotindra v. Probodh*, *supra*. Whether the plaintiff must be content with an award of damages must depend on the circumstances of each particular case. If it is clear that damages will afford adequate relief to the injured party and the defendant has not been guilty of any high-handed action, or unneighbourly conduct, an award in damages is the appropriate remedy. If the property is still substantially useful to him, depreciation in value can be met by a decree for damages ; but where the defendant's building deprives plaintiff to a very great extent of his best sources of light and incidentally to a large extent of the beneficial use of his property, damages would not be adequate relief : *Ellerman Arracan*

PLAINT.

395.

LIGHT AND AIR.

CLAIM for Injunction to restrain threatened Obstruction to the Access of Light and Air to a House.

1. (Same as in Form No. 394)

2. (Same as in From No. 394)

3. Since 19..., the defendant is engaged in erecting a wall on the adjoining land belonging to him near to the said windows, and threatens and intends to complete the erection of the said wall which, if not stopped, will materially diminish the light and air coming through the said windows and render the said house dark, unwholesome and unfit for the ordinary purposes of habitation.

Rice and Trading Co. v. Pazundaung Bazar Co., A. I. R. 1933 Rang. 351. Where in a suit relating to an easement of light and air, the plaintiff seeks an injunction restraining the defendant from interfering with his right, the Court is entitled, in a proper case, to order an enquiry as to damages, even though it holds that the plaintiff is not entitled to injunction. No such enquiry can, however, be ordered when the plaintiff has not proved any damage : *Abaula v. Municipal Corporation, Karachi*, A. I. R. 1939 Sind 39. In the case of an action for damages or for an injunction *simpliciter*, it is necessary for the plaintiff to show conclusively that there has been substantial interference with the physical comfort etc : *Mt. Punna v. Ram Saran*, (1933) I. L. R. 55 All. 711 ; *Wali Mohammad v. Batuk*, A. I. R. 1936 All. 517 (cases under the Easements Act) ; *Ganga Charan v. Satkari*, (1931) 53 C. L. J. 604.

- (1) **Limitation** : A title to easement is not complete merely upon the effluxion of the period mentioned in the Statute, viz., 20 years, and, however long the period of actual enjoyment may be, no absolute or indefeasible right can be acquired until it is so brought in question in some suit and, until it is so brought in question, the right is inchoate only and, in order to establish it when brought in question, the enjoyment relied on must be an enjoyment for 20 years up to within two years of the institution of the suit : *Siti Kanta v. Radha Gobinda* (1929) I. L. R. 56 Cal. 927. Sec. 26 requires only the enjoyment and not the user to be brought down to a period within two years of the suit : *Manjural v. Chandi Charan*, (1935-1936) 40 C. W. N. 222.
- (2) **Parties to suit** : The owner or the occupier of a dominant heritage may institute a suit for disturbance of the easement right : Sec. 33 of the Easements Act (V of 1882). Only those servient owners who have interfered with the plaintiff's right of easement need be added as defendants : *Madan Mohan v. Sashi Bhusun*, (1914-15) 19 C. W. N. 1211, folld, in *Surja Narain v. Chandra*, (1924) 40 C. L. J. 74.

The plaintiff claims—

An injunction to restrain the defendant, his servants and workmen from continuing the erection of the said wall so as to obstruct or diminish the access and use of light and/or air to and for the said house.

DEFENCE.

396.

LIGHT AND AIR.

DEFENCE to a Claim for Mandatory Injunction for Obstruction to the Access and Use of Light and Air to and for a House. (m)

1. The defendant denies that the access and use of light and/or air to and for the said house through the said windows or any of them has been enjoyed by the plaintiffs and/or their predecessors in title for the said period of 20 years within the meaning of Sec. 26 of the Indian Limitation Act, as alleged or at all.

2. The alleged enjoyment during the statutory period was interrupted by the defendant erecting a in 19..., and maintaining the same until

3. The said windows are not ancient windows. In, the plaintiff rebuilt his house and opened new windows which did not receive the same cones of light as were enjoyed through the old ones and no easement respecting the new windows has been acquired by enjoyment for the statutory period.

4. The defendant denies that the said wall has materially interfered with the access of light and/or air to and for the said house through any of the said windows or has rendered the said house unwholesome or unfit for ordinary purposes of habitation as alleged or at all.

(m) **Defence of interruption of enjoyment :** See Explanation to Sec. 26 of the Ind. Lim. Act which provides that "Nothing is an interruption within the meaning of this section unless where there is an actual discontinuance of the possession or enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof and of the person making or authorising the same to be made."

(m) **Defence of alteration of easement :** *Bai Hariyanga v. Tricamlal*, (1902) I. L. R. 26 Bom. 374 (The easement claimed in respect of the new windows which did not receive the same cones of light as were enjoyed through the old ones, was quite distinct from the easement in respect

PLAINT.

397.

MAINTENANCE.

Hindu Law.

CLAIM by Widow against her Husband's surviving
Coparceners. (n)

1. The plaintiff is the widow of A. B. who, with his brothers, the defendants, constituted a joint Hindu family governed by the Mitakshara.

of the old windows ; and, therefore, the easement respecting them could be applied only by enjoying it for the required length of time.), folld. in *Khazam Singh v. Ralla Ram*, A. I. R. 1937 Lah. 839. Cf. Sec. 29 of the Ind. Easements Act, 1882.

(m) **Defence of extinguishment of easement** : See Secs. 37-47, Ind. Easements Act.

(n) **Widow's right to maintenance** : The duty of maintaining the widow devolves on the persons who take the property of the deceased undivided member of the family and the duty is dependent on the taking of the property : *Lakshmi v. Veera Reddi*, I. L. R. (1939) Mad. 877. A widow is not bound to reside with her husband's family, and the relatives of her husband have no right to compel her to live with them and she does not forfeit her right to property or maintenance merely on account of her going and residing with her family or leaving her husband's residence from any other cause than unchaste or improper purpose : *Ekradeshwari v. Homeshwar*, (1928-29) L. R. 56 I. A. 182, 190, 191. A widow who has been unchaste but has given up the life of unchastity should be given a bare maintenance : *Bhikubai v. Hariba*, (1925) I. L. R. 49 Bom. 459 ; *Sathyabhama v. Kesavacharya*, (1916) I. L. R. 39 Mad. 658.

(n) **Amount of maintenance** : The maintenance should be such an amount as will enable the widow to live, consistently with her position as a widow, with the same degree of comfort and reasonable luxury as she had in her husband's house, unless there are circumstances which affected, one way or the other, her mode of living there : *Ekradeshwari v. Homeshwar*, *supra*, folld. in *Rajani Kanta v. Sajani Sundari*, (1933-34) L. R. 61 I. A. 29. As to whether the amount of maintenance should depend upon the private property of the widow, there is a difference of judicial opinion. According to the Calcutta High Court, so long as the widow has sufficient private means for her support she cannot claim maintenance from her husband's family : *Ramaucati Koer v. Manjhari Koer*, (1906) 4 C. L. J. 74. According to the Madras High Court, the widow's right of maintenance is absolute. It is immaterial whether she has any private means of her own : *Annapoornamma v. Veeraraghava*, A. I. R. 1940 Mad. 547. According to the Bombay and Nagpur High Courts, if she has ornaments of great

2. The said A.B. died January 10th, 1935, and, upon his death, the defendants came into exclusive possession of the joint family properties in which the said A.B. was a coparcener at the time of his death. The said properties are specified in Schedule "A" hereto, and are hereinafter referred to as 'the said properties'.

3. On....., the plaintiff left the residence of her deceased husband and has since been residing with her father at

4. The defendants have not paid the plaintiff any maintenance allowance since.....in spite of several demands in writing made between.....and.....(or, the defendants have denied the plaintiff's right to maintenance, stating how and when.),

5. The average annual income of the said properties is Rs.....

value which she does not require for her use but is likely to dispose of, such matter may be taken into consideration: *Gurushiddappa v. Parwatappa*, I. L. R. (1937) Bom. 113, folld, in *Krishnaji v. Anusaya*, A. I. R. 1939 Nag. 130. The Court should take into consideration the debts with which the family is burdened: *Shridhar v. Sitabai*, I. L. R. (1938) Nag. 289; *Annapoornamma v. Veeraraghava*, I. L. R. 1940 Mad. 547.

- (n) **Arrears of maintenance**: A widow is entitled not only to maintenance, but also to arrears of maintenance from the date of her leaving her husband's residence (not for unchaste or improper purposes) although she does not prove that she has incurred debts in maintaining herself and gives no reason for change of residence: *Ekradeswari v. Homeshwar*, (1928-29) L.R. 56 I.A. 182. Arrears of maintenance are a debt due to the person claiming it, although whether to allow past arrears or not or what amount should be allowed is in the discretion of the Court: *Secretary of State v. Ahalyabai*, I.L.R. (1938) Bom. 454. In order to recover arrears of maintenance it is necessary to prove that there was a wrongful withholding of maintenance for the period for which arrears are claimed. Past non-payment does not necessarily give a right of action: it is a *prima facie* proof of wrongful withholding; and if it is coupled with a denial of right of plaintiff's maintenance it may constitute sufficient proof of wrongful withholding to entitle the plaintiff to arrears of maintenance: *Raja Yarlagadda v. Raja Yarlagadda*, (1899-1900) L.R. 27 I. A. 151. In order to recover arrears of maintenance it is not necessary to prove demand for each year's maintenance as it became payable; *Raja Yarlagadda v. Raja Yarlagadda*, *supra*. Cf. *Ramarayulu v. Sitalakshnamma*, A.I.R. 1937 Mad. 915; *Panchakshara v. Pattammal*, A.I.R. 1927 Mad. 865.

- (n) **Charge**: In awarding maintenance to a widow against her husband's coparcener, *prima facie* the charge must be on the husband's share in the joint family property and only in exceptional circumstances a Court

6. The sum of Rs.....a month is a reasonable sum for the plaintiff's maintenance allowance, having regard to the income of the said properties, the position and status and the standard of living of the plaintiff and her deceased husband and the needs of the plaintiff for comfortable living.

7. The sum of Rs..... is due to the plaintiff for arrears of maintenance.

Particulars :

The plaintiff claims—

- (1) A declaration that she is entitled to maintenance.
- (2) Rs.....arrears of maintenance.
- (3) Future maintenance at Rs.....*per* month.
- (4) A declaration of charge on the said properties or a sufficient part thereof for the payment of such maintenance.

Note : The plaintiff ought to ask for a declaration of her right to maintenance if her right has been denied by the defendants or any of them.

may declare a charge on a larger extent of the joint family property :
Ramarayudu v. Sitalakshamma, A.I.R. 1937 Mad. 915.

- (n) **Interest :** Interest on arrears at the Court rate of interest may be allowed from the date of the decree : *Shridhar v. Sitabai*, A.I.R. 1938 Nag. 198 ; cf. *Saraswati v. Sheoratan*, (1934) I.L.R. 12 Pat. 869.
- (n) **Maintenance and bona fide transferee :** See *Akhoy Kumar v. Corpn. of Calcutta*, (1915) I.L.R. 42 Cal. 625.
- (n) **Cost :** Cf. *Shridhar v. Sitabai*, *supra* (When costs should be payable from joint family and not by any individual member).
- (n) **Limitation :** For arrears of maintenance, Art. 128, for declaration of right to maintenance, Art. 129, for enforcement of maintenance charged on immovable property, Art. 132, Sch. 1, Ind. Lim. Act.
- (n) **Effect of The Hindu Women's Right of Property Act (XVIII of 1937) as amended by Act XI of 1938 :** Sec. 3(2) provides that "When a Hindu governed by any school of Hindu law other than the Dayabhaga school or by customary law dies having at the time of his death an interest in a Hindu joint family property, his widow shall, subject to the provisions of sub-section (3), have in the property the same interest as he himself had." Sub-sec. (3) of that section provides that "Any interest devolving on a Hindu widow under the provisions of this section shall be the limited interest known as a Hindu woman's estate, provided however that she shall have the same right of claiming partition as a male owner." Sec. 4 provides that "Nothing in this Act shall apply to the property of any Hindu dying intestate before the commencement of this Act." The effect of this new enactment is that widows whose husbands died after the commencement of the Act, will not be required to file suits for maintenance. They will be entitled to file suits for parti-

DEFENCE.**398****MAINTENANCE.****Hindu Law.****DEFENCE by the surviving Coparceners of the Widow's Husband to Claim for Maintenance. (o)**

1. The properties mentioned in paragraph 2 of the plaint are the separate properties of the defendants, and the plaintiff's husband was not a coparcener with the defendants or any of them in any of the said properties at the time of his death.

2. If, which is not admitted, the plaintiff's husband was a coparcener with the defendants or any of them in any of the said properties at the time of his death, the defendants say that, since leaving her husband's residence in....., the plaintiff has been living an unchaste life (give particulars) and has forfeited her right to maintenance, if any.

Or,

The said properties are burdened with debts for which the plaintiff's husband was jointly liable with the defendants (here give particulars of debts). After payment of the said debts there will be nothing left for payment of maintenance to the plaintiff.

Or,

The defendants deny that the plaintiff made the alleged or any demand for maintenance. By not making any demand for maintenance ever since she left her husband's residence, the plaintiff induced the defendants to believe that her claim for maintenance, if any, had been abandoned and the defendants have in consequence, not set aside any portion of the annual income of the said property to meet her claim for arrears of maintenance.

3. In the alternative, the defendants say that the average annual income of the said properties is only Rs.....and the amount claimed as maintenance is excessive.

4. (*If such be the case*) That portion of the plaintiff's claim for arrears of maintenance, which is beyond 12 years of the date

tion and accounts against the defendants if the latter were in possession of the joint family properties. But widows, whose husbands died before the commencement of the Act, will have to file suits for maintenance.

- (o) This is a defence to Form No. 397. See notes under the said Form. For defence of abandonment of right to arrears of maintenance, See *Panchakshara v. Pattammal*, A. I. R. 1927 Mad. 865.

of the death of her husband is barred by the Statute of Limitations.

5. The plaintiff has got jewellery which she does not require for her personal use. The value of the said jewellery would be about Rs.....

PLAINT.

399.

MAINTENANCE.

Hindu Law.

CLAIM by Wife against her Husband for Maintenance. (p)

1. The plaintiff is the wife of the defendant to whom she was married on 19....

2. The defendant is a profligate youth addicted to drink.

3. In 19..., the defendant kept a concubine in his house and thereafter began habitually to ill-treat and neglect the plaintiff by refusing to render her conjugal rights and by confining her in a room from time to time and for hours together.

(p) **Wife's right of maintenance:** The maintenance of wife is a matter of personal obligation arising from the very existence of the relation and quite independent of the possession by the husband of any property, ancestral or self acquired: *Jayanti v. Alametu*, (1904) I. L. R. 27 Mad. 45; *Appibai v. Khimji Cooverji*, (1936) I. L. R. 60 Bom. 455. If he neglects or refuses to maintain his wife, which he is legally bound to do, she would have no option but to have recourse to law: *Hanumayamma v. Official Receiver*, A. I. R. 1910 Mad. 749. The first duty of a Hindu wife, however, is to submit to her husband's authority and to stay under his roof and not to quit his house without any adequate excuse or justifying cause. If, however, the husband by reason of his misconduct, or cruelty in the sense in which that term is used by the English Matrimonial Courts, or by his refusal to maintain her, or for any other justifying cause, makes it compulsory or necessary for her to live apart from him, he must be deemed to have deserted her, and she will be entitled to separate maintenance and residence: *Bai Appibai v. Khimji Cooverji*, *supra*. Thus, where a husband kept a Mahomedan woman and by such conduct compelled the wife, under her religious feelings, to leave the house, it was held that the husband was bound to give maintenance to his wife: *Gobind Persad v. Dowlut*, (1870) 14 Suth. W. R. 451. The wife is entitled to maintenance when the husband habitually treats her with cruelty and such violence as to create the most serious apprehension for her personal safety: *Matangini v. Jogendra*, (1892) I. L. R. 19 Cal. 84; *refd. to in Ram Bharosey v. Sheo Dei*, (1939) I. L. R. 14 Luck. 366. It is not necessary for her to prove that she has been subject to repeated violence; mere delay in bringing a suit for maintenance is no cause

4. On, the defendant, without any justification, beat the plaintiff violently with a stick and forcibly turned her out of his house, whereupon she was compelled, as her parents were not alive, to come over to the house of....., a relative, with whom she has been staying since.

5. The defendant owns several house properties in and outside, yielding an average annual income of Rs.....

6. The defendant has not paid the plaintiff any maintenance allowance since she was turned out by him.

7. The sum of Rs. a month is a reasonable allowance for the plaintiff's maintenance, having regard to the income of the defendant and his position, status and mode of living and the needs of the plaintiff for comfortable living.

8. The plaintiff cannot continue to live in the house of her said relative for any length of time and she has not any other relative with whom she can live.

The plaintiff claims—

(1) Payment of maintenance every month at Rs.

(2) Rs. arrears of maintenance calculated at the said rate from up to the date of suit.

(3) Provision for her residence at one of the houses owned by the defendant.

for its dismissal: *Ude Singh v. Mt. Daulat Kaur*, (1935) I. L. R. 16 Lah. 892.

(p) **Amount of maintenance** : It is an error to suppose that it is to a starving maintenance that a wife is entitled and that she can claim only such amount, if any, which will be left as residue after all the comforts of the husband and his family are assured. She gets the maintenance as of right and gets it on such a computation as would enable her to live consistently with her position as the wife of her husband with the same degree of comfort and reasonable luxury as she would have in his house for the deprivation of which, not she but her husband and his family were responsible: *Gajendra v. Sulochana*, (1938) 68 C. L. J. 559.

(p) **Right to arrears** : A Hindu wife whose residence in her husband's house has been made impossible for no appreciable fault of hers, and who resides with her father, is entitled to arrears of maintenance from the date of her leaving her husband's residence, although she does not prove that she or her father has incurred debts on account of her maintenance: *Gajendra v. Sulochana, supra*.

(p) **Unchastity of wife** : Under the Hindu law, a wife is not entitled to maintenance from her husband if at the time of the suit she is living in adultery and persists in her vicious course in life: *Debi Saran v.*

PLAINT.**400.****MAINTENANCE.****Mahomedan Law.****CLAIM by Wife against her Husband for Maintenance. (q)**

1. The parties are Mahomedans of the Shafi sect.
2. The plaintiff was on the.....day of.....19..., married to the defendant at.....
3. After the said marriage the defendant cohabited with the plaintiff until....., when he deserted her and has not since contributed anything towards her maintenance. (Give particulars of desertion).
4. The sum of Rs.....is a reasonable sum for the plaintiff's maintenance.

The plaintiff claims—

- (1) Rs.....arrears of maintenance from..... up to the date of suit.
- (2) Rs.....*per* month as maintenance during the continuance of the marriage.

DEFENCE.**401.**

Daulata Shuklain, (1917) I. L. R. 39 All. 234; *Kishanji v. Lakshmi*, A. I. R. 1931 Bom. 286. If the wife completely renounces her immoral course of conduct, her husband is liable to pay a starving allowance. But if the unchaste wife wishes to enforce her right to bare maintenance against her husband on the ground that she has ceased to live a life of unchastity and returned to the path of virtue, that case should be definitely pleaded and supported by definite evidence: *Jeera Ammal v. Ranganatha*, (1939) 2 M. L. J. 294.

(p) **Note** : On other points, see notes under Form No. 397.

(q) **Claim for maintenance** : If the husband neglects or refuses to maintain his wife without any lawful cause, the wife may sue him for maintenance. According to the Shafi school of Mahomedan law, wife is entitled to recover from her husband arrears of maintenance: *Mahamed Haji v. Kalimabi*, (1918) I.L.R. 41 Mad. 211. According to the Hanafi law she is not entitled to arrears of maintenance but only to future maintenance during continuance of marriage: *Abdool Futteh Moulvie v. Zabunnessa Khatun*, (1881) I. L. R. 6 Cal. 631, folld. in *Mt. Ismabai v. Umar Md. Sidik*, A.I.R. 1930 Sind 11. An ante-nuptial agreement providing for maintenance to the wife in the event of disagreement is not against public policy and is enforceable: *Mt. Hamidan v. Md. Umar*, A. I. R. 1932 Lah. 65 (2); *Ahmad Kasim v. Khatun Bibi*, (1932) I. L. R. 59 Cal. 833; *Abbas Ali v. Nazemunessa* (1938-39) 43 C.W.N. 1059.

MAINTENANCE.**Mahomedan Law.****DEFENCE to a Claim by Wife for Maintenance. (r)**

1. The defendant admits his marriage with the plaintiff.
2. On or about19..., the plaintiff voluntarily left the defendant and has since been staying with her parents and has refused to perform her marital duties.
3. The defendant has always been ready and willing to maintain the plaintiff upon condition of her living with him.
4. The claim for maintenance is excessive.
5. Save what is hereinbefore expressly admitted, the defendant denies all other the allegations in the plaint.

PLAINT.**402.****MAINTENANCE.****Burmese Buddhist Law.****CLAIM by Wife against Husband for Maintenance. (s)**

1. The parties were and are Burmese Buddhists.
2. The plaintiff was on the day of19..., married to the defendant at, and thereafter they lived together as husband and wife until....., when they separated on the defendant contracting a second marriage. They have since been living separately.
3. Since their separation aforesaid the defendant has not contributed anything to the maintenance of the plaintiff.

The plaintiff claims—

Rs.....a month for maintenance.

PLAINT.**403.**

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- (r) **Defence of voluntary desertion by wife :** See *Mahmud Ali v. Mt. Ghulam Fatima*, A.I.R. 1935 Lah. 902.
- (r) **Defence of willingness to maintain wife :** See *Md. Axixullah v. Abdul Halim*, A.I.R. 1935 Oudh 285.
- (r) **Other defences :** (1) Disobedience of the wife : A (the wife) v. B (the husband), (1897) I. L. R. 21 Bom. 77, 82, unless such disobedience is a result of refusal of payment of prompt dower : Baillie 442 ; (2) that the wife is too young for matrimonial intercourse : Baillie 441.
- (s) **Reference :** *Ma Saw Nwe v. U Aung Soe*, A.I.R. 1939 Rang. 223 (Under Buddhist law there is a positive duty cast on the husband to maintain his wife. Hence, a suit for maintenance by Burmese Buddhist wife against her husband, who is living separately from her would lie. But in such a suit a claim for arrears of maintenance cannot be sustained).

MALICIOUS ABUSE OF PROCESS.**Malicious Arrest.****CLAIM for Damages for Malicious Arrest. (t).**

1. In Suit No..... of 19..., on the file of the Small Cause Court of, the defendant obtained a decree against the plaintiff for Rs. 200/-, payable in equal monthly instalments of Rs. 20/-, the first payment to be made on..... and the subsequent payments by the of each subsequent month.

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- (t) **Reference :** *Sudhangshu Sekhar v. Hari Charan*, (1931-32) 36 C.W.N. 809 (*Per Pankridge J.*, at p. 814, 815, "When one party to a suit makes a statement to the Court without reasonable or probable cause for the purpose of obtaining a more drastic order against his opponent than would otherwise be passed, his conduct amounts in law to malice..... A Court may have ample jurisdiction under O.XXI, r. 30, C.P. Code to issue a warrant of arrest without previously serving a notice on the judgment debtor..... but I do not think it is necessary for a plaintiff who brings a suit in respect of an illegal process to show that the order of which he complains is in the circumstances of the case wholly wrong or without jurisdiction.....The allegations of the plaint are allegations appropriate to support an action for damages for abuse of process analogous to an action for malicious prosecution.....It is not necessary to aver and prove that the proceedings terminated in the plaintiff's favour as in an action for malicious prosecution, because this is not a case in which the proceedings are capable of terminating in plaintiff's favour in the sense in which an acquittal in a criminal prosecution can be regarded as a termination in favour of the accused." Cf. *Velji Bhimsey & Co. v. Bachoo*, (1925) I. L. R. 48 Bom. 691 (Where a judgment-creditor, who had obtained a decree against the estate of a deceased person in the hands of the defendants, caused and procured the arrest of one of the defendants in execution of his decree, it was held that the warrant of arrest was bad and illegal and the plaintiff was entitled to damages for wrongful arrest.), distd. in *Madan Lall v. Lakshmi Narain*, A.I.R. 1939 Pat. 13 (in which the plaintiff was held not entitled to damages because the decree as made against him was silent as to whether it should be executed only against the property or assets in the hands of the plaintiff and in such circumstances the judgment-creditor may execute the decree by proceeding against the person of the judgment-debtor and if he does so however maliciously, he cannot be said to be actuated by any unreasonable or improper conduct so as to found a suit for damages for malicious arrest. Where the decree, still exists and has never been set aside, in order to succeed in an action for malicious arrest the plaintiff has to show in the first instance that the original civil action out of which the alleged injury arose has been decided in his favour and, secondly, that the defendant maliciously and without reasonable or probable cause procured his arrest and then

2. Thereafter the defendant on....., maliciously and without reasonable or probable cause, made a false affidavit in support of an application for execution of the said decree by the arrest and detention in civil prison of the plaintiff and procured an order from the said Court under O. XXI, r. 37 of the Civil Procedure Code, dated... .., for the issue of a warrant for the plaintiff's arrest instead of a notice, and in execution of the warrant issued by the said Court, maliciously and without reasonable or probable cause procured the plaintiff to be arrested by the bailiff of the Court on the 19..., at the office of the company where the plaintiff was employed as a clerk. The same day the plaintiff obtained his release by payment to the bailiff of the whole of the decretal amount.

3. The said affidavit was false in the following particulars :

(a) It was stated in the said affidavit that the plaintiff had made default in payment of the first instalment under the decree, whereas the plaintiff had paid the first instalment to the defendant on

(b) It was stated in the said affidavit that the plaintiff was likely to abscond or leave the local limits of the jurisdiction of the Court unless a warrant instead of a notice were issued against him, whereas the plaintiff was an employee of the said company and, in, he had no intention of absconding or leaving the jurisdiction of the Court.

4. The plaintiff came to know about the steps taken by the defendant for his arrest and about the contents of the said affidavit on

5. By reason of the facts hereinbefore complained of, the plaintiff has been greatly injured in his credit and reputation.

The plaintiff claims—

Rs.....damages.

he, of course, has to establish the injury and the damage as a result of his arrest.), follg. *Raj Chunder v. Shama Soondari*, (1879) I.L.R. 4 Cal. 583. Cf. *Ram Kishan v. Basdev Lal*, A.I.R. 1934 Lah. 170 (Damages cannot be awarded to witnesses against whom warrants of arrest are wrongfully served).

(t) Arrest—what amounts to : An arrest of a person by a duly authorised officer is accomplished if the officer lawfully touches him : *U Thwe v. A Kim Fee*, (1929) I. L. R. 7 Rang. 598. Cf. *Berry v. Adamson*, (1827) 6 B. & C. 528.

DEFENCE.**404.****MALICIOUS ABUSE OF PROCESS.****Malicious Arrest.****DEFENCE to a Claim for Malicious Arrest.**

1. The decree mentioned in paragraph of the plaint provided that in default of payment of any one instalment, the plaintiff would be entitled to execute the decree for the entire balance for the time being remaining due.

2. The plaintiff made default in the payment of the first instalment payable in terms of the said decree.

3. In 19 ..., the plaintiff sent away his wife and children to and he admitted to one A. B. that he himself would soon give up his Calcutta residence and join them. A. B. verbally communicated the said fact to the defendant on The defendant therefore had reason to think that he (the plaintiff) entertained the intention of leaving the local limits of the jurisdiction of the Court.

4. The plaintiff is involved in debts and he has got no immovable properties within the jurisdiction of the Court. The defendant reasonably apprehended that if the plaintiff left the jurisdiction of the Court, the defendant would not be able to realise his dues under the decree.

5. The defendant denies that the plaintiff was arrested by the bailiff. The said bailiff did not touch the plaintiff's person but intimated to him the purpose of his visit, whereupon the plaintiff paid him the amount of the decree and the bailiff upon receiving such payment did not arrest him.

6. If, which is not admitted, the plaintiff was arrested by the

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- (t) **Cause of action:** To claim damages it is essential that the arrest is procured maliciously and without reasonable or probable cause: *U Thwe v. A Kim Fee*, (1929) I. L. R. 7 Rang. 598. If there be reasonable or probable cause, no malice, however distinctly proved, will make defendant liable; but when there is no reasonable or probable cause, malice is to be inferred from the facts proved the term malice in this form of action is not to be considered in the sense of spite or hatred against an individual, but of *malus animus*, and as denoting that the party is actuated by improper and indirect motives: *Per Parke J.*, in *Mitchell v. Jenkins*, (1833) 5 B. & Ad. 588.

- (t) **Limitation:** In a suit for compensation for malicious arrest by a Police Inspector, the Article applicable is Art. 2 and not Art. 36 of the Ind. Lim. Act: *Sharifut Hasan v. Lachmi*, A. I. R. 1932 All. 16.

bailiff, the defendant denies that he without reasonable or probable cause procured the said order for his arrest or without reasonable or probable cause procured him to be arrested by the bailiff or that by doing what he did he acted with any malice towards the plaintiff.

7. Save what is hereinbefore expressly admitted the allegations in the plaint are denied.

PLAINT.

405.

MALICIOUS ABUSE OF PROCESS.

Malicious Temporary Injunction.

CLAIM for Damages for a Temporary Injunction wrongfully obtained. (u)

1. In 19 ..., the plaintiff began to construct a building on his land, premises No. Street in, for purposes of his business. *

2. The defendant, on 19 ..., maliciously and without reasonable or probable cause commenced a suit against the plaintiff in this Court (Suit No. of 19 ...) for a declaration of title to, and for recovery of possession of, the said land and, on 19 ..., maliciously and without reasonable or probable cause procured an order of temporary injunction restraining the plaintiff from going on with the building operation on the said land until the disposal of the said suit, as a result whereof the plaintiff was compelled to stay further progress of the construction of the building.

3. The said suit was heard on the merits and dismissed on 19..., and the appeal preferred by the defendant from the said decree (Appeal No..... of 19...) was dismissed on 19...

- (u) **Cause of action :** In *Bhut Nath v. Chandra Benode*, (1912) 16 C. L. J. 34. Mookerjee J., held that where the defendants have unlawfully interfered with the exercise of property rights by the plaintiff, they must be held to have committed an act in the nature of trespass to property, and are consequently liable in an action for trespass and it is not necessary for the plaintiff to prove any malice or want of reasonable or probable cause. The principle of this decision seems to have been affirmed in a Full Bench case of the Calcutta High Court : *Norendra v. Bhusan*, (1920) 31 C. L. J. 495. In a later case of the said High Court, *Har Kumar v. Jagat Bandhu*, (1926) I. L. R. 53 Cal. 1008, it was held that a suit for damages for wrongfully obtaining a temporary injunction is maintainable but their Lordships B. B. Ghose and Crammie, JJ., did

4. By reason of the premises the plaintiff was deprived of the use of his property and some of the building materials collected by him on the said land deteriorated and partially disappeared and the plaintiff was injured in his credit and has suffered damage.

Particulars of special damage :

The plaintiff claims—

Rs..... damages.

PLAINT.

408.

MALICIOUS PROSECUTION.

Malicious Civil Proceedings.

CLAIM for Damages for a Malicious Petition to adjudicate the Plaintiff an Insolvent. (v)

1. The plaintiff is a banker and money-lender carrying on business in Rangoon.

not express any opinion as to what the plaintiff must prove in order to succeed in such a suit. In a still later case of the said High Court, *Imperial Tobacco Co. v. A. Bonnan*, (1927) 46 C. L. J. 455, 481, Rankin C. J. expressed his dissent from the view expressed in *Bhut Nath v. Chandra Benode*, (1912) 16 C. L. J. 34, that apart from malice or want of probable cause a plaintiff can recover damages in an independent suit upon mere proof that an injunction was granted to restrain him from doing what has since been held to be within his rights. The case in *Bhut Nath v. Chandra Benode*, *supra* has been considered in *Rama Row v. Somasundaram*, (1928) I. L. R. 51 Mad. 642, in which it has been held that an action does not lie on the footing of trespass on an injunction wrongfully issued by a Court against the party who moved the Court for the injunction, the injunction not being without jurisdiction and there being no want of malice or want of reasonable or probable cause. *Bhut Nath's* case has, however, been followed by the Lahore High Court in *Evans v. Arthur Minok*, A. I. R. 1922 Lah. 303, in which case it has been held that a suit for compensation in respect of tortious temporary injunction lies and if it is necessary to prove malice, such malice can be inferred on proof that there were no sufficient grounds for an application for temporary injunction and that the plaintiff has sustained some substantial injury. In this state of authorities, it is submitted, that the plaintiff ought to, if he can, plead malice and want of reasonable or probable cause.

- (u) **Limitation :** For compensation for injury caused by an injunction wrongfully obtained, the period of limitation is, under Act 42, Ind. Lim. Act, 3 years from the date when the injunction ceases : *Mohini Mohan v. Surendra*, (1915) I. L. R. 42 Cal. 550.
- (v) **Cause of action and place of suing :** The dismissal of the petition and damage to the plaintiff's reputation and to his business are parts of the

2. On 10th October, 19..., the defendants maliciously and without reasonable or probable cause filed a petition in the District Court of under the Provincial Insolvency Act, praying that the plaintiff might be adjudicated insolvent.

3. The plaintiff contested the said petition and the same was dismissed on 19...

4. In consequence of the filing of the said petition the plaintiff was greatly injured in his credit and reputation and was hampered and injured in the transaction of his business and incurred expenses and thereby suffered damages.

Particulars of special damage :

The plaintiff claims—

Rs.....damages.

PLAINT.

407.

MALICIOUS PROSECUTION.

Malicious Civil Proceedings.

cause of action : *Murugappa Chettyar v. Galliera*, (1935) I. L. R. 13 Rang. 330. The commencement of proceedings in bankruptcy against a trader, or the analogous process of a petition to wind up a company, is in itself a blow struck at the credit of the person or company whose affairs are thus brought in question : *Quartz Hill Gold Mining Co. v. Eyre*, (1883) 11 Q. B. D. 674 (*Per* Bowen, L. J., "In the present day and according to our present law the bringing of an ordinary action however maliciously and however great the want of reasonable and probable cause, will not support a subsequent action for malicious prosecution. This general rule is no doubt subject to certain exception in case where proceedings involve either scandal to reputation or the possible loss of liberty to the person. and when proceedings of that kind have been taken falsely and maliciously without reasonable and probable cause, then in as much as an injury has been done, the law gives a remedy. In its very nature the presentation or the prosecution of an indictment involves damage, which cannot be afterwards repaired by the failure of the proceedings, to the fair fame of the person assailed, and for that reason, as it seems to me, the law considers that to present and prosecute an indictment falsely and without reasonable or probable cause, is a foundation for a subsequent action for a malicious prosecution."), *refd.* to in *Mohini Mohan v. Surendra*, (1915) I. L. R. 42 Cal. 550, 554, *appld.* to case of malicious prosecution under the Legal Practitioners' Act, in *Nityanand v. Babu Ram*, A. I. R. 1937 All. 506, on appeal, *Babu Ram v. Nityanand*, I. L. R. 1939 All. 224, and to a malicious stay order whereby the plaintiff was prevented from carrying on his business, in *Ah Fong v. Nam Kee*, (1934) I. L. R. 12 Rang. 289.

**CLAIM for Damages for Malicious Petition to wind up
a Company. (w)**

1. The plaintiff company (hereinafter called 'the company') is a company incorporated under the provisions of the Indian Companies Act VII of 1913.

2. Before the time material hereto the defendant held 200 shares of Rs. 10 each in the capital of the company.

3. The defendant, on 19..., after he had sold his said shares (through certain brokers) to one D. D. and the company had registered the transfer, falsely, maliciously and without reasonable or probable cause presented a petition to this Court to wind up the company.

4. The said petition was false in the following particulars :

(i) It was alleged in the said petition that the company had suspended its business for a whole year, whereas, at the time of presenting the petition the company was an existing and going concern and had not suspended its business as alleged or at all.

(ii) It was alleged in the said petition that the company was unable to pay its debts, whereas, at the time of presenting the petition, the company had valuable property and it had sufficient assets to meet its current, contingent and possible liabilities and it had never failed to pay any of its debts as alleged or at all.

5. At the time of presenting the petition the defendant was not a shareholder of the company.

6. Upon discovering that the transfer of his shares had been registered by the company before he presented the petition, the defendant gave notice to the company that the petition would be withdrawn, and it was ultimately dismissed with costs on the 19...

7. By the presentation of the petition the company was greatly injured in its credit and reputation.

The plaintiff company claims—

Rs..... damages.

PLAINT.

408.

MALICIOUS PROSECUTION.

(w) **Reference :** *Quartz Hill Gold Mining Co. v. Eyre*, (1883) 11 Q. B. D. 674,
See notes under Form No. 406,

Malicious Criminal Proceedings.

CLAIM for Damages for Malicious Prosecution of the Plaintiff in a Criminal Court. (x)

1. The plaintiff carries on business in petrol lamps in Calcutta.

2. The defendant, on the 19..., maliciously and without reasonable or probable cause, preferred before the sub-divisional magistrate of Dhanbad a complaint against the plaintiff charging him with having sold and delivered to him (the defendant) as new an old lamp patched up and revarnished, and procured the said magistrate to issue a warrant for the arrest of the plaintiff and caused the plaintiff to be arrested on the 19..., at and detained in a lock-up until, and to be sent for trial

(x) **Place of suing :** Cf. *Alexander Brault v. Indrakrishna*, (1933) I. L. R. 60 Cal. 918.

(x) **Malicious prosecution—what the plaintiff must prove :** See 'Particulars', Pt. II, Ch. XX, pp. 496-498 ; *Mauji Ram v. Chaturbhuj*, A. I. R. 1939 P. C. 225 ; *Gobind Ram v. Kaju Ram*, A. I. R. 1939 Lah. 504 ; *Issardas v. Assudomal*, A. I. R. 1940 Sind. 90 ; *Fateh Chand v. Kunj Behari*, A. I. R. 1940 Oudh. 320. The definition of "prosecution" is not limited to prosecution before a magistrate of Criminal Court. Thus, an application for sanction under S. 195, Cr. P. C. where notice is issued to the defendant to show cause, is malicious prosecution : *Robindra v. Jogendra*, (1928-29) 33 C. W. N. 79, so also proceedings taken under S. 476, Cr. P. C. : *Nagarmull v. Jhabarmull* (1933) I. L. R. 60 Cal. 1022.

(x) **Parties to suit :** See "Particulars", Pt. II, Ch. XX, pp. 496-498 ; *Raghubar Dayal v. Kallu*, A. I. R. 1940 All. 231. (The defendant to be liable must be substantially responsible for the prosecution) ; *Issardas v. Assudomal, supra* (person instigating false and malicious prosecution is liable. It matters little that he was too careful to come as a witness in the box).

(x) **Nature of damages supporting action :** An action for malicious prosecution can be supported by any one of three sets* of damages : Firstly, damage to a man's fame, as if the matter whereof he is accused be scandalous ; secondly, damages to his person, as where a man is put in danger to life, limb or liberty ; thirdly, damage to his property, as where he is forced to expend money in necessary charges to acquit himself of the crime of which he is accused. In all such cases, it must be proved that there was legal damage suffered as a consequence of the institution of these proceedings : *Narayana Muduli v. Peria Kalathi*, A. I. R. 1939 Mad. 783. Cf. *Ali Mohamed v. Zakir Ali*, (1931) I. L. R. 53 All. 771, 773 (in which Bennet J. held that it is only the two latter heads of damages which are recognised in India).

(x) **Special damages :** Cost necessarily incurred by plaintiff in defending himself in the criminal charge can be recovered : *Bunnomati v. Hurry-*

on charges of cheating under Sections 417 and 420 of the Indian Penal Code.

3. The plaintiff was tried on the said charges and acquitted on 19....

4. The plaintiff in consequence has been greatly injured in his character and reputation and had to incur expenses in defending himself.

Particulars of special damages.

The plaintiff claims—

Rs. damages.

class, (1832) I. L. R. 8 Cal. 710; *Vithoba v. Bhinai*, A. I. R. 1925 Nag. 216. But where it is found that the plaintiff has not spent anything towards the expense of the defence the amount being paid by another person, and there being no liability to repay the amount so provided, no damages can be awarded: *Oyasiram v. Kishore*, A. I. R. 1930 All. 165.

- (x) **Malice and absence of reasonable and probable cause:** In deciding whether there is absence of reasonable and probable cause for the prosecution, the Court can only have regard to the facts known at the time of the presentation of the complaint. Malice may be implied when there is absence of reasonable and probable cause, but it does not necessarily follow from the fact that proceedings have been launched without reasonable and probable cause that the person launching them did in fact act maliciously. Whether malice should be implied will be depending on the circumstances. It would be a proper inference if it is shown that the defendant acted recklessly: *Abubucker Ebrahim v. M. K. Javery*, A. I. R. 1940 Mad. 683. The presence or absence of reasonable and probable cause is a question relating to the state of the mind of the accuser and has to be inferred from the facts of each particular case. The question whether the inference from certain facts is correct or not is a question of law. Although in many cases the finding that the complainant's case was false may lead to a presumption that the complainant had no reasonable and probable cause for bringing the complaint leaving him in an action of malicious prosecution to rebut that presumption, in certain other cases such presumption may not arise at all merely upon the finding that the case was a false one: *Fateh Chand v. Kunj Behari*, A. I. R. 1940 Oudh. 320. When a prosecutor launches a prosecution based upon a statement which he knows to be untrue, and for which there is no reasonable and probable cause, that very circumstance would raise the inference that there was malice in his instituting the prosecution: *Daw Yon v. U Min Sin*, A. I. R. 1940 Rang. 230.

- (x) **Criminal judgment—as evidence:** The judgment of the Criminal Court is admissible only for showing that the proceedings terminated in favour of the plaintiff, but it is not evidence that the prosecution was false

PLAINT.**409.****MALICIOUS PROSECUTION.**

Malicious Criminal Proceedings.

CLAIM for Damages for Malicious Prosecution of the Plaintiff in a Criminal Court. (y)

(Form No. 31, Appendix A, C. P. Code).

A. B., the above-named plaintiff, states as follows :—

1. On the day of 19 , the defendant obtained a warrant of arrest from.....(a Magistrate of the said city, or as the case may be) on a charge of.....and the plaintiff was arrested thereon, and imprisoned for..... (days, or hours, and gave bail in the sum of.....rupees to obtain his release).

2. In so doing the defendant acted maliciously and without reasonable or probable cause.

3. On the... ..day of.....19..., the Magistrate dismissed the complaint of the defendant and acquitted the plaintiff.

4. Many persons, whose names are unknown to the plaintiff, hearing of the arrest, and supposing the plaintiff to be a criminal, have ceased to do business with him ; or in consequence of the said arrest, the plaintiff lost his situation as clerk to one E.F. ; or in consequence the plaintiff suffered pain of body and mind, and was prevented from transacting his business, and was injured in his credit, and incurred expense in obtaining his release from the said imprisonment and in defending himself against the said complaint.

and malicious, for a Civil Court must, in its own proceedings form its own judgment and cannot rely upon the reason and opinions of the magistrate for his decision : *Issardas v. Assudomal*, A. I. R. 1940 Sind. 90 ; *Mauji Ram v. Chaturbhuj* A. I. R. 1936 All. 537 on appeal, A.I.R. 1939 P. C. 225.

(x) **Malicious prosecution and false imprisonment—distinction between :**
See notes under Form No. 302, pp. 952, 953.

(x) **Limitation :** Under Art. 23, Ind. Lim. Act, one year from the date when the plaintiff is acquitted or the prosecution is otherwise terminated. The words "when the plaintiff is acquitted" cannot be divorced from the words "or the prosecution is otherwise terminated". If the acquittal is followed by other proceedings by way of revision etc., the prosecution is terminated not by the acquittal but by the order passed in the subsequent proceedings : *Kulasekara v. Tholasingam*, I. L. R. (1938) Mad. 675 ; *Bhagat Raj v. Ml. Gurai*, I. L. R. (1938) All. 89.

(y) See notes under Form No. 408.

5. (Facts showing when the cause of action arose and that the Court has jurisdiction.)

6. The value of the subject-matter of the suit for the purpose of jurisdiction is.....rupees and for the purpose of Court-fees is ...rupees.

PLAINT.

410.

MALICIOUS PROSECUTION.

Milicious *Quasi*-criminal Proceedings.

CLAIM for Damages for Malicious Prosecution under the Legal Practitioners' Act. (z)

1. The plaintiff is a mukhtear practising at in the district of.....

2. On.....19..., the defendant maliciously and without reasonable or probable cause made an application to the High Court of..... under Sec. 30, Legal Practitioners' Act, praying that action should be taken against the plaintiff for professional misconduct. The said application was supported by an affidavit sworn by the defendant alleging that (here specify the alleged misconduct).

3. The High Court sent the case to the District Judge of..... for enquiry and report, and the said learned Judge conducted an enquiry and reported that the plaintiff was innocent, whereupon the High Court dismissed the application on.....

4. In consequence of the said proceedings the plaintiff was greatly injured in his credit and reputation.

The plaintiff claims—

Rs..... damages.

DEFENCE.

411.

MALICIOUS PROSECUTION.

- (z) **Reference :** *Nityanand v. Babu Ram*, A I.R. 1937 All. 506 (*Per Harris J.*, "Proceedings under the Legal Practitioners' Act are very similar to criminal proceedings and do inevitably involve a head of damage which is stated in *Quartz Hill Consolidated Gold Mining Co. v. Eyre*, (1883) 11 Q. B.D. 674 to be sufficient to maintain an action for malicious institution of proceedings other than criminal. ... I hold that the institution of proceedings under the Legal Practitioners' Act maliciously and without reasonable and probable cause affords the person proceeded against a cause of action if he is ultimately acquitted of the charges brought against him."), on appeal, *Babu Ram v. Nityanand*, I. L. R. (1939) All. 224.

Milicious Criminal Proceedings.**DEFENCE to a Claim for Malicious Criminal Prosecution. (a)**

1. The defendant denies that he prosecuted the plaintiff.
2. If, which is not admitted, the defendant prosecuted the plaintiff, the defendant denies that he caused the plaintiff to be arrested or imprisoned.
3. The defendant denies that he had not reasonable or probable cause for preferring the said charge (or causing the said charge to be preferred) against the plaintiff and for causing the said proceedings to be taken against the plaintiff and that in so doing he acted with malice.
4. The defendant denies that the plaintiff was acquitted or that the alleged prosecution otherwise terminated in his favour.
5. The defendant denies that the plaintiff suffered the alleged or any special damage. Alternatively, the said damages are not the direct consequence of the plaintiff's prosecution.
6. The suit is not brought within one year from the date of the alleged acquittal or the alleged termination of the prosecution in plaintiff's favour.

PLAINT.**412.****MARRIAGE.****Dissolution of Marriage : Mahomedan Law.****CLAIM by Wife for Dissolution of Marriage. Ground : Husband's Impotence. (b).**

1. The plaintiff was on the day of married to the defendant under Muslim law at

- (a) **Absence of reasonable and probable cause :** The onus is on the plaintiff to establish absence of reasonable or probable cause, and it is not for the defendant to prove that he had reasonable and probable cause : *Abdul Shakur v. Lipton & Co.*, A. I. R. 1924 Lah. 1 ; *Taharat Karim v. Abdul Khaliq*, A.I.R. 1938 Pat. 529 ; *Gobind Ram v. Kaju Ram*, A.I.R. 1939 Lah. 504 ; *Mauji Ram v. Chaturbhuj*, A.I.R. 1939 P.C. 225. The defendant is therefore not required to plead facts showing that he had reasonable and probable cause for prosecuting the plaintiff.
- (b) **Grounds for dissolution of marriage :** Dissolution of Muslim Marriages Act VIII of 1939. Where dissolution is sought on the ground of husband's impotence, the Court shall before passing a decree, on application by the husband, make an order requiring the husband to satisfy the Court within a period of 1 year from the date of such order that he has ceased to be impotent, and if the husband so satisfies the Court within such period, no decree shall be passed on the said ground : Sec. 2 (c) of the said Act.

2. The defendant was impotent at the time of the marriage and continues to be so.

The plaintiff claims—

That the marriage of the plaintiff with the defendant be dissolved.

PLAINT.

413.

MARRIAGE.

Dissolution of Marriage : Mahomedan Law.

CLAIM by Wife for Dissolution of Marriage. Ground :

Husband's Whereabouts not known. (c).

1. The plaintiff was on the day of married to the defendant C.D. under Muslim law at

2. The whereabouts of the defendant C.D. have not been known for a period of 4 years. ,

3. The defendant A.D. is the paternal uncle and the defendant B.D. is the brother of the defendant C.D.

4. The following are the names and addresses of the persons who would have been the heirs of the said C. D. under Muslim law if he had died on the date of the filing of this plaint :—

The plaintiff claims—

That her marriage with the defendant C.D. be dissolved.

-
- (b) **Impotence—definition of :** An impotent person is defined by the Mahomedan law as one who is unable to have connection with a woman, though he has the natural organs ; and a person who is able to have connection with an enjoyed woman, but not with a virgin, or with some women but not with others, whether the disability be by reason of disease or weakness, or original constitution, or advanced age, or enchantment, is still to be accounted impotent with respect to her with whom he cannot have connection : *Mt. Altafan v. Ibrahim*, A.I.R. 1924 All. 116.
- (b) **Limitation :** Under Mahomedan law marriage is a civil contract and husband's impotency is a continuing breach of contract of marriage within the meaning of Sec. 23, Lim. Act. Hence a suit by wife for dissolution of her marriage with her husband on the ground that he was impotent at the time of marriage, and at the date of the suit he was still unable to perform the sexual act is not capable of being barred by limitation : *Sahibzadi v. Abdul Ghafoor*, A.I.R. 1939 Lah. 454.
- (c) **Grounds for dissolution of marriage :** That the whereabouts of the husband have not been known for a period of 4 years is a ground for dissolution of marriage under the Dissolution of Muslim Marriages Act VIII of 1939, Sec. 2. By Sec. 3 (a) the names and addresses of the persons who would have been the heirs of the husband under Muslim law, if he

PLAINT.**414.****MARRIAGE.**

Dissolution of Marriage : Mahomedan Law.

CLAIM by Wife against Husband for Dissolution of Marriage.

Ground : La'an (False Accusation of Adultery). (d)

1. The parties are Mahomedans.
2. The plaintiff was on the day of 19..., married to the defendant under the Muslim law at and the marriage is still subsisting.
3. In 19..., the plaintiff with the knowledge and consent of the defendant came to live with her parents at and while she was there the defendant, on 19..., falsely preferred a complaint under Sec. 498 of the Indian Penal Code before the Sub-divisional Magistrate of against one M. H. charging him with having enticed away the plaintiff with intent that she might have illicit intercourse with him and falsely alleging that he was committing adultery with the plaintiff.

The plaintiff claims—

That her marriage with the defendant be dissolved.

PLAINT.**415.****MARRIAGE.**

Dissolution of Marriage : Mahomedan Law.

CLAIM by Hindu Wife converted to Islam for Dissolution of Marriage. (d₁).

had died on the date of the filing of the plaint, shall be stated in the plaint; (b) notice of the suit shall be served on such persons and (c) such persons shall have the right to be heard in the suit: Provided that paternal uncle and brother of the husband, if any, shall be cited as parties even if he or they are not heirs.

- (d) **La'an or imprecation** : A Mahomedan wife is entitled to bring a suit for divorce and obtain a decree for dissolution of marriage on the ground that her husband has falsely charged her with adultery : *Zafar Husain v. Ummat-ur-Rahaman*, (1919) I. L. R. 41 All. 278; *Khatijabibi v. Umarsaheb*, (1928) I. L. R. 52 Bom. 295.
- (d) **Remedy** : The proper procedure for dissolution of marriage is not by a mere application but by filing a suit : *Kabil Gazi v. Magdari Bibi*, (1933) 57 C. L. J. 106; *Ayesha Bibi v. Abdul Gani*, (1934) 59 C. L. J. 466. Cf. The Dissolution of Muslim Marriages Act (VIII of 1939), S. 2 (ix) under which such a suit would be maintainable.
- (d₁) **Ground for dissolution** : If one of two married persons, not Muslim,

1. On 19..., the plaintiff and the defendant, both then Hindus, were married to each other, in accordance with Hindu rites.

2. In 19..., the plaintiff embraced the Mahomedan faith and, on 19..., she verbally (or, in writing, as the case may be) invited the defendant to embrace that faith.

3. On 19..., the defendant wrote to the plaintiff saying that he would not embrace Islam.

The plaintiff claims —

That the said marriage be dissolved.

PLAINT.

416.

MARRIAGE.

Mahomedan Law.

CLAIM by Husband for Damages for enticing away his Wife. (e)

1. The plaintiff was on the day of 19..., married to the defendant No. 1 under the Muslim law at

embraces Islam, Islam is to be presented to the other ; if he accepts, the marriage is not affected, if not, it is a ground for divorce : Wilson's Anglo-Muhammadian Law, 6th Edn., Art. 74A, p. 150. Cf. *In the matter of Ram Kumari*, (1890) I.L.R. 18 Cal. 264 (where a Hindu wife after her conversion to Islam married a Mahomedan without giving any notice to her first husband inviting him to embrace Islam and without having recourse to the Courts for the purpose of obtaining a declaration that her former marriage was dissolved.—*Held* : the subsequent marriage was void.). When one of the spouses embraces Islam, the law which is to govern the rights of the parties is Mahomedan law. Under Mahomedan law when a Hindu wife embraces Islam she can call upon her husband to embrace that faith and in the event of the husband's refusal the Kazi will dissolve the marriage : *Haripada Roy v. Krishna Benode*, (1938-39) 43 C.W.N. 659, 661. But see *Keolapati v. Harnam Singh*, (1937) I.L.R. 12 Luck. 568 and Tyabji's Mahomedan Law, 3rd Edn., p. 244. It is only where the conversion takes place in a country where the Mahomedan law is not administered that the marriage is so dissolved on the lapse of a woman's term of probation. But when she remains in a country where the Mahomedan law regarding questions of marriage is in force, she has only the right to obtain a divorce if her husband has refused to embrace Islam. The marriage is not dissolved but a separation amounting to a legal divorce can be effected through Court : *Mahtab-un-Nissa v. Rifaquatullah*, (1935) 85 I.C. 459.

(e) Cause of action : Where a person entices away the wife of another,

2. On 19...., the defendant No. 2, the mother, and the defendant No. 3, a distant relative of the defendant No. 1, enticed away the defendant No. 1 from the house of the plaintiff and have since wrongfully and unjustly persuaded and procured the defendant No. 1 to continue absent from the society of, and cohabitation with, the plaintiff, and have thereby deprived the plaintiff of her society and cohabitation and her aid in his domestic affairs.

The plaintiff claims—

Rs..... damages against defendants Nos. 2 and 3.

DEFENCE.

417.

MARRIAGE.

Dissolution of Marriage : Mahomedan Law.

DEFENCE by Husband to a Claim by Wife for Dissolution of Marriage on the Ground of La'an. (f)

The defendant denies that the plaintiff went to live with her parents with the knowledge or consent of the defendant as alleged

a suit for damages against him by the husband is competent and the enticement of the wife of the plaintiff is a good ground for awarding him damages. The action for seduction of a daughter or a servant has no bearing on the case. The husband has a right to the society of his wife and the infringement of the absolute right by any other person is a tort : *Sobha Ram v. Tika Ram*, (1936) I. L. R. 58 All. 903. Cf. *Muhammad Ibrahim v. Gulam Ahmed*, (1864) 1 B. H. C. R., O. C. 236 ; *Abdul Karim v. Aminabai*, (1935) I. L. R. 59 Bom. 426.

- (e) **Limitation** : Such a suit is governed by Art. 120, Lim. Act : *Sobha Ram v. Tika Ram*, *supra*. But see Art. 36, and Rustomji's Limitation Act, 5th Edn., p. 630, note 10 under Art. 26. Cf. *Muhammad Ibrahim v. Gulam Ahmed*, *supra*.
- (f) **Defence of justification** : If the charge is proved to be false the plaintiff is entitled to a decree but not if it is proved to be true : *Khatijabihi v. Umarsaheb*, (1928) I. L. R. 52 Bom. 295 ; folld. in *Mt. Fakhre Jahan*, v. *Md. Hamidullah* (1929) I. L. R. 4 Luck. 168 ; *Mt. Rahiman Bibi v. Fazal* (1926) I. L. R. 48 All. 834.
- (f) **Defence of retraction of charge** : The purpose behind the principle of retraction is to give the husband a *locus penitentie* before the marriage is dissolved. The object is to re-establish cordial relationship between husband and wife. The retraction, therefore, must be *bona fide* and not a mere device for defeating the suit for dissolution. The retraction must be unconditional : *Shamsunnessa v. Mir Abdul*, A. I. R. 1940 Cal. 95, folld. *Mt. Rahiman Bibi v. Fazal*, *supra*, folld. in *Mt. Fakhre Jahan v. Md. Hamidullah*, *supra*. Cf. *Ahmed v. Bai Fatma*, (1931) I. L. R. 55 Bom. 160, 162 (in which the opinion is expressed that retraction has no place in the procedure in British Courts).

or at all. The defendant admits that he preferred the complaint mentioned in paragraph 3 of the plaint but says that the accusations made therein against the plaintiff and the said M. H. were true in substance.

Or,

The defendant admits that he preferred the complaint mentioned in paragraph 2 of the plaint, on, but says that he has since withdrawn the said complaint. The defendant unequivocally retracts each and every charge made against the plaintiff and the said M. H. in the said complaint and expresses his genuine regret for having made the said charges. The defendant is anxious to re-establish cordial relationship between himself and his wife, the plaintiff.

PLAINT.

418.

MARRIAGE.

Restitution of Conjugal Rights : Hindu Law.

CLAIM by Hindu Husband for Restitution of Conjugal Rights. (g)

1. The parties at all material times were and are Hindus.
 2. On.....19..., the plaintiff, then aged 22 years, was duly married to the defendant, then of the age of 14 years and 6 months, with the consent of her parents.
 3. After the marriage, the defendant continued to live with her
- (g) **Reference :** *Dadaji Bhikaji v. Rukmabai*, (1886) I.L.R. 10 Bom. 301. Cf. *Binda v. Kaunsilia*, (1891) I.L.R. 13 All. 126, 132, 133, 134. *Surjya-moni v. Kali Kanta*, (1901) I.L.R. 28 Cal. 37; *Rukmani v. Chari*, A.I.R. 1935 Mad. 616.
- (g) **Cause of action :** The breach without lawful cause, of the duty of the wife to reside with her husband is the cause of action. A suit will lie even where the marriage has not been consummated and the parties have not lived together: *Venugopal v. Lakshmi* (1936) I.L.R. 59 Mad. 392. In a suit for wrongful desertion by wife, it is not necessary, as a condition precedent to such suit, the parties being Hindus, that there should be any demand by the plaintiff and refusal by the defendant: *Binda v. Kaunsilia*, *supra*, at pp. 139, 140.
- (g) **Place of suing :** The cause of action arises in the place where there has been breach, namely, in the husband's home. The fact that the wife has not previously lived with her husband within the jurisdiction cannot make any difference: *Venugopal v. Lakshmi*, *supra*. Cf. *Lalitagar v. Bai Suraj*, (1894) I.L.R. 18 Bom. 316.
- (g) **Limitation :** Art. 120 of the First Schedule, read with section 23, of the Ind. Lim. Act: *Binda v. Kaunsilia*, *supra*, at p. 149. See Rustomji's Limitation, 5th Edn., pp. 483, 484,

parents at....., where the plaintiff visited her from time to time.

4. Seven years after the marriage, viz., on....., and thereafter the plaintiff verbally requested the defendant to come to the plaintiff's home at.....and live with him as his wife, but she refused and is still refusing to do so.

The plaintiff claims—

That the defendant be ordered to come and live with the plaintiff and render him conjugal rights.

PLAINT.

419.

MARRIAGE.

Restitution of Conjugal Rights : Burmese Buddhist Law.

CLAIM by Burmese Buddhist Husband against Minor Wife for Restitution of Conjugal Rights. (h)

1. The parties at all material times were and are Burmese Buddhists.

2. On....., the defendant, who was then aged 14 years, was duly given in marriage by her parents with the plaintiff.

3. After the marriage the defendant continued to live with her parents at.....

(g) **Court-fees :** Art. 17 (vi) of the Second Schedule of the Court Fees Act and for U.P., s. 17 (iv) added by U.P. Amendment Act, 1939.

(g) **Suits' valuation :** The plaintiff will be entitled to put his own valuation. But under the rules framed by the Lahore High Court, the suit is to be valued at Rs. 1000/- ; under those of the Nagpur High Court, at Rs. 400/-

(h) **Reference :** *Nya Nwa v. Mi Su Ma* (Spl. Court), Chan-Toon's Leading Cases on Buddhist Law, p. 46 (So long as a marriage is not regularly dissolved, the contract subsists, and during its subsistence a suit for restitution of conjugal rights will lie). See *Maung Myat Tha v. Ma Thon*, Chan-Toon's Leading Cases on Buddhist Law, p. 86 (A Buddhist woman, if she is a minor at the time of marriage and she is duly given in marriage by her parents, upon marriage is emancipated from parental control and ceases to be a minor so far as marriage and its incidents are concerned. Sec. 11 of the Ind. Cont. Act is not applicable to the case).

(h) **Burmese marriage :** Among Burmese Buddhists marriage is a contract entered into by mutual consent of the parties and no ceremony is necessary. In the absence of direct proof, consent may be inferred from the conduct of the parties established by reputation : *U Tun Sein v. Ma San*, A.I.R. 1938 Rang. 115. *Maung Bu To v. Maung Nyun*, A.I.R. 1939 Rang. 442. The Burmese Buddhist law is applica-

4. On....., the plaintiff verbally requested the defendant to come to the plaintiff's home at.....and to render him conjugal rights but she refused and is still refusing to do so.

The plaintiff claims—

That the defendant be ordered to come and live with the plaintiff and render him conjugal rights.

DEFENCE.

420.

MARRIAGE.

Restitution of Conjugal Rights : Hindu Law.

DEFENCE by Wife to Husband's Claim for Restitution of Conjugal Rights. (i)

The defendant may take one or more of the following defences :—

1. The defendant was not validly married to the plaintiff. The following ceremonies which are the most essential ingredients in the marriage of the caste to which the parties belong, were not performed : (Give particulars).

6. At the time the defendant left the plaintiff's house the

ble to Chinese Buddhists contracting marriage in Burma : *Ma Tin v. Ko Sein Hone*, A.I.R. 1939 Rang. 291. Where a Hindu becomes a Buddhist and marries conforming with the customs of Buddhists in Burma, the marriage must be regarded as a legal marriage on the principle of *lex loci contractus* : *Chinnasamy Pillay v. Ma Toke*, A. I. R. 1938 Rang. 51.

- (i) Defence of invalidity of marriage : *Surjyamani v. Kali Kanta*, (1901) I. L. R. 28 Cal. 37.
- (i) Defence that the husband is suffering from a loathsome disease : *Bai Premkuvar v. Bhika Kallianji*, (1868) 5 B. H. C. R. (A.C.) 209.
- (i) Defence of cruelty : *Kondal Rayal Reddiar v. Ranganayaki*, (1923) I. L. R. 46 Mad. 791 ; *Ude Singh v. Mt. Daulat Kaur*, (1935) I. L. R. 16 Lah. 892.
- (i) Defence that plaintiff keeps a concubine in the house : *Dular Koer v. Dwarka Nath*, (1907) I. L. R. 34 Cal. 971 ; *Mt. Chilha v. Ohedi*, A. I. R. 1929 Oudh 121 ; *Mt. Sita Kumhar v. Debidin*, A. I. R. 1933 Nag. 5.
- (i) Defence that defendant is by custom prevented from living with her husband : *Surjyamani v. Kali Kanta*, *supra*, at p. 44.
- (i) Defence that the husband is guilty of matrimonial offence : The conduct of the plaintiff in making charges of theft and immorality against his wife constitutes a matrimonial offence and is a good defence to the suit particularly where there are acts of physical violence : *Ram Bharosey v. Mt. Sheo Dei*, (1939) I. L. R. 14 Luck. 366.
- (i) Defence that the suit is brought to coerce the wife into delivering her property : *Khurshedi v. Khurshedi*, 12 A. L. J. 1065,

plaintiff was suffering from venereal diseases and he is still suffering from the same.

3. The plaintiff after the marriage habitually treated the defendant cruelly by beating her at regular intervals and keeping her confined in a room without providing her with any food and the defendant cannot return to his house without endangering her personal safety.

4. The plaintiff kept a low caste woman as his mistress in the house to live with him as a member of the family and thereby made it impossible for the defendant to live with the plaintiff. The plaintiff still keeps and maintains the said mistress in his house.

5. The defendant is under the age of 12 and has not attained puberty. By the custom of the family to which she belongs, a child-wife does not go to live with her husband until she attains puberty.

6. In, the plaintiff assaulted the defendant and turned her out of his house and did not permit her to return to his house. He did not pay the defendant any maintenance, and she, on 19..., obtained against him an order for maintenance under Section 68, Criminal Procedure Code, and during the said criminal proceedings the plaintiff made charges of theft and immorality against the defendant.

and/or,

The plaintiff is addicted to gambling and, during the time the defendant lived with him after her marriage, the plaintiff forced her from time to time to part with her jewellery to provide him with money for gambling. The suit is brought to coerce the defendant into delivering to him certain Government Promissory Notes which she holds as her separate property.

DEFENCE.

421.

MARRIAGE.

Restitution of Conjugal Rights ; Mahomedan Law.

DEFENCE by Wife to a Claim for Restitution of Conjugal Rights. (j)

The defendant was a minor at the time of her marriage and she was given in marriage by A. B., her paternal uncle, without the

- (j) **Defence of option of puberty :** Where a minor girl is given in marriage by her father, the girl will not have the option of puberty : *Mt. Fatima Bibi v. Mian Eusoof Sulaiman*, A. I. R. 1937 Rang. 361, unless any fraud or dishonesty on the part of the father is shown to exist : *Zana*

consent of her father who was then alive. The defendant attained puberty on, and, on, before consummation took place, she exercised her option of puberty by communicating to the defendant in writting her repudiation of the said marriage.

Or,

The parties are Sunni Mahomedans of the Shafi sect. The defendant was aged 24 at the time of marriage and the marriage was performed by her father against her wishes and under compulsion. (Give particulars)

Or,

Soon after the said marriage the plaintiff treated the defendant cruelly by beating her at regular intervals and keeping her confined in a room for hours together, as a result whereof the defendant was compelled to leave the plaintiff's house on, and has

Bibi v. Axiz Mir, (1939) 41 P. L. R. J. & K. 99. But when a marriage is contracted by any other person as guardian, the minor has the option to repudiate the marriage on attaining puberty : *Muhammad Sharif v. Khuda Bakhsh*, A. I. R. 1936 Lah. 683. Cf. *Abnal Kasem v. Jamila Khatun*, (1939-40) 44 C. W. N. 352 (When a marriage is contracted on behalf of a minor by a remoter guardian when the nearer guardian is present and has not given his consent, such marriage is not only invalid but void'. The option to repudiate marriage must be exercised within reasonable time of her knowledge of the fact that she has the power to repudiate the marriage : *Ahmad Husain v. Mt. Amir Bano*, A. I. R. 1940 All. 63 ; *Mt. Aishan v. Jodha Ram*, A. I. R. 1938 Lah. 719 ; *Mt. Mukhan v. Haidar*, A. I. R. 1932 Lah. 449; *Bismillah v. Nur Muhammad*, (1922) I. L. R. 44 All. 61. Cf. *Abdul Karim v. Aminabai*, (1935) I. L. R. 59. Bom. 426 (The option may be exercised immediately on attaining puberty). The option may be exercised by pleading the same in defence to the suit for restitution of marriage or by remarriage : *Mt. Bhawan v. Gaman*, A. I. R. 1934 Lah. 77. The option is not lost by mere consummation where it was without the wife's consent : *Abdul Karim v. Aminabai*, *supra*.

- (i) Defence that the marriage was against the wishes of the defendant : *Sayad Mohiuddin v. Khatijabi*, (1939) 41 Bom. L.R. 1020.
- (j) Defence of cruelty : If there be cruelty to a degree rendering it unsafe for the wife to return to her husband's dominion, the Court will refuse to send her back to his house : *Moonshee Buxloor Ruheem v. Shumsoonnissa Begum*, (1866-67) 11 M.I.A. 551, appld. in *Ram Bharosey v. Mt. Sheo Dei*, (1939) I.L.R. 14 Luck. 366. The same rule shall apply where there had been a good deal of ill-treatment short of physical cruelty : *Hamid Husain v. Kubra Begum*, (1918) I.L.R. 40 All. 332, folld. in *Gunu Meah v. Begumah Bibi*, A.I.R. 1933 Rang. 322. Unfounded accusation of adultery by husband constitutes legal cruelty : *Mt. Maqboolan v. Ramzan*, (1927) I.L.R. 2 Luck. 482.

since been living with her parents. The defendant cannot return to the plaintiff without endangering her personal safety.

Or,

By a *Kabin Nama*, dated, the plaintiff, in consideration of the marriage, agreed to pay the defendant Rs. 20,000/- as prompt dower. The defendant on, verbally demanded the payment of the said sum but the plaintiff has not paid the same.

Or,

The plaintiff, in, filed a complaint before the Magistrate of against one C.D., charging him with commission of adultery with the defendant.

PLAINT.

422.

MARRIAGE.

Nullity of Marriage.

CLAIM by Parsi Wife for Nullity of Marriage. (k)

1. In 19..., the plaintiff and the defendant, Parsis, were married, with the consent of their respective parents, in accordance with the rites and ceremonies of their religion.

2. The plaintiff attained puberty in....., from which time down to the end of 19..., she lived with the defendant at

-
- (j) **Defence of non-payment of dower :** Non-payment of dower cannot be pleaded so as to defeat altogether the suit for restitution of conjugal rights but can only operate in modification of the decree for restitution by rendering its enforcement conditional upon payment of proper dower : *Abdul Kadir v. Salima*, (1896) I.L.R. 8 All. 149 (F.B.) ; *Mt. Anis Begum v. Md. Istafa*, (1933) I.L.R. 55 All. 743.
- (j) **Defence of false charge of adultery :** A decree for restitution of conjugal rights will be refused on the ground of unfounded accusation of adultery, by the husband : *Mt. Maqboolan v. Ramzan*, (1927) I.L.R. 2 Luck. 482.
- (k) **Reference :** *S. (the wife) v. B. (the husband)*, (1892) I. L. R. 16 Bom. 639.
- (k) **Parsi Matrimonial Courts :** See secs. 18, 19, 20, 21, 22, Parsi Marriage and Divorce Act, 1936.
- (k) **Grounds for nullity of marriage :** In any case in which consummation of the marriage is from natural causes impossible, such marriage may, at the instance of either party thereto be declared to be null and void : Sec. 30, Parsi Marriage and Divorce Act (III of 1936). The relief of declaration of nullity of marriage on the ground of unsoundness of mind given by Sec. 27 of the Parsi Marriage and Divorce Act, 1865, has been abrogated by Sec. 52 of the Act of 1936 : *Phiroze v. Shirinbai*. (1937) 39 Bom. L. R. 1146.

3. The defendant was at the time of marriage, and still is impotent, and he was and is unable to effect consummation by reason of his impotency.

The plaintiff claims—

That her marriage with the defendant be declared null and void.

PLAINT.

423.

MARRIAGE.

Breach of Contract of Marriage : Hindu Law.

CLAIM for Damages for Breach of Contract of Marriage. (1)

1. The parties are Hindus of the caste.

2. On September 6th, 19..., at, the defendant verbally agreed with the plaintiff to marry his eldest son A. B. to the plaintiff's youngest daughter, K.L.

3. The said agreement was followed by the ceremony of , which, according to the custom of the caste to which the parties belong, made the marriage contract complete.

4. The defendant in breach of the said contract, married his said son to one, the daughter of, on November 10th, 19...

5. By reason of the premises, the plaintiff's feelings have been greatly injured and he has suffered monetary loss.

Particulars of special damage :

The plaintiff claims—

Rs..... damages.

(1) **Contract of marriage :** A promise by A to marry B is good consideration for B's promise to marry A ; and, as a general rule, such promises are reciprocal and obligatory on both parties : *Chitty on Contracts*, 19th Edn., p. 851.

(1) **Parties to suit :** A breach of contract gives rise to a cause of action to the party aggrieved, to maintain a suit for damages or compensation against the party who has broken it or has brought about the breach thereof : *Santu v. Mt. Har Devi*, A. I. R. 1934 Lah. 544. Therefore, the father or the guardian of a proposed bride may sue the father or guardian of a proposed bridegroom and *vice versa*, for breach of contract : *Kandaswami v. Kanniah*, A. I. R. 1924 Mad. 692. A minor bride or bridegroom on whose behalf and for whose benefit the contract was entered into by his or her guardian, may on attaining majority sue for damages for breach of contract : *Fernandez v. J. Gonsalves*, (1925) I.L.R. 48 Bom. 673 ; cf. *Purshotamdas v. Purshotamdas*, (1997) I. L. R. 21 Bom. 23.

DEFENCE.

424.

MARRIAGE.

Breach of Contract of Marriage : Hindu Law.

- (1) **Remedy for breach :** A suit for specific performance of a contract to give in marriage will not lie : the remedy is an action for the breach of the contract : *In the matter of Gunput Narain Singh*, (1874) I. L. R. 1 Cal. 74 ; *Umed Kika v. Nagindas* (1891) 7 Bom. H. C. R., O. C. 122. Neither a contract of personal service nor a contract of marriage can be ordered to be specifically enforced so that in either case the apprentice or the girl cannot be compelled to carry out his or her part of a contract against his or her wishes : *Fernandez v. J. Gonsalves*, (1925) I.L.R. 48 Bom. 673.
- (1) **Damages :** In assessing damages, the injury to the feelings of the plaintiff may be taken into account and the monetary loss and special damage which he has sustained : *Umed Kika v. Nagindas*, *supra*, *foldd.* in *Kandaswami v. Kanniah*, A. I. R. 1924 Mad. 692 (The plaintiff is entitled to recover money actually thrown away and also damages to his credit and reputation by reason of the refusal) ; *Mulji Thakersey v. Gombi*, (1887) I.L.R. 11 Bom. 412 ; *Rambhat v. Timmayya*, (1892) I.L.R. 16 Bom. 673, *reftd.* to in *Mohori Lal v. Emperor*, (1937-38) 42 C.W.N. 783. *Cf.* *Jagannath v. Munno Lal*, (1937) I.L.R. 12 Luck. 478 (Where it was held that the girl to whom the ornaments were given being married went out of defendant's control and the defendant therefore could not be made liable for the return of ornaments or the value thereof). An agreement to pay money to the father or guardian in consideration of giving his son or daughter in marriage is regarded as immoral or opposed to public policy within the meaning of sec. 23 of the Ind. Cont. Act, and the money cannot be recovered by suit : *Venkata Krishnayya v. Lakshmi Narayana*, (1909) I.L.R. 32 Mad. 185 ; *Baldeo Sahai v. Jumna Kunwar*, (1901) I.L.R. 23 All. 495. A suit for recovery of money already advanced can, however, lie : *Ganpat v. Lahana*, A.I.R. 1928 Nag. 89 (2). *Cf.* *Srinivasa v. Sesha*, (1918) I.L.R. 41 Mad. 197 (A marriage brokerage agreement is unlawful and void *ab initio* and brokerage paid thereunder is recoverable if the agreement or substantial part of it is not performed. Such an agreement does not fall within Sec. 66 of the Contract Act. And the rule to be applied is the rule of English law).
- (1) **Limitation :** The period of limitations is 3 years under Art. 65 or 115 of the Ind. Lim. Act. In a suit for damages for breach of contract to give a girl in marriage, limitation starts from the date on which the girl is betrothed to a third person in contravention of the contract with the plaintiff, and not from the date of the betrothal of the plaintiff, because the contract is repudiated only on the former date : *Mewa Singh v. Narain Singh*, A.I.R. 1919 Lah. 109.

**DEFENCE to Claim for Damages for Breach of Contract
of Marriage. (m).**

The defendant did not agree to marry his son to the plaintiff's daughter as alleged or at all. The defendant denies that the ceremony mentioned in paragraph 2 of the plaint took place as alleged or at all.

Or

The plaintiff had verbally represented to the defendant that his daughter K.L. was healthy and handsome and the defendant relying on the said representation and induced thereby consented to marry his son to the plaintiff's said daughter. On or about 19..., after the ceremony mentioned in paragraph 3 of the plaint had been performed, the defendant came to know that the plaintiff's said daughter had been suffering from chronic asthma and immediately thereafter the defendant verbally communicated to the plaintiff his refusal to marry his son to the said daughter.

Or

The defendant admits that he consented to marry his son to the plaintiff's daughter but says that the said consent was conditional upon the plaintiff's promise to marry his son to the defendant's niece. In, the plaintiff retracted from his promise and refused to marry his son to the defendant's niece, whereupon the defendant refused to marry his son to the plaintiff's daughter.

Or

The defendant admits the agreement mentioned in paragraph 2 of the plaint, but says that after he had given his consent to the marriage, his relatives disapproved of the match on the ground of and accordingly, the defendant could not fulfil his promise to the plaintiff.

Or

The defendant admits that he consented to the marriage but says that at the time he gave his consent thereto the plaintiff's said daughter was apparently in good health but afterwards, in 19..., the defendant came to know that the plaintiff's said daughter had an abscess in her breast and for that reason he refused to marry his son to the plaintiff's said daughter.

(m) **Defence that the plaintiff's consent was obtained by misrepresentation :**
Sec. 19, Ind. Cont. Act.

(m) **Defence of ill health :** *Atchinson v. Baker*, (1796) Peake, Add. C. 103, 124
(The plaintiff was apparently in good health when the promise was made. The defendant afterwards discovered that the plaintiff had

PLAINT.**425.****MARRIAGE.**

Breach of Contract of Marriage : Mahomedan Law.

CLAIM for Damages for Breach of Contract of Marriage. (n)

1. In July 19..., at, the defendant verbally agreed with the plaintiff to give his daughter Mariambai, a minor, in marriage to the plaintiff.

2. Pursuant to the said agreement the defendant's said daughter was betrothed to the plaintiff on the 25th of July 19...

3. On the occasion of the betrothal ceremonies the plaintiff presented to the bride several gold and silver ornaments and rich, embroidered garments, specified in Schedule 'A' hereto, and the defendant presented to the plaintiff a diamond ring.

4. On August 20th, 18..., the defendant through his attorney wrote to the plaintiff stating that the betrothal had been cancelled and asking for the return of the ring.

5. By reason of the facts hereinbefore stated, the plaintiff's feelings have been injured and he has suffered damages.

an abscess in his breast, and for that reason refused to marry him. Lord Kenyon held, "If the conditions of the parties had changed after the time of making the contract, it was a good cause for either party to break off the connection".

(m) **Pleading facts in mitigation of damages :** The defendant may in mitigation of damages, give evidence that his relatives disapproved of the marriage : *Irving v. Greenwood*, (1824) 1 C. & P. 350 N. P.

(n) **Maintainability of suit under the Mahomedan law :** In *Abdul Razak v. Mahomed Hussein*, (1918) I. L. R. 42 Bom. 499, which was a suit by the plaintiff against the father of the minor defendant, an issue was raised as to whether a suit for breach of promise of marriage would lie under the Mahomedan Law and that was decided in favour of the plaintiff, refd. to in *Fernandez v. J. Gonsalves*, (1925) I. L. R. 48 Bom. 673. In *Muhammad Khan v. Husaini Begam*, (1910) I. L. R. 32 All. 410 (P.C.), which was a suit brought by the plaintiff who, at the time of the contract, was a minor, for enforcing a contract which was entered into by the defendant and the father of the plaintiff, the question was raised as to whether the plaintiff, who was not a party to the contract, could maintain the suit, their Lordships of the Privy Council observed that "in India and among communities circumstanced as the Mahomedans, among whom marriages are contracted for minors by parents and guardians, it might occasion injustice if the common law doctrine is applied to agreements or arrangements entered into in connection with such contracts, folld. in *Fernandez v. J. Gonsalves*, (1925) I. L. R. 48

Particulars of special damage :

Value of ornaments and garments presented to the defendant's said daughter	Rs.....
Other expenses incurred in connection with the betrothal ceremonies.	Rs.....
<hr/>	
Total ...	Rs....

The plaintiff claims—

Rs..... damages.

Bom. 673 (*Per Taraporewala J.*, "To my mind in India the Court would be justified in applying the principle of contracts of apprenticeship in England in so far as to hold that the contract of marriage in India stands on the same footing as being one for the benefit of the minor and being one which the father can enter into on behalf of the minor).

- (ii) **Damages :** In *Abdul Razak v. Mahomed Hussein*, (1918) I. L. R. 42 Bom. 499, Kemp J., held, that "under Mahomedan Law in a suit for breach of promise to marry, the plaintiff cannot recover the damage peculiar to an action for breach of promise under the English law ; therefore all consequential damages, if proved under Sec. 73 of the Indian Contract Act to flow as the ordinary result from the breach would be recoverable by the plaintiff."), *folld. in Ghulam Muhammad v. Mehraj Din* A. I. R. 1923 Lah. 679 and *refd. to in Fernandez v. J. Gonsalves*, (1925) I. L. R. 48 Bom. 673, (where Taraporewala J., held, "I do not agree with Mr. Justice Kemp if he meant to hold that no damages are ordinarily suffered by the wronged party on a breach of contract of marriage among the Mahomedans or other Indian communities in their position. As I have stated, the harm is greater to the girl in the Indian communities than to a European female, and, if such breaches are allowed to be made without any penalty, either on the ground that there is no enforceable contract or that there are no damages, the consequences would be very serious so far as minor females are concerned.").

- (ii) **Age of majority for the purpose of giving consent to marriage :** Minority under the Mahomedan law terminates on the completion of the fifteenth year and every Mahomedan of sound mind, who has attained puberty, may enter into a contract of marriage even if he or she is a minor according to the provisions of the Ind. Majority Act : *Mt. Begum Bibi v. Rahamat Khan*, A. I. R. 1924 Lah. 873. The age of majority for giving a minor girl in marriage is fifteen years. A boy aged 15 is therefore competent to give his sister in marriage : *Yusaf v. Mt. Zainab*, A. I. R. 1923 Lah. 102. In the Shia law of marriage the authorities are conflicting as to the age of consent for the girl and the attainment of puberty is the test for her having reached the age of majority for consenting to her marriage : *Mt. Zaitun v. Shaikh Kommal*, A. I. R. 1924 All. 870.

PLAINT.**426.****MASTER AND SERVANT.**

1. Contract : Servant v. Master.

CLAIM by Servant against Master for Wages due. (o)

1. By an agreement, dated19..., made in writing between the defendant and the plaintiff at....., the defendant agreed to employ the plaintiff as his clerk at the salary of Rs..... per month.

2. The plaintiff served the defendant in the said capacity from the19... until when, by mutual consent, the said employment was terminated.

3. The defendant has not paid the plaintiff his salary for the month of

The plaintiff claims—

Rs.....

PLAINT.**427.****MASTER AND SERVANT.**

Contract : Servant v. Master.

CLAIM by Servant against Master for Damages for**Dismissal without Notice. (p)**

1. By an agreement, dated 19..., made in writing between the defendant and the plaintiff, the defendant agreed to employ the plaintiff as a clerk in his office at at the salary of Rs. per month.

1. The plaintiff served the defendant in the said capacity from 19... until 19..., when the defendant verbally dismissed the plaintiff without giving him any previous

(o) **Limitation :** Art. 102, Ind. Lim. Act, which is a residuary Article. For wages of a household servant, artisan or labourer, Art. 7, and those of a seaman, Art. 101, would apply. Art. 7 and Art. 102 deal with two different classes of wage earners. The former obviously deals with a lower class of wage earner to that dealt with by Art. 102 in respect of which a three years' period of limitation is given : *Venkateswara Rao Audinarayana*, A.I.R. 1935 Mad. 129. When the wages are monthly wages they accrue and become due on the final day of the month : *Gajadhar Prasad v. Dharma Nand*, A.I.R. 1935 AH. 716.

(p) **Reasonable notice :—**If no custom or stipulation as to notice exists, and if the contract of service is not one which can be regarded as yearly hiring, the service is terminable by reasonable notice : *Kamini Kumar*

notice and refused to allow the plaintiff to remain in his service any longer.

The plaintiff claims—

Rs. damages.

PLAINT.

428.

MASTER AND SERVANT.

1. Contract ; Servant v. Master.

CLAIM by Servant employed for a Fixed Term against Master for Dismissal before Expiry of the Term. (q)

1. The plaintiff is a retired member of the Indian Civil Service.
2. By an agreement, dated 19... made in writing between the defendant and the plaintiff at, the defendant

v. Rebati, (1921) 33 C. L. J. 336. The rule of one month's notice applies to menials, but it will not apply to the case, say, of a schoolmaster. In the case of a schoolmaster, three months' notice in the particular circumstances of the case has been held in the following cases to be reasonable: *Bhupendra v. Jatindra*, (1929) 49 C. L. J. 191; *Nirod v. Raja Kirtya Nanda*, A. I. R. 1922 Pat. 24; *Wittenbaker v. Galstaun*, (1917) I. L. R. 44 Cal. 917. There is no absolute rule that a person employed on a monthly salary who is not a household servant or menial is entitled to three months' notice or three months' pay in lieu of notice. All that the rule requires is that he should be given a reasonable notice and what is reasonable notice would depend upon the facts of each particular case: *Detaram v. Forbes*, A. I. R. 1930 Sind 17; *Bimalacharan v. Trustees for the Indian Museum*, (1930) I. L. R. 57 Cal. 231. Cf. *Thein Pe v. De Souza*, (1929) I. L. R. 7 Rang. 303 (where one month's notice was applied to the case of a schoolmaster engaged on a month to month contract); *Ralli Brothers v. Ambika Prasad*, (1913) I. L. R. 35 All. 132 (case of an office clerk). Cf. *E. M. Moola v. K. C. Bose*, (1916) 8 L. B. R. 420 (where it was held that in the case of a clerk employed by the month, 15 days' notice is reasonable), *folded in Ganga Ram v. Duni Chand*, A. I. R. 1925 Lah. 186.

- (p) **Burden of proof** : The plaintiff must prove that he himself was ready and willing and able to perform his part of the contract : *Burma Oil Co. v. Naraindas*, A. I. R. 1927 Sind. 253. He need not, however, plead readiness and willingness in as much as it is a "condition precedent" within the meaning of O. VI, r. 6, C. P. Code. The averment of such readiness and willingness in paragraph 3, Form No. 15, App. A., C. P. Code, it is submitted, is not in conformity with the rules of pleading. See 'Condition Prececent' under "Special Defences" Pt. II. Chap. XVII, p. 394 and *Bullen & Leake*, 8th Edn., p. 163, note (f).
- (q) **Right of action** : Where the servant has actually entered the master's service, a breach of the contract is committed if the servant is wrongfully dismissed before the expiration of the term for which he was

agreed to employ the plaintiff as the manager of his zamindary and house properties at the monthly salary of Rs. plus Rs. as sumptuary allowance with free furnished quarters for a period of two years commencing from the19...

3. The plaintiff served the defendant in the said capacity until 19... when the defendant, by letter of that date, terminated the contract of service and verbally refused to allow the plaintiff to continue in his service any longer.

4. The plaintiff made attempts which have been unsuccessful to obtain other employment.

5. In consequence of the wrongful dismissal aforesaid, the plaintiff has been prevented from earning his salary and deprived of the other benefits to which he was entitled during the remainder of the term, and has thereby suffered damages.

Particulars of damages :

Salary for the balance of the period at		
Rs.	per month	Rs.
Value of his deprivation of the sumptuary allowance and the free furnished quarters for the remainder of the term Rs. ..		
The plaintiff claims—		
Rs. damages.		

employed : *Driscoll v. Australian Royal etc. Co.*, (1859) 1 F. & F. 458. But in case the promisor repudiates the contract before it is executed, two courses are open to the promisee. He may either treat the repudiation of the other party as a wrongful putting an end to the contract and may at once bring his action as a breach of it, or he may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance but, in the latter case, he keeps the contract alive for the benefit of the other party as well as his own ; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it : *Nannier v. Rayulu Iyer & Co.*, (1926) I. L. R. 49 Mad. 781 ; *Hochster v. De La Tour*, (1853) 2 E. & B. 678 ; *Jhandoo Mal v. Phul Chand*, (1924) I. L. R. 5 Lah. 497.

- (q) **Damages** : Damages are to be measured by the amount of wages which the servant has been prevented from earning by reason of his wrongful dismissal : *Smith v. Thompson*, (1849) 8 C. B. 44, including the value of any other benefit to which he is entitled by virtue of his contract and of which he is deprived in consequence of his breach : *Lake v. Campbell*,

DEFENCE.**429.****MASTER AND SERVANT.****1. Contract : Servant v. Master.****DEFENCE by Master to a Claim by Servant for Wages. (r)**

1. The defendant denies that the plaintiff's employment was terminated by mutual consent as alleged or otherwise at all.

2. The plaintiff left the defendant's service of his own accord on and verbally refused to serve the defendant any longer.

3. The defendant paid the plaintiff's wages up to the end of the month of

4. By reason of the premises the plaintiff is not entitled to be paid any wages for the portion of time during which he has served since the last payment of wages.

DEFENCE.**430.****MASTER AND SERVANT.****1. Contract : Servant v. Master.****DEFENCE by Master to a Claim by Servant for Damages for Dismissal without Notice. (s)**

1. The defendant admits the contract of service and also the dismissal of the plaintiff alleged in paragraphs 1 and 2 of the plaint,

(1862) 5 L. T. 582 ; *Re London & Colonial Co., Exp. Clark*, (1869) L. R. 7 Eq. 550, refd. to in *Girdhari Lal v. Secy. of State*, A. I. R. 1937 Lah. 226, 232, after taking into consideration probabilities of his taking employment elsewhere. It is his duty to minimise his loss, and he must therefore use due diligence in endeavouring to secure other employment : *Beckham v. Drake*, (1849) 2 H. L. Cas. 579, 606. Cf. *Maharaja Bahadur of Hathwa v. H. E. Beal*, (1935-36) 40 C. W. N. 65 ; *Burma Oil Co. v. Naraindas*, A. I. R. 1927 Sind 253 ; *Chokalingam v. Mohammad*, (1912) 23 M. L. J. 680.

(r) When a servant, whose wages are due periodically, so conducts himself that the master is justified in discharging him without notice, as when the servant leaves his employment without notice, he cannot draw wages for that portion of time for which he has served since the last periodical payment of wages : *Bhakta Shiromani v. Seetal Nath*, A. I. R. 1925 All. 680 ; *Maung Aung Tha v. Maung Ba Than*, A. I. R. 1925 Rang. 246 ; *Etbari v. Bellamy*, A. I. R. 1938 Rang. 207 (case of domestic-servant).

(s) **Defence of wilful disobedience to lawful and reasonable orders :** *Turner v. Mason*, (1845) 14 M. & W. 112 (Where a domestic servant requested leave of absence for the purpose of seeing his ailing mother, and, on

but says that he terminated the said contract, as he was justified to do, because (here state one or more of the following grounds)—

(a) The plaintiff, on, requested leave of absence, and, on refusal by the defendant, absented himself without leave.

(b) On, the defendant discovered that the plaintiff had misappropriated Rs. out of the funds of the defendant in his hands and had made fictitious entries in the books of account.

(c) The plaintiff was habitually neglectful in respect of the duties for which he was engaged. On 19..., he committed an act of neglect sufficiently gross to justify his dismissal, (*viz.*, here give particulars).

(d) The defendant employed the plaintiff as his accountant relying on his representation that he had great experience in accounts. The plaintiff proved to be absolutely incompetent in the matter of keeping accounts.

refusal by the master, absented himself without leave, *Held*: he was properly dismissed.). Cf. *Chandra Shekhar v. Burhwal Sugar Mills Co.*, A. I. R. 1935 All. 908; *Nirod Chandra v. Raja Kirtya Nanda*, A. I. R. 1922 Pat. 24 (where a schoolmaster was ordered to cease to practise as a pleader but refused to do so).

(a) **Defence of misconduct in business** : There is no fixed rule of law, defining the degree of misconduct which will justify dismissal, but misconduct inconsistent with the fulfilment of the express or implied condition of service will justify dismissal. Whether the misconduct proved establishes the right to dismiss the servant must depend upon facts—and is a question of fact: *Clouston & Co. v. Corry*, (1906) A. C. 122, 129 (P. C.), *folld.* in *Abraham Reuben v. Karachi Municipality*, A. I. R. 1929 Sind. 69. A master after having condoned an offence cannot dismiss the servant for the same offence: *Middleton v. Playfair*, A. I. R. 1925 Cal. 87. But if the servant offends again, his previous offence may be taken into consideration as to whether he should be dismissed or not: *Madura etc. Devasthanam v. Annavi*, A. I. R. 1926 Mad. 57.

(a) **Defence of negligence** : There is good ground for the dismissal of a servant if he is habitually neglectful in respect of the duties for which he was engaged. Even an isolated instance of neglect sufficiently gross may justify dismissal: *Gujarat Ginning & Mfy. Co. v. Govindan Nair*, A. I. R. 1940 P. C. 101. The test to be applied varies with the nature of the business and the position held by the employee: *Jupiter General Ins. Co. v. Ardeshir Bomanji*, A. I. R. 1937 P. C. 223, *folld.* in *Chatra Serampore Co-op. Society v. Becharam*, (1937-38) 42 C. W. N. 1219. Cf. *Baster v. London & County Ptg. Works*, (1899) 1 Q. B. 901 (where forgetfulness causing considerable damage to the master was held a serious neglect of duty justifying dismissal).

PLAINT.

431.

MASTER AND SERVANT.

1. Contract : Master v. Servant.

CLAIM by Master for Damage for Breach of
Contract of Service. (t)

1. By an agreement, dated 19... made in writing between the defendant and the plaintiff at, the defendant agreed to serve the plaintiff as an assistant in his trade of for the term of 3 years from 19..., at a monthly salary of Rs.....

2. The defendant served the plaintiff in the said capacity until 19..., when he abruptly left the plaintiff's service and verbally refused to continue in his service any longer, whereupon the plaintiff was obliged to employ another person in the said post on.....at a higher salary, namely, Rs..... per month.

3. By reason of the premises the plaintiff has suffered damages.

Particulars of special damage :

The plaintiff claims—

Rs..... damages.

- (s) **Defence of incompetence :** The failure to afford the requisite skill which had been expressly or impliedly promised is a breach of legal duty and, therefore, misconduct : *Per Willes, J., in Harmer v. Cornelius*, (1858) 5 C. B. N. S. 236, 247, folld. in *Pandurang v. Jairamdas*, A. I. R. 1925 Nag. 166 ; *Malabar Forest & Rubber Co. v. Macleod*, A. I. R. 1926 Mad. 270 ; *Detaram v. Forbes*, A. I. R. 1930 Sind. 17.
- (s) **Defence that the servant's conduct is prejudicial to the master's business :** Cf. *Pearce v. Foster*, (1886) 17 Q. B. D. 536, C. A. ; *Lacy v. Osbaldiston*, (1837) 8 C. & P. 80, N. P., folld. in *Pandurang v. Jairamdas*, *supra*.
- (s) **Grounds of dismissal :** A master dismissing a servant for good cause need not state the grounds for such dismissal. Justification of dismissal can be shown by proof of facts known subsequently to the dismissal : *Ridgway v. Hungerford Market Co.*, (1835) 3 Ad. & El. 171, or on grounds differing from those alleged at the time : *Baillie v. Kell*, (1838) 4 Bing. N. C. 638, 650.
- (t) **There is a breach of contract of service whenever the servant leaves his service without just cause or excuse before the expiration of the agreed term, or, when no term has been agreed upon, without giving due notice.** The master is entitled in such cases to recover damages : *Ootes v. Sadler*, (1666) 2 Keb. 16 ; *Huttman v. Boulnois*, (1836) 2 C. & P. 510, 513 (leaving service without notice) ; *Bowes & Partners v. Press*, (1894) 1 Q.B. 202, C.A. (substantial damages). Cf. *Cuddalore Municipal Council v. Panchabikesa*, A.I.R. 1922 Mad. 102 ; *Sheppard Publishing*

PLAINT.**432.****MASTER AND SERVANT.****2. Tort : Third Party v. Master.****CLAIM against Master for Fraud of Servant. (u)**

1. For some time in 19..., the plaintiff, on a guarantee of the defendants, who are bankers, supplied J. D., a customer of theirs, with oats on credit, for carrying out a Government contract.

2. In or about the month of 19..., the plaintiff refused to supply any more oats to the said J. D. until he had a better guarantee.

3. On 19..., A. B., the defendants' manager gave the plaintiff a letter of guarantee to the effect that J.D.'s cheques drawn on the defendants' bank (hereinafter called 'the bank'), in plaintiff's favour in payment for the oats supplied should be paid on receipt of the Government money, in priority to any other payment "except to the bank".

4. The plaintiff thereupon supplied oats to J.D. between and up to the value of Rs.....

5. Upon fulfilment of the said contract, the Government money amounting to Rs..... was received by J.D. and paid into the bank on or about 19..., but J.D.'s cheque dated for Rs..... drawn on the bank in favour of the plaintiff in payment of the price of oats supplied was dishonoured by the bank, who claimed to retain the whole sum of Rs..... in payment of J.D.'s debt to the bank.

6. At the time the above guarantee was given, the plaintiff did not know, and the said manager intentionally kept back from the plaintiff, the fact that J.D. was then indebted to the bank to the amount of Rs..... and that the guarantee given by him to the plaintiff would be unavailing.

The plaintiff claims—

Rs..... damage.

v. Harkins, (1905) 5 O.W.R. 482. A servant may refuse to serve or abandon service on reasonable grounds: *Ottoman Bank v. Etienne Chakarian*, A.I.R. 1930 P.C. 110; *Middleton v. Playfair*, A.I.R. 1925 Cal. 87; *Partap Narain v. Jute Mills*, A.I.R. 1927 All. 653 (case of presentation of a forged bill by servant under the apparent authority of his master).

(u) Reference: *Barwick v. English Joint Stock Bank*, (1867) L. R. 2 Ex. 259

PLAINT.

433.

MASTER AND SERVANT.

Tort : Third Party v. Master.

CLAIM against Solicitor for Fraud of Servant
involving Forgery. (v)

1. At all material times the defendant was a solicitor practising in under the name of & Co., with a branch office at, hereinafter called 'the branch firm'.

2. At all material times the branch firm was managed by one C. as managing clerk for the defendant.

3. On April 19..., C. in the course of his employment as such managing clerk wrote to the plaintiff a letter enclosing an application for an advance for Rs. 5,000/- on the security of a house property in Calcutta. This application purported to be signed by one P. C. of and represented that he was negotiating to purchase premises No..... (hereinafter called 'the said premises') for Rs..... and that it was on the security of this property that the loan was asked for.

(In this case it was found that the master did not authorise the act of the servant but that the servant or the agent committed the alleged fraud, if he did commit it, for the benefit of his master: *Held*, the master was liable). Barwick's case, however, is not an authority for the proposition that a principal is not liable for the fraud of the agent unless committed for the benefit of the principal. In *Lloyd v. Grace, Smith & Co.*, (1912) A. C. 716, Lord Macnaughten pointed out that Barwick's case "has been misunderstood in late years" and what was really decided in that case was that "*a principal must be liable for the fraud of his agent committed in the course of his agent's employment and not beyond the scope of his agency whether the fraud be committed for the principal's benefit or not*" (p. 731). Cf. *Burmah Trading Corporation v. Mirza Mahomed Ally*, (1877-78) L. R. 5 I. A. 130, 135, 136 (Though the master may not have authorised the act, if he has put the agent to do a particular class of acts, he must be answerable for the manner in which that agent has conducted himself in doing the business which was the act of the master to place him in); Cf. *Uxbridge Permanent Benefit Building Society v. Pickard*, (1939) 2 K.B. 248; *Dinabandhu Saha v. Abdul Latif*, (1923) I.L.R. 50 Cal. 258; and *Sherjan Khan v. Alimuddi*, (1916) I.L.R. 43 Cal. 511, 516, 520.

- (v) Reference : *Uxbridge Permanent Benefit Building Society v. Pickard*, *supra* (In this case it was contended on behalf of the defendant, (a) that the principle of *Lloyd v. Grace, Smith & Co.*, (1912) A. C. 716, must be confined to cases where the fraudulent act committed by the servant is committed on a person who was a client of the firm,

4. The plaintiff assented to the application, subject to the execution of a mortgage, and passed the matter to his solicitors Messrs..... to be dealt with in the usual way.

5. In the course of investigation of title, C. in the course of his said employment wrote to the plaintiff's solicitors saying that P. C. was a member of the Indian Civil Service and was a contemplated purchaser of the said premises from one L., who in had acquired it from one K. of

6. On, C. in the course of his said employment, sent to the plaintiff's solicitors title deeds purporting to show this devolution of title together with a conveyance from L. to P. C., whose signature purported to be witnessed by C.

7. On, the mortgage was accordingly prepared and executed by P. C. and again witnessed by C., and the sum of Rs. 5,000/- was advanced by the plaintiff on interest at

8. On, the plaintiff discovered that P. C. was not a member of the Indian Civil Service, L. and K. were fictitious persons and the deeds mentioned in paragraph 6 hereof were forgeries.

The plaintiff claims—

1. Rs..... as damage for fraud.

2. Alternatively, Rs....., the amount of the advance including interest as money had and received by the defendant to the use of the plaintiff.

and not as in this case, where the person defrauded was not a client of the firm, (b) that the liability of the master does not arise where the documents by means of which the fraud was perpetrated were forgeries. On the first contention, Greene M. R. observed at p. 253: "The managing clerk put in charge of that office, as he was, was unquestionably given in fact full authority to conduct the business of a solicitor's office on behalf of and in the name of his principal. That authority would cover not merely acting for clients, but the carrying through of all transactions which would normally be carried through by a solicitor—namely, completion of conveyancing business with third parties, having dealing with clients and the obtaining from such third parties upon completion of the transaction sums of money and giving receipts therefor. With regard to that part of the office activities, there is no question of the relationship of solicitor and client between the solicitor and third party. Nevertheless the authority of a clerk occupying the position of the principal to deal with third parties in circumstances where the third parties are going to change their position as the result of the transaction in progress, or which appears to be in progress cannot be denied.

The principle of *Lloyd v. Grace, Smith & Co.* extends to cases where the authority which the clerk purports to exercise, and which upon the

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434.

MASTER AND SERVANT.

2. Tort : Third Party v. Master.

CLAIM against Master for Damages for personal Injury caused by the Negligence of Servant. (w)

1. On 19, the plaintiff, a police constable, was on duty inside the police station in Street in which, at the material time, were a large number of people including children.

2. The defendants were the owners of a two-horse van, which was being driven by their servant, a man named B., on that date.

3. At about P. M. on that date, B. took the two horses and van out into the said street and left them standing on the left-hand side of the street facing in the direction of the police station, while he went elsewhere to attend to other business.

4. During the time the horses and the van were left unattended,

face of it, he has got, is one which involves leading third parties to change their position on the faith of that the business which brings them into contact with the firm is genuine. On the second contention, namely, whether the well known principles applying the authority of agents and the extent to which their acts will bind their principals apply in the case of a forged document, his Lordship observed at p. 256 thus : "The case of *Ruben v. Great Fingall Consolidated*, (1906) A.C. 439, *Kreditbank Cassel v. Schenkers*, (1927) 1 K. B. 826 and *Slingsby v. District Bank*, (1932) 1 K. B. 544, appear to me to make it quite clear that in the view of the learned judges who dealt with the matter the question of the effect of a forged instrument as affecting the principal falls within the question of ostensible authority. I can find no justification in any of the observations in those cases for the suggestion that a forgery, if in other respects it comes within the scope of ostensible authority, in any way prevents that doctrine from applying.").

(w) Reference : *Haynes v. Harwood*, (1935) 1 K.B. 146 (Various defences were taken in this action, amongst others, the defences of *novus actus interveniens* and *volenti non fit injuria*. It was held, (a) that the defendant's servant was guilty of negligence in leaving the horses unattended in a crowded street in which many people including children were likely to be at the time when the horses were unattended and where mischievous children might be about and where something might be done which might result in the horses running away ; (b) the police are under a general duty to protect life and property ; (c) the injuries to the plaintiff were the natural and probable consequences of the defendant's negligence ; and (d) that the maxim '*volenti non fit injuria*' did not apply to prevent the plaintiff recovering.).

(w) Limitation : One year under Art. 22, Ind. Lim. Act.

a boy threw a stone at the horses which caused them to run away and when they got opposite the police station, the plaintiff came out into the street and saw the horses and the van coming and also an old woman who was in imminent danger if nothing was done by him to arrest the progress of the horses.

5. To save the woman from imminent danger, the plaintiff, at great risk to his life and limb rushed out and seized the offside horse and eventually stopped the horses, but one of the horses fell upon him with the consequence that he sustained serious personal injuries.

Particulars of injuries :

6. The plaintiff has sustained damages caused by the negligence of the defendant's servant as aforesaid.

(Here set out particulars of special damage, if any).

The plaintiff claims—

Rs..... damages.

PLAINT.

435.

MASTER AND SERVANT.

2. Tort : Third Party v. Master.

CLAIM against Master for Damage to Property caused by the Negligence of Servant. (x)

1. At all material times the defendant was the owner of a cocoanut and fruit estate at, and the plaintiff was the lessee of an adjacent property at upon which were certain pottery works and kilns. The said two properties were conterminous along the south-east boundary of the plaintiff's land as far as that extended and there came some Government land left waste and uncultivated, wedged in between the south-west boundary of the plaintiff's property and the continuation of the defendant's property from which latter it was divided by a bamboo hedge.

2. On, a fire or fires kindled for the purpose of

(x) Reference : *Goh Choon v. Lee Kim Soo*, (1925) A. C. 550 (An employer is responsible for damage caused by the negligent act of his servant in carrying out work which he is employed to do, even if the act incidentally involves a trespass which the employer has not authorised. "When a servant does an act which he is authorised by his employment to do under certain circumstances and under certain conditions, and he does them under circumstances or in a manner which are unauthorised and improper, in such cases the employer is liable for the wrongful act").

burning branches, jungle trees and other vegetable rubbish piled close to the bamboo hedge, spread across the wedge of Government land on to the plaintiff's land, and burnt down a number of buildings upon it. The said fire or fires had been negligently kindled and allowed to spread by the servants of the defendant.

3. By reason of the premises the plaintiff has sustained damage.

Particulars of special damage :

The plaintiff claims—

Rs.....

PLAINT.

436.

MASTER AND SERVANT.

2. Tort : Third Party v. Master.

CLAIM against Master, for Damage to Property caused by the Negligence of Servants under Defendant's Control. (y)

1. In 19....., the plaintiffs, ship-owners, let on hire to the defendants a lighter manned by two lighter boys who were to remain under the control of the defendants during the continuance of the hire.

2. The use to which the defendants put the lighter was for the purpose of loading ground nuts on to their steamship "The....." lying in the harbour of.....

3. On the evening of there was a strong ebb-tide running and the lighter, which was then lying alongside the said

(y) *Reference : Bull & Co. v. W. African Shipping etc. Co., (1927) A. C. 686* (In this case, the *dictum* of Cockburn C. J. in *Rourke v. White Moss Colliery Co., (1877) 2 C. P. D. 205, 209* was quoted with approval : "When one person lends his servant to another for a particular employment, the servant for anything done in that particular employment must be dealt with as a servant of the man to whom he is lent, although he remains the general servant of the person who lent him." The lighter men in this case had deserted their duty at a moment, as it turned out, which was critical for the safety of the ship. While doing so, and at that moment, they were in the service of the defendants. The defendants had not provided any other servants to supply their place, in what was a continuous duty. It is out of question to suggest that these circumstances did not constitute negligence for which the defendants were responsible.)

(y) **Relationship of master and servant—test :** The test is the right of control which a person has in the manner in which the other does the work : *Goolbai v. Pestonji, A. I. R. 1935 Bom. 333. Cf. Kondiba Gopal v. Mestrejean, A. I. R. 1928 Bom. 91.*

steamship, parted her moorings and drifted with the current out of the harbour and subsequently ran ashore at a point about miles distant therefrom and broke up before she could be saved.

4. The loss of the lighter was due to the defendants' negligence in not taking reasonable care for her safety during ebb-tide :

Particulars of negligence :

(a) The lighter boys supplied by the plaintiffs were not in the lighter, nor did the defendants provide any other servants to supply their place, when she broke adrift,

(b) The ropes supplied by the defendants were not suitable for making fast the lighter to the ship.

The plaintiffs claim—

Rs.....damage, being the value of the lighter.

PLAINT.

437.

MASTER AND SERVANT.

2. Tort : Third Party v. Master.

CLAIM against Master for Criminal Act committed by Servant in the Course of his Employment. (z)

1. At all material times, the defendant M. carried on the business of a furniture dealer on the hire-purchase system in Calcutta, and the defendant P. was the manager of a branch establishment of the said business at

2. Plaintiff at all material times was and is the owner and occupier in part of the house, No..... Street in.....

3. In19..., one S. lodged in a portion of the said house as a monthly tenant to plaintiff and, being in arrear with his rent for four months amounting to Rs....., pledged his furniture, specified in Schedule 'A' hereto, to the plaintiff on

(z) **Reference :** *Dyer v. Munday*, (1895) 1 Q.B. 742 (*Per* Rigny L.J., The law on the matter was laid down by Willes J., in *Bayley v. Manchester, Sheffield, and Lincolnshire Ry. Co.*, (1872-73) L. R. 7 C. P. 415 at 420, thus : "A person who puts another in his place to do a class of acts in his absence necessarily leaves him to determine, according to the circumstances that arise, when an act of that class is to be done, and trust him for the manner in which it is done; and consequently he is held answerable for the wrong of the person so entrusted either in the manner of doing such an act under circumstances in which it ought not to have been done; provided that what was done was done, not from any caprice of the servant, but in the course of the employment. I can find no authority for distinguishing in the application of this

4. On 19..., the defendant P. went to the said house with a number of servants at about, and, when the door was opened by the plaintiff, they pushed their way in. P. then and there told the plaintiff that he had come to reclaim the furniture sold to S. under a hire-purchase agreement upon default in payment of one of the instalments, and proceeded to forceably remove the said furniture, and did remove the same through his said servants although the plaintiff told him that she knew nothing about the alleged contract of sale and that the furniture had been pledged with her for arrears of rent due. In the act of removing the said furniture, the defendant P. assaulted the plaintiff (*give particulars*).

The plaintiff claims—

- (1) The return of the furniture or their value.
- (2) Rs..... damage for detention.
- (3) Rs..... damage for trespass.
- (4) Rs..... damage for assault.

PLAINT.

438.

MASTER AND SERVANT.

2. Tort : Third Party v. Master.

CLAIM against Corporation for Libel published by a Servant. (a).

1. The defendant company are an insurance company with limited liability, incorporated under the provisions of the Indian

rule between tortious and criminal acts of the servant. The class of acts to be done by the manager in the case before us was the resumption of furniture in respect of which instalments were unpaid, and it was left to him to determine when such an act should be done and the manner in which it should be done. It was therefore immaterial whether, in the course of doing one of this class of acts, the manager acted in accordance with the instruction of his employee or not.”), appld in *Faxal Bahi v. East Indian Ry. Co.*, (1921) I. L. R. 43 All. 623, 630, and *Morumal v. Gobindram*, A. I. R. 1933 Sind 176 ; cf. *Hamlyn v. Houston & Co.*, (1903) 1 K. B. 81, 85 (*Per Collins M. R.*, “The principal having delegated the performance of a certain class of acts to the agent, it is not unjust that he, being the person who has appointed the agent, and who will have the benefit of his efforts if, successful, should bear the risk of his exceeding his authority in matters incidental to the doing of the acts the performance of which has been delegated to him”), folld. in *Morumal v. Gobindram*, *supra*.

(z) Limitation : 3 years under Art. 48, 49 or 39.

(a) Reference : *Citizens' Life Assurance Co. v. Brown*, (1904) A. C. 423 (In this case, it was found as a fact that F. P. had no actual

Insurance Act IV of 1938, having their registered office at.....
in

2. From until the plaintiff was in the service of the defendant company as an insurance agent upon terms and conditions set out in an agreement, dated 19..., made in writing between the plaintiff and the defendant company.

3. Shortly after leaving the employment of the defendant company in the month of, the plaintiff entered the service of a rival company called the S. L. Association.

4. At all material times, one F. P. was employed by the defendant company as the chief superintendent of their agencies. His authority was to secure business and to save business and to visit policy-holders whose policies had lapsed or were likely to lapse.

5. In a circular letter sent to several persons insured in the defendant company (whose names and addressess so far as the plaintiff has been able to ascertain have been specified in Schedule 'A' hereto), the said F.P., in the course of his employment as such superintendent, falsely, maliciously, and without reasonable or probable cause, printed and published of the plaintiff the words following, that is to say,

6. By the said words the said F.P. meant and was understood to mean that the plaintiff was a cheat and a liar who was engaged in carrying on a false propaganda among the policy-holders of the defendant company.

7. By the publication of the said words the plaintiff has been injured in his credit and reputation and has suffered damage.

(Here set out special damage, if any).

The plaintiff claims—

Rs..... damages.

authority, express or implied, to write libels, nor to do anything legally wrong. Even so it was held by Lord Lindley, L.J. (pp. 427, 428) that "it is not necessary that he should have any such authority in order to render the company liable for his acts. The law on the subject cannot be better expressed than it was by the Acting Chief Justice in this case : "Although the particular act which gives the cause of action may not be authorised, still if the act is done in the course of employment which is authorised then the master is liable for the act of the servant", fold. in *Moti Lal v. Indra Nath*, (1908-09) 13 C.W.N. 1165, 1170, and appld. in *Municipal Committee, Rupar v. Rahmat Ilahi*, A.I.R. 1934 Lah. 907, and in *Chatra Serampore etc. Society v. Becharam*, I.L.R. (1939) 1 Cal. 123, to suits for malicious prosecution

PLAINT.

439.

MINOR.

CLAIM by Minor on attaining Majority for a Declaration that a Deed of Family Settlement entered into by a supposed Guardian on her behalf during her Minority is Void. (b).

1. One A.B., a Hindu governed by the Mitakshara, died January, 5th, 19..., leaving him surviving C.D., his widow, since deceased.

2. The said A.B. in his life time held four squares of land in, hereinafter called 'the said property,' as a tenant under the Government of the Punjab.

3. On or about, C.D. purchased the said property from the Government out of her stridhana money and became the owner thereof.

4. The said C.D. died, April 15th, 19..., leaving her surviving the plaintiff, her illegitimate daughter, then a minor, as her sole heir.

5. The question of succession to the said property arose shortly after the death of C.D. In the course of the proceedings taken by the Revenue Officer in 19... for the mutation of names in respect of the said property, the plaintiff's right of inheritance thereto was denied by the defendants, Nos. 1 and 2, the brother's sons, and the defendants Nos. 3 and 4, the paternal cousins of A.B., deceased.

6. The defendants purported to settle the said alleged dispute by executing a deed, described as a deed of family settlement, dated, hereinafter called 'the said deed'. To make it appear that the plaintiff then a minor, was a party to the said deed, the defendant No. 1 purported to sign the said deed for self and also as the guardian of the plaintiff.

against corporation. cf. *Barwick v. English Joint Stock Bank* (1867) L.R. 2 Ex. 259, and *Houldsworth v. City of Glasgow Bank*, (1880) 5 A.C. 317, 326.

(a) **Limitation** : one year under Art. 24.

(b) **Reference** : *Partap Singh v. Sant Kaur*, (1937-38) L. R. 65 I. A. 213. (If a compromise has been entered into in good faith by the manager of a joint Hindu family or by the father in such family, a minor member of the family cannot be allowed to disturb it on the ground of inequality of the benefit, unless there was fraud or some other ground which in law vitiates it. This rule proceeds upon the principle that the minor was properly represented by the father or the manager of the family ; and he was therefore a party to the compromise. The rule does not

7. The defendant No. 1 was not the plaintiff's lawful or *defuncto* guardian. In the matter of plaintiff's claim to the said property, the interest of the said defendant was adverse to that of the plaintiff and, accordingly, he was not competent to represent the plaintiff as her guardian in the said deed.

8. By reason of the premises the said deed became and is void.

9. Since the defendants have been in possession of their respective shares in the said property by virtue of, and in accordance with, the aforesaid deed.

10. The plaintiff attained majority on, and, by letter dated, called upon the defendants to surrender their respective possession of the said property to her.

11. By letter, dated, the defendants refused to acknowledge the plaintiff as the sole owner of the said property or to surrender possession of the said property to her.

The plaintiff claims—

(1) A declaration that she is the owner of the said property.

(2) A declaration that the said deed of settlement is void and not binding upon her.

(3) Possession of the said property.

(4) Rs..... as mesne profits against each of the defendants from.....up to.....; alternatively, an enquiry into mesne profits and payment to the plaintiff of such sums as may be found due.

(5) Further mesne profits until possession is delivered up to the plaintiff.

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offend against any law governing a contract. But where there is no person who has authority either under the law of contract or under the personal law applicable to the minors to make a compromise on their behalf, a compromise entered into by minors settling dispute as regards inheritance between themselves and their father's collaterals is not binding on them. Such transaction cannot be upheld even on the ground of family settlement because a party cannot by describing a contract as a family settlement claim for it an exemption from the law governing the capacity of a person to make a valid contract.).

(b) Limitation : Art. 120, Ind. Lim. Act.

CLAIM by Minor on attaining Majority to set aside an unauthorised Alienation by certificated Guardian. (c)

1. The plaintiff was born on 19..., and, at the time of the transfer hereinafter mentioned, was a minor.

2. By an order, dated, made by the District Judge of, one B.S. was appointed the guardian of the (person and) property of the plaintiff.

3. By a registered deed of sale, dated 19..., the said B.S., as such guardian, sold to the defendant the house and premises No., belonging to the plaintiff, for a consideration of Rs., without obtaining any permission of the District Judge therefor.

Or,

By an order of the District Judge, dated 19..., the said B.S., as such guardian, was authorised to sell the house and premises No., belonging to the plaintiff, for not less than Rs. 5000/-. Yet the said B.S. sold the said property for Rs. 4000/- to the defendant on

4. The defendant has been in possession of the property from the date of sale.

(c) **Limitation of powers of guardians :** Sec. 30 of the Guardians and Wards Act, VIII of 1890, provides that a disposal of immovable property by a guardian in contravention of either Sec. 28 or Sec. 29 is voidable at the instance of any other person affected thereby. The "guardian" contemplated by Sec. 30 is not only a certificated guardian who is a natural guardian of the ward but also a certificated guardian who is not the natural guardian : *Jai Narain v. Bechoo Lal*, I. L. R. (1938) All. 614.

(c) **Transfer voidable :** A transfer by a certificated guardian without the leave of the Court is only voidable and not void. It is necessary to inquire whether it is beneficial to the minor or not : *Jagdamba Prasad v. Anadi Nath*, (1938) I. L. R. 17 Pat. 460. It is not necessary that a minor on attaining majority should institute a suit to set aside a transfer; he may take the point of invalidity of transfer by way of defence when an action is brought to enforce a transfer against him : *Jai Narain v. Bechoo Lal*, *supra* ; *Sivanmalai v. Arunachala*, A. I. R. 1938 Mad. 822 ; *Hem Chandra v. Lalit Mohon*, (1911-12) 16 O. W. N. 715. Where there is a sanction authorising the alienation followed by the alienation so authorised, the person who enters into the transaction with the guardian would be entitled to rely upon the sanction itself for the validity of the transaction. He is not bound to go behind the order sanctioning the loan and if he has acted *bona fide* he is not bound to see to the application of the money or any part of it : *Vinayak v. Shantabai*, A. I. R. 1938 Bom. 234. When

5. The plaintiff attained the age of majority on

6. By letter, dated 19..., addressed to the defendant, the plaintiff repudiated the said sale and made a demand for possession of the said property, offering to pay the defendant the consideration money he had paid for purchasing the said property.

7. The defendant replied to the plaintiff's letter on, refusing to surrender possession of the said property on any terms.

The plaintiff claims—

(1) A declaration that the sale aforesaid is not binding on the plaintiff.

(2) Possession of the said property.

(3) Rs. mesne profits from up to the date of suit.

(4) Further mesne profits until possession is delivered.

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immovable property belonging to a minor is sold by his certificated guardian for consideration but without permission of the District Judge and that property is again sold by the guardian to another party but with permission of the District Judge, the second purchaser need not seek to have the first sale expressly set aside by a suit brought within the time provided for in Art. 91 of the Limitation Act. He is entitled to sue for possession of the property on a declaration that the previous sale is not binding on him and the suit would be governed by Art. 120 : *Nagendra Nath v. Mohini Mohan*, (1931) I. L. R. 58 Cal. 123. If the District Judge laid down certain terms, it is not open to the transferee to say that the conditions laid down were impossible of compliance and, therefore, he would take the minor's property without complying with the restrictive terms imposed : *Kishori Ramanji v. Duley Ram*, A. I. R. 1924 All. 474. Cf. *Chiranji Lal v. Syed Ilias* (1924) I. L. R. 46 All. 620.

- (c) **Restitution** : In a case where property of a minor has been conveyed by the guardian without permission of the District Judge, the minor, in a suit brought against him, cannot avoid the transfer without restoring the benefit which he has received : *Jai Narain v. Bechoo Lal*, I. L. R. (1938) All. 614 ; *Hem Chandra v. Lalit Mohan*, (1911-12) 16 C. W. N. 715 ; *Manasharam v. Ahmad Hossein*, (1916-17) 21 C. W. N. 63. Where the transaction is not at all to the minor's benefit he is not bound to make any restitution : Cf. *Dwijendra v. Manorama*, (1922) I. L. R. 49 Cal. 911 ; *Ohiranji Lal v. Syed Ilias*, (1924) I. L. R. 46 All. 620.

Limitation : A suit to set aside a deed is governed by Art. 44, Lim. Act : *Jagdamba Prasad v. Anadi Nath*, (1938) I. L. R. 17 Pat. 460.

CLAIM by an Adult to have a Decree, obtained against him in a Suit in which he was described as Minor while, in fact, he was Major, set aside. (d)

1. The plaintiff was born on 15th July, 19...
2. On 10th September, 1922, the defendant instituted a suit in this Court (No. of 19...) against the plaintiff for the recovery of a sum of Rs. on a bond, dated, alleged to have been executed in his favour by the plaintiff's father, since deceased.
3. The plaintiff had attained the age of majority on the date of the said suit; nevertheless the defendant alleged in the said suit that the plaintiff was a minor and got one M. N. appointed as his guardian *ad litem*.
4. The said M. N. failed and neglected to raise any defence to the said suit and suffered an *ex parte* decree to be passed against the plaintiff on 19..., although the suit could have been successfully resisted on the ground that (*here state the grounds*).
5. The plaintiff had no knowledge of the said suit or of the proceedings therein, until 10th April, 1923, when the defendant informed him of the said decree and demanded payment.

The plaintiff claims—

That the said decree be set aside.

PLAINT.

442.

MINOR.

CLAIM by Minor on attaining Majority to recover Property omitted from his Claim in a previous Suit by his Next Friend. (e)

-
- (d) A decree passed against a person described as a minor, while in fact he was a major, is not void but is only voidable by him provided he had no knowledge of the suit or the proceedings therein: *Ramachari v. Duraisami* (1898) I. L. R. 21 Mad. 167; *Seshagiri v. Hanumantha*, (1916) I. L. R. 39 Mad. 1031. The effect of setting aside the decree will be to restore the original proceedings in the former suit, and the plaintiff in the former suit may get his plaint suitably amended and proceed with the same. See *Khujooroonissa v. Roushun Jehun*, (1876) 3 I. A. 291; *Ramayya v. Venkatasubba*, (1916) I. L. R. 39 Mad. 853; *Zuhara Begam v. Mt. Mashuq Fatima*, A. I. R. 1926 Oudh 32.
- (e) **Reference:** *Vyankat v. Onkar Nathu*, (1921) I. L. R. 45 Bom. 805. "It was argued that the suit was barred under O. II, r. 2, C. P. Code, as the subject-matter of the suit ought to have been included in the previous suit. That argument would not apply to a case like this where

1. The properties specified in Schedules A. and B. hereto, hereinafter called 'the said properties', belonged to one N. D., a Hindu governed by the Dayabhaga, who died September 5th, 1902, leaving him surviving A. D., his widow, and no issues.

2. In pursuance of a written authority given by N. D., the said A. D. duly adopted the plaintiff, then 10 years old, as a son to her husband on June 3, 1903.

3. On or about 19..., that is, shortly after the said adoption, the defendant, a divided brother of the said N. D. took wrongful possession of the said properties.

4. On, the said A. D. as the next friend of the plaintiff instituted Suit No..... of in this Court, for a declaration that the plaintiff was the adopted son of A. D., and for possession of the A. Schedule properties. She omitted to include in the said suit the B. Schedule properties either through ignorance or by mistake, but not with any intention of relinquishing the plaintiff's claim to them.

5. The defendant contested the said suit both as regards the question of adoption, and the plaintiff's right to the A. Schedule properties ; but this Court decreed the said suit in full on 19..., and the plaintiff got possession of the A. Schedule properties through Court.

6. The plaintiff attained the age of majority on

7. By letter dated....., the plaintiff requested the defendant to deliver up possession of the B. Schedule properties to him. On....., the defendant, in his reply to the said letter, repudiated the plaintiff's claim thereto.

The plaintiff claims—

(a) A declaration that the B. Schedule properties belong to the plaintiff as the adopted son and heir of N. D., deceased.

the previous proceedings were taken in the name of the minor by his next friend. The minor could not possibly be prejudiced by a mistake made by those representing him during his minority as his right to suit in his own person only comes into effect when he attains majority. He will, therefore, be entitled to disregard any proceedings which had been taken during his minority if his interests had not been properly safe-guarded." See also *Lalla Sheo Churn v. Ramnandan*, (1895) I.L.R. 22 Cal. 8. But see *Gopal Rao v. Narasinga*, (1899) I. L. R. 22 Mad. 309, which was a case of relinquishment of rent for prior faslis, and suits instituted as to rent due for later faslis by next friend of plaintiff.

(b) Possession of the said properties.

(c) Rs. mesne profits at the rate of Rs.
per annum from to.....

(d) Further mesne profits at the said rate until delivery
of possession.

PLAINT.

443.

MINOR.

CLAIM by Minor to have a Decree set aside on the Ground of Gross Negligence of the Guardian *ad litem*. (f)

The plaintiff through his next friend abovenamed states :—

1. The plaintiff was born on the.....19... He lost his
father in March 19...

2. On 10th April 19..., the plaintiff's mother purporting to
act as his guardian executed a mortgage deed in favour of the defend-
ant E.F. for a sum of Rs....., mortgaging the plaintiff's property
specified in the schedule hereto.

3. The said mortgage deed recited that the said sum was re-
quired for providing funds to B. C., the plaintiff's maternal uncle,
for starting a cloth trade on behalf of himself and the plaintiff's
family.

4. The plaintiff's family is not a trading family nor has there
been any ancestral trade carried on by the family at any time.

5. The defendant E. F. instituted a suit in this Court (Suit No...
.....of19....) on the said mortgage and got the defendant
G. K., an officer of the Court, appointed as the plaintiff's guardian
ad litem.

(f) **Cause of action :** According to all the High Courts, except Bombay, a
suit for setting aside a decree on the simple ground of gross negligence
of the guardian is maintainable : *Punnayyah v. Viranna*, (1922) I. L. R.
45 Mad. 425 ; *Swami Kone v. Sankaravadia*, A. I. R. 1936 Mad. 804 ;
Subbaratnam v. Gunavanthalal, A. I. R. 1937 Mad. 472 ; *Haji*
Muhammad v. Venkata Komaraju, A. I. R. 1940 Mad. 810 ; *Sheo Churn*
v. Ramnandan, (1895) I. L. R. 22 Cal. 8 ; *Mt. Siraj Fatima v. Mahmood*
Ali, (1932) I. L. R. 54 All. 646 F. B. (Even where a guardian has been
formally appointed, but he is grossly negligent in his duties, he ceases
to represent the minor properly and effectively, and the result is the
same as if no proper guardian had been in existence) ; *Kali Charan v.*
Hirdai Narain, A. I. R. 1935 Pat. 24 ; *Fazal Din v. Md. Shafi*, A. I. R.
1928 Lah. 674. But the Bombay High Court has in a recent Full
Bench case held that apart from the ground of fraud or collusion, no
suit lies for a minor to set aside a decree passed against him, on the

6. The said G. K. did not raise any defence to the said suit and suffered an *ex parte* mortgage decree to be passed against the plaintiff on19..., although the suit could have been successfully resisted on the simple ground that the mortgage of immovable property for the purpose of lending money to a maternal uncle for a trade was not a transaction for the benefit of the plaintiff and could not bind him.

7. The said inaction on the part of the said guardian *ad litem* amounted to gross negligence and culpable neglect of the plaintiff's interest and has been greatly prejudicial to the plaintiff.

The plaintiff claims—

That the said decree be set aside.

PLAINT.

444.

simple ground of gross negligence on the part of his guardian *ad litem* : *Krishnadas v. Vithoba*, I. L. R. (1939) Bom. 340 F. B., folld. in *Nana Namdeo v. Dalpat Supadu*, A. I. R. 1940 Bom. 33.

- (f) **Gross negligence—what amounts to :** It is not every kind of negligence which would render proceedings otherwise regular and proper liable to be opened up ; it must be such negligence as leads to the loss of a right which, if the suit had been conducted or resisted with due care, must have been successfully asserted : *Kali Charan v. Hirdai Narain*, A. I. R. 1935 Pat. 24. Failure to raise a doubtful plea in the suit by the guardian *ad litem* does not amount to gross negligence on his part : *Venkataramani v. Subramania*, A. I. R. 1928 Mad. 945. In a suit against minor, after the plaintiff had finished his evidence, the guardian *ad litem* who up to that date had done everything necessary to defend the suit, did not appear and also did not appear in the appeal though served, *Held*, that this was of itself not sufficient to prove negligence : *Panna Lal v. Mohammad Zaki*, A.I.R. 1937 Lah. 563. It is not reasonable to hold the guardian responsible if the lawyer fails to raise a point of law which may well have been raised by him. The guardian cannot be made responsible for the intelligence or the honesty of the lawyer : *Daiva Annmal v. Selvaramanuja*, A.I.R. 1936 Mad. 479.
- (f) **Burden of proof :** The burden of proving that circumstances exist which vitiate the decree is upon the plaintiff and it is an element in that proof that there was an available good ground of defence which the guardian failed to put forward at the hearing : *Srirangam v. Rangarao*, A.I.R. 1937 Mad. 846. One must assume that *prima facie* a Court guardian is doing everything rightly and properly in his office. Therefore very cogent evidence is necessary to charge him with gross negligence : *Visweswara Rao v. Suryarao*, (1936) I.L.R. 59 Mad. 667.
- (f) **Limitation :** Under Art. 120, Ind. Lim. Act, 6 years from the date when negligence comes to plaintiff's knowledge.

MINOR.**CLAIM by Trader for Necessaries supplied to a Minor. (g)**

1. The defendant at all material times was and is a minor, whose parents had died in 19...

2. A. B., the brother and natural guardian of the defendant, neglected to provide him with proper food and clothing.

3. Between and 19..., the plaintiff supplied the defendant with the goods specified in Schedule 'A' hereto, which were necessaries suited to his condition in life and his actual requirements at the time of the transactions.

The plaintiff claims—

(1) Rs., the value of the said goods.

(2) Rs. interest at the rate of 6 per cent. per annum.

- (g) **Liability of minors for necessaries** : Sec. 68, Ind. Cont. Act. "Necessaries" include articles fit to maintain a particular person in the degree, state and station in life in which he is. "Necessaries" must be determined with reference to the fortune and circumstances of the particular infant. The question as to what are "necessaries" is a mixed question of fact and law. It is incumbent upon one who sells goods to an infant to enquire into his circumstances, so as to determine not only whether the thing sold is such an article as an infant of the station in life of the purchaser would require, but whether in the particular case the purchaser had need for it, for if the infant did not require it, the seller cannot recover it : *Jagon Ram v. Mahadeo Prosad*, (1909) I. L. R. 36 Cal. 763. Cf. *Sadasheo Balaji v. Firm Hiralal*, A. I. R. 1938 Nag. 65 (The term 'necessaries' is not confined to goods. Thus, where the guardian of a minor borrowed money for the payment of rent which the minor was bound to pay, the minor is liable under the transaction.) ; *Sadasheo Balaji v. Shankar Govind*, A. I. R. 1938 Nag. 68 (case of advances made to minor for necessaries). Cf. *Elkington & Co. v. Amery*, (1936) 2 All E. R. 86 (where rings purchased by minor as gift to the person to whom he was engaged to be married were held to be necessaries, upon proof of a definite engagement.).
- (g) **Burden of proof** : The onus is on the plaintiff to show that the articles are suitable to the minor's station in life and that he is not already sufficiently supplied with them : *Jagon Ram v. Mahadeo Prosad*, (1909) I. L. R. 36 Cal. 763 ; *Sadasheo Balaji v. Firm Hiralal*, A. I. R. 1938 Nag. 65 ; *Sadasheo Balaji v. Shankar Govind*, A. I. R. 1938 Nag. 68.
- (g) **Interest** : A person who had advanced moneys to a minor for 'necessaries' is entitled to interest at a fair rate on that money : *Rajarathna Chettiar v. Mahboob Sahib*, A. I. R. 1940 Mad. 106.
- (g) **Limitation** : Art. 61 and not Art. 120, Ind. Lim. Act : *Rajarathna Chettiar v. Mahboob Sahib*, *supra*.

DEFENCE.**445.****MINOR.****DEFENCE to a Claim for Necessaries supplied. (h)**

The defendant through his guardian *ad litem* states :

1. The goods mentioned in paragraph 2 of the plaint were not such as a person of the station in life of the defendant would require.
2. At the time of the transactions the defendant was already plentifully supplied with similar goods and had no need for the goods supplied by the plaintiff.

PLAINT.**446.****MINOR.****CLAIM against Minor for Damages for Tort. (i)**

1. By an agreement in writing, dated 19..., the defendant, a minor, aged 17, hired from plaintiff a mare and dogcart to go from M. to C. and back, on the express conditions (i) that only one other person besides the defendant should be carried on any part of the journey in the dogcart, and (ii) that the mare should be driven from M. to C. and back, and nowhere else.

2. In violation of the said conditions, the defendant carried, on his return journey, 3 other persons besides himself in the dogcart and also drove the mare a greater distance than from M. to C. and back, *viz.*, from M. to B., 4 miles beyond C., and back to M.

3. The defendant, also, instead of using due care and dilligence in driving the mare at a reasonable pace, as it was his duty to do, drove her furiously and negligently, and flogged and otherwise ill treated her, so that the mare on her return was found to be badly cut, bruised, and injured, and was suffering greatly owing to having been overridden, and her injuries, by reason of the negligence, misuse, and improper conduct of the defendant, were so great that the plaintiff was obliged to have her destroyed on

4. By reason of the facts hereinbefore complained of, the plaintiff has suffered damages.

(h) This is a defence to Form No. 444. See notes under that Form.

(i) **Reference :** *Walley v. Holt*, (1876) 35 L. T. 631 (Defence was defendant's minority and that the contract being void, the claim was not sustainable. *Held*, it was clear from the statement of claim, the whole of which must be looked at in order to see whether the case was substantially in contract or in tort, that plaintiff claimed damages for a tort ; and in addition to breaking the contract, defendant by driving the

Particulars of special damage :

Value of the said mare ... Rs.

The plaintiff claims—

- (1) Rs. damages under Paragraph 2, and
 (2) Rs. damages under Paragraphs 3 and 4,
 of the plaint.

PLAINT.**447.****MISTAKE OF FACT.**

**CLAIM to set aside an Agreement for Sale on the Ground of
 Mutual Mistake. (j).**

1. On 19..., the defendant, who was a receiver appointed by this Court in Suit No.....of..., sold by public auction the land and premises No..... Burtolla Street, Calcutta, (hereinafter called 'the said property'), which formed part of the property in his charge.

mare at an excessive speed, and unduly flogging, and otherwise ill treating, and negligently and carelessly using her, committed a separate and independent wrong beyond and apart from the contract, and was liable for that wrong in the present suit, to which, being in tort, the plea of minority afforded no defence). You cannot convert a contract into a tort to enable you to sue an infant: *Jennings v. Rundall*, (1799) 8 T. R. 335, but where an infant commits a wrong of which a contract or the obtaining of something under a contract, is an occasion, but only the occasion, he is liable: *Burnard v. Haggis*, (1863) 14 C. B. N. S. 45. Cf. *Fawcett v. Smethurst*, (1914) 84 L. J. K. B. 473 (where an infant hired a motor car to drive to a place six miles away to fetch his bag, but, in fact, drove a friend 12 miles further on and in the course of such additional journey the car was damaged without any negligence on the part of the infant. In an action against the infant for damages for the wrongful use of the car, *Held*, Nothing done by the infant rendered him liable as an independent tortfeasor; and that although the hiring of the car for the purpose in question by an infant in the position of defendant might be necessary, it would not be so if an onerous term, such as that the car should be at the infant's risk, formed part of the contract of hiring), *folld. in Motor House Co. Ltd. v. Charlie*, (1928) 1. L. R. 6 Rang. 763.

- (j) **Reference :** *Nursing Dass Kothari v. Chuttoo Lall*, (1923) I.L.R. 50 Cal. 615 (*Per Sanderson C.J.*, "The notice issued by the Improvement Trust and the liability to restriction upon the use of the premises consequent upon the proceedings initiated by the Improvement Trust may be said to be "a matter of fact essential to the agreement." That essential matter of fact was unknown both to the plaintiff and the defendant at the time of the plaintiff's purchase; consequently by reason of Sec. 20

2. At such sale the plaintiff was declared the highest bidder, and he purchased the said property for Rs., of which sum, in accordance with the conditions of sale, he deposited Rs. the same day with the defendant, and entered into an agreement with him for the purchase of the said property.

3. At the time of the purchase, there had been already published in the Calcutta Gazette of the a notice under Sec. 63 (2) of the Calcutta Improvement Act V of 1911, stating that the Board of Trustees for the Improvement of Calcutta had prepared a plan of a proposed public street known as alignment, Section. In the said notice particulars of the land (shown in such plan) through which the proposed public street would pass were stated. The said property was affected by the said proposed public street. No mention of this notice was made in the Sale Notification.

4. The publication of the said notice, which was a matter essential to the agreement, was unknown to the plaintiff and/or the defendant at the time the plaintiff entered into the agreement and made the deposit aforesaid.

5. On, the plaintiff discovered that there had already been published such notice and, accordingly, he refused to complete the purchase and demanded back the said deposit on

6. The defendant has not returned the said deposit to the plaintiff.

The plaintiff claims—

1. A declaration that the said agreement for purchase became and is void.

2. Rs....., the amount of the said deposit.

of the Contract Act, the agreement is void). Cf. *Scott v. Coulson*, (1909) 1 Ch. D. 453, on appeal, (1903) 2 Ch. D. 249 (case of assignment of an insurance policy. *Per* Vaughan Williams L.J., "It is true that both parties entered into this contract upon the basis of a common affirmative belief that the assured was alive; but as it turned out that this was a common mistake, the contract was one which cannot be enforced. "*Per* Cozens-Hardy L.J., "Under such circumstances it is impossible that the defendants can be allowed to derive any benefit from the assignment."). Cf. *Bell v. Lever Brothers*, (1932) A. C. 161 (where the action to set aside two agreements failed: as to mutual mistake, on the ground that the mutual mistake related not to the subject matter, but to the quality of the service contracts: as to unilateral mistake, on the ground that the defendants under their contract of service with the L. company owed no duty to them to disclose the impugned transactions).

PLAINT.

448.

MISTAKE OF FACT.

CLAIM to set aside a Consent Order on the Ground of
Mutual Mistake. (k)

1. By an indenture of mortgage, dated, the defendant company mortgaged to the plaintiffs certain leasehold Mills near, and all the fixed plant and machinery then and thereafter to be brought on and affixed to the mortgaged premises, hereinafter called 'the said premises'.

2. In 19..., a debenture-holders' action, in which the defendants Nos. 3 to 7 herein were the plaintiffs, was commenced against the defendant company and, on 19..., the defendant No. 2 was appointed the receiver of the stock-in-trade and other assets of the said company on behalf of the debenture-holders. The plaintiffs were not parties to the said action.

3. On January 16, 19..., a petition was presented for the winding up of the defendant company and, on, an order was made for winding up and the defendant No. 2 was appointed the liquidator.

4. The plaintiffs claimed to be entitled, by virtue of their mortgage, to the plant and machinery affixed to the mortgaged premises and, by an arrangement arrived at between the plaintiffs and the defendant No. 2, the liquidator and receiver, an inspection of the said premises was made on, when it appeared that

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- (k) **Reference :** *Huddersfield Banking Co. v. Lister (Henry) & Son*, (1895) 2 Ch. D. 273 (It was held that the Court has jurisdiction to set aside a consent order which has been passed, drawn up and acted upon. Such consent order can be set aside not only on the ground of fraud, but upon any ground which would invalidate an agreement. *Per* Lindley L. J. at p. 281, "The moment you have got rid of the consent order, it is quite plain that an action would lie at law for money had and received against the receiver." *Per* Lopes L. J., at p. 283, "When once a common mistake is established you can set aside an agreement." *Per* Kay L. J., at p. 284, "Of course, if the order had been acted upon, and third parties' interests had intervened and so on, difficulties might arise; but nothing of that kind occurs here."); cf. *Wilding v. Sander-son*, (1897) 2 Ch. 534; *Hickman v. Berens*, (1895) 2 Ch. 638 (where counsel on both sides were not *ad litem*). An order by consent is binding unless and until it has been set aside in proceedings constituted for that purpose: *Kinch v. Walcott* (1929) A. C. 482.

out of the thirtyfive fast power looms in the said premises, thirty-three were not attached to the Mills.

5. On, a summons was taken out by the defendants Nos. 3 to 7, the plaintiffs in the debenture-holders' action, for sale of what was termed "admittedly loose machinery" set out in a schedule which included the thirtythree fast power looms above-mentioned. The plaintiffs attended at the hearing of it, and by consent, an order was made on..... in terms of summons, for the sale of the machinery and plant included in the said schedule, as belonging to the defendant No. 2 as such receiver and liquidator.

6. In 19..., the aforesaid thirtythree fast power looms were sold, realising the net sum of Rs., and this sum was received by the defendant No. 2 and still remains in his hands.

7. The arrangement in relation to the ownership of the thirty-three fast power looms was agreed to and the consent of the plaintiffs to the order of October 17, 19..., was given under the mistaken supposition that the said thirtythree fast power looms which were not then in any way fixed to, but merely resting on their own weight on the floor of the Mills, were always in that state, whereas in truth and in fact the said looms, as the plaintiffs ascertained in, were, during upon delivery, affixed to the Mills so as to become part of the property comprised in the mortgage security and remained so until February, 19...; when they were wrongfully loosened and severed from the premises.

The plaintiffs claim—

(1) An order to set aside the arrangement and sale aforesaid.

(2) A declaration that the said thirtythree fast power looms, at the date of the arrangement, the order, and the sale were, and still are their own property as mortgagees.

(3) Payment to the plaintiffs Rs....., the proceeds of the sale with interest at *per cent.*

PLAINT.

449.

MONEY.

Money paid.

CLAIM for Money paid to a Third Party at the Defendant's Request. (1)

(1) **Cause of action :** There must be actual payment, or what is equivalent,

1. On 19..., the plaintiff paid to one A. B. Rs. 500/- for the defendant at his request. Such request was made orally (or in writing, as the case may be) on, or was implied from the following circumstances :—

2. The defendant has not paid the said sum or any part thereof to the plaintiff.

The plaintiff claims—

(1) Rs.....

PLAINT.

450. MONEY.

Money had and received.

CLAIM for Money received by the Defendant to the Use of the Plaintiff. (m)

1. The defendant is a solicitor of
2. On 19..., the plaintiff instructed the defendant

Thus, if a party gives a promissory note for the debt of another which the creditor accepts in payment, it is as a payment of money to the party's use and may be recovered as such : *Barclay v. Gooch*, (1797) 2 Esp. 571 N. P. The payment must be at the request or authority of the defendant. Thus, where money is paid against the express consent of the party for whose use it is supposed to have been paid, no suit will lie for money paid, laid out and expended. A mere voluntary payment of debt of another person is not sufficient: *Stokes v. Lewis*, (1785) 1 Term. Rep. 20 ; cf. *Brittain v. Lloyd* (1845) 14 M. & W. 762, 773. "The request which is necessary to support an executed consideration, if it has not been made in express terms will be implied in the following circumstances : (i) Where the consideration consists in the plaintiff having been compelled to do that which the defendant was legally compellable. (ii) Where the defendant has adopted and enjoyed the benefit of the consideration, for here his subsequent assent amounts to a ratification, and such ratification may be relied on as evidence of a previous request. (iii) Where the plaintiff voluntarily does that to which the defendant was legally compellable, and the defendant afterwards in consideration thereof expressly promises." : *Chitty on Contract*, 19th Edn., pp. 37, 38. See *Bullen & Leake*, 8th Edn., pp. 264, 265.

- (l) **Limitation** : Art. 61 of the Lim. Act ; cf. *Kandaswamy v. Avayambal*, (1911) I. L. R. 34 Mad. 167 ; *Girraj v. Mul Chand*, (1907) I. L. R. 29 All 627 ; *Torab Ali v. Nitruttun*, (1886) I. L. R. 13 Cal. 155.

- (m) **Money had and received** : The action for money had and received can only be maintained where there is an obligation *ex aquo et bono* upon defendant to repay the money : *Evanston v. Crooks*, (1911) 106 L. T. 264, 269. Cf. *Moses v. Macfarlan*, (1780) 2 Burr. 1005 (The action lies for money

in writing to recover on her behalf the sum of Rs..... due to her from one A. B.

3. The defendant recovered the said sum from the said A. B. on but did not pay it to the plaintiff.

4. By letter dated... ..the plaintiff demanded of the defendant payment of the said sum and gave him notice that unless he paid the said sum on or before....., the plaintiff would claim interest on the said sum at the rate of as from that date. The said sum still remains unpaid.

The plaintiff claims—

(1) Rs.....

(2) Rs..... interest on the said sum at..... from

(3) Further interest at the said rate until payment.

PLAINT.

451. MONEY.

CLAIM for Refund of Money paid for an Illegal Purpose. (n).

1. On 19..., the plaintiff verbally promised to pay the sum of Rs. 2000/- to the defendant as consideration for the latter's promise to marry his niece to the plaintiff's son.

had by mistake ; or upon a consideration which happens to fail ; or for money got through imposition express or implied ; or extortion ; or oppression ; or an undue advantage taken of plaintiff's situation, contrary to laws made for protection of persons under those circumstances. In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.).

(m) **Particulars :** See 'Money had and received' under "Particulars", Pt. II, Ch. XX, pp. 500, 501.

(m) **Interest :** Interest Act XXXII of 1839 ; *Bengal Nagpur Ity. v. Ruttanji Ramji*, (1937-38) L. R. 65 I. A. 66, folld. in *Nirupama Devi v. Surabala*, (1937-38) 42 C.W.N. 1004.

(m) **Limitation :** Under Art. 62, Ind. Lim. Act, 3 years from the date when the money is received : *U Sein Po v. U Phyu*, (1929) I. L. R. 7 Rang. 540.

(n) **Cause of action :** In the case of an executory illegal agreement, the person who has paid money or delivered goods under the agreement, may, before the illegal purpose is carried out, repudiate the transaction and recover back the money or goods as upon a total failure of consideration, but if he waits till the illegal purpose is carried out, he cannot maintain an action : See 'Consideration' under "Special Defences", Pt. II, Chap. XVII, pp. 398, 399. A marriage brocage contract is void

2. Under the said agreement, the plaintiff paid Rs., part of the said sum, to the defendant on 19....

3. On 19..., before the marriage could take place, the plaintiff's son died (or, the plaintiff repudiated the said agreement and demanded back the money paid, stating how).

4. The defendant has not refunded the said sum or any part thereof to the plaintiff in spite of demand in writing made on.....
.....19....

The plaintiff claims—

Rs.....

PLAINT.

452.

MONEY.

CLAIM to recover Money paid under Coercion. (o)

1. The plaintiffs at all material times were and are the proprietors of the J. Cotton Mills at, and of the machinery and other property therein.

being against public policy : *Baldeo Das v. Mohamaya*, (1910-11) 15 C.W.N. 447. *Venkata Kristmayya v. Lakshmi Narayana*, (1909) I.L.R. 32 Mad. 185 (F. B.).

- (n) **Reference :** *Gulabchand v. Fulbai*, (1909) I. L. R. 33 Bom. 411 (In such a case as this, where no part of the illegal purpose has been carried into effect, the payment has been held to be recoverable.). Cf. *Venkata Kristmayya v. Lakshmi Narayana*, *supra* (If the money had been paid and the marriage solemnised, the money cannot be recovered back).
- (n) Where the consideration failed *ab initio*, the transaction being in its inception void, the suit is governed by Art. 62 and not by Art. 97 which governs suits for refund of money paid upon an existing consideration which afterwards fails : *Ardesir v. Vajesing*, (1901) I.L.R. 25 Bom. 593 ; *Basivireddi v. Tallapragada*, (1912) I.L.R. 35 Mad. 39. Cf. *Hanuman v. Hanuman*, (1892) I.L.R. 19 Cal. 123 (P.C.).
- (o) **Reference :** *Seth, Kanhaya Lal v. National Bank of India*, (1912-13) L.R. 40 I.A. 56, 63, 65 (The word 'coercion' in Sec. 72 of the Cont. Act is used in its general and ordinary sense as an English word. The plaintiff was clearly entitled to rid himself of that unlawful interference by any lawful means without thereby affecting his right to hold the defendants liable for that which they have thus caused him to do. It is true that paying under protest the sum demanded was not the only course open to him. He might have taken legal proceedings, by which, sooner or later, he might have rid himself of the interference. But to do so would have involved his submitting to the wrong for all the period necessary for those proceedings to be effective, and that might have been a serious aggravation of the wrong. To this he was in no wise bound to submit.). See 'Coercion' under "Particulars", Pt. II, Chap.

2. On 19..., the defendants, who had obtained a decree against the V. Cotton Mills Company Ltd., in Suit No..... of 19..... on the file of this Court, obtained warrants of attachment against the said J. Cotton Mills, premises and the property therein, and, on, took possession of them (stating how) to obtain satisfaction for the sum of Rs....., the balance then unpaid under the said decree.

3. On thus being ousted from the J. Cotton Mills, the plaintiffs, on, paid into Court under protest the sum of, and had the said attachment removed.

The plaintiff claims—

- (1) Rs..... paid as aforesaid.
- (2) Rs..... damages.

PLAINT.

453.

MONEY.

Money had and received.

CLAIM to recover Money paid under Mistake of Fact. (p)

1. On 19..., the plaintiff paid to the defendant the sum of Rs. by a mistake of fact.

Particulars :

The plaintiff and one B. C. owed the defendant Rs. 1000. B. C. paid the said amount to the defendant on and the plaintiff, not knowing this fact, paid Rs. 1000 over again to the defendant on 19..., and the defendant received the said sum from the plaintiff, without disclosing to him the fact that he had already received the said sum from B. C.

2. The plaintiff discovered the mistake on 19... and, on 19..., requested the defendant in writing to refund the said sum ; yet the defendant has not refunded the said sum or any part thereof.

The plaintiff claims—

Rs.....

XX, p. 473. Cf. *Satyam v. Perraju*, A. I. R. 1931 Mad. 753; *Hajee Shakoo Gani v. Sabapathi*, (1924) I. L. R. 47 Mad. 222, 229 (The principle of law does not depend upon the protest being made or not).

(o) Limitation : 3 years under Art. 62, Ind. Lim. Act.

(p) Reference : Sec. 72, Ind. Cont. Act, III (a).

(p) Leading case : *Norwich Union F. I. Society v. Wm. H. Price*, A. I. R.

DEFENCE.

454.

MONEY.

DEFENCE to a Claim for Money paid to a Third Party at the Defendant's Request. (q)

1. The defendant denies that he ever requested the plaintiff to pay the said sum or any part of it as alleged or at all, or that the said sum or any part of it was paid, if at all, either for him or at his request or under circumstances such as would entitle the plaintiff to recover it from the defendant.

1934 P. C. 171 (It is essential that the mistake relied on should be of such a nature that it can be properly described as a mistake in respect of the underlying assumption of the contract or transaction or as being fundamental or basic.); *Lloyds Bank Ltd. v. Administrator-General*, (1934) I. L. R. 12 Rang. 25 (A person paying under a mistake of fact, however ignorant he may be and however forgetful he may have been, is entitled to recover such money unless he has at any time waived his claim or has been estopped by reason of conduct by which the payee has altered his position by parting with the money. But the mistaken payment must be of such a nature that, if such payment is not rectified, a liability will be created against the person paying.); *P. C. Muthu v. R. M. Venkatachalam*, A. I. R. 1935 Mad. 287; *Badr-un-nisa v. Muhammad Jan*, (1879) I.L.R. 2 All. 671, 674 (case of money paid by debtor to creditor by mistake). Cf. *Soloman Jacob v. The National Bank of India*, (1918) I. L. R. 42 Bom. 16, 32 (Section 72 of the Ind. Cont. Act. should be read subject to the law of estoppel.). Money paid by the plaintiff to the defendant under a contract which goes off or rather is not followed by "completion" owing to the default of the plaintiff, cannot be recovered by him. Ignorance of a particular right, however excusable, is on the same footing as ignorance of law. Thus, where the plaintiff thought that there was a firm contract and pleaded that if it were assumed that no contract in fact existed, he paid the sum under a mistake of law, *Held*, that the plaintiff could not recover the money: *Katherine Stiffles v. Carr Mackertich Martin*, (1934-35) 39 C. W. N. 174. Cf. *Bell v. Lever Brothers*, (1932) A.C. 161 (where money may be recovered under a unilateral mistake).

- (p) **Particulars :** See 'Mistake' under "Particulars", Pt. II, Chap. XX, p. 500.
- (p) **Limitation :** Art. 96, Lim. Act : Three years from the date the mistake 'becomes known to the plaintiff: *Tofa Lal Das v. Syed Moinuddin*, A. I. R. 1925 Pat. 765 : *Ramiah & Co. v. Sadasiva Mudaliar*, (1925) I. L. R. 48 Mad. 925.
- (q) **This is a defence to Form No. 449. See notes under the said Form.**

PLAINT.**455.
MONEY.****CLAIM for Refund of Money under Section 36 (1) (d) of the Bengal Money-Lenders Act, 1940. (q₁)**

1. On....., the plaintiff executed a promissory note for Rs.....in favour of the defendant at....., Calcutta, and thereby agreed to repay the said sum on demand with interest at 18 *per cent. per annum*.

2. Thereafter the plaintiff made the following payments to the defendant against the said loan : (give particulars with dates).

3. The defendant is entitled under Section 30(i) of the Bengal Money-Lenders Act, 1940, to the maximum interest of ten *per centum* simple.

4. By the payments aforesaid the defendant's claim on the said promissory note for principal and interest, calculated at the rate of 10 *per cent. per annum* simple, has not only been fully satisfied but the defendant has in his hands Rs., money overpaid.

5. The defendant has not refunded the said sum of Rs..... in spite of demand made in writing by the plaintiff on

The plaintiff claims—

(1) A declaration that the promissory note aforesaid has been discharged by payment.

(2) Delivery up of the said promissory note by the defendant to the plaintiff.

(3) Payment of Rs.....the amount overpaid.

DEFENCE.**456.
MONEY.**

Money had and received.

- (q₁) **Cause of action :** Under Sec. 36(1)(d), Bengal Money-Lenders Act, 1940, no order for refund would be made in respect of excess payments made or credits given prior to the 1st of January, 1939. The only effect of excess realisations made before the 1st of January, 1939, will be that the borrower will be released from further payments and, in such cases, the borrower should not claim any refund but should ask for exoneration from liability under Cl. (1) (e) of the said section. Cf. Sec. 3 (1) (b) (ii) of the Usurious Loans Act, 1918, which will apply to a claim of refund which subsisted prior to 1st of January, 1939. Cf. *Lajbarkhan v. Nanhu*, A.I.R. 1929 Nag. 348.

**DEFENCE by Solicitor to a Claim for Money had and received
by him to the Use of the Plaintiff. (r)**

The said sum was recovered by the efforts of the defendant for the plaintiff and is retained by the defendant in exercise of his right of lien for the balance of his costs, charges and expenses amounting to Rs....., which sum the plaintiff has not paid in spite of demand in writing made on

DEFENCE.

457.

MONEY.

Money had and received.

**DEFENCE to a Claim for Recovery of Money paid under
Mistake of Fact. (s)**

The plaintiff did not pay the said sum of Rs.... or any part thereof to the defendant.

Or

The defendant did not receive the said sum of Rs..... or any part of it from B. C.

Or

At the time of the said payment the plaintiff well knew that B. C. had already paid Rs. 1000 to the defendant. The defendant received the said sum from the plaintiff at his request and also, at his request, returned to B. C. the amount deposited by him. In the alternative, the defendant says that he owed no duty to disclose to the plaintiff that he had received the said amount from B. C.

PLAINT.

458.

MORTGAGE.

Simple or English Mortgage.

(r) **Solicitor's Lien :** Sec. 171, Ind. Cont. Act. See *Tyabji Dayabhai & Co. v. Jetha Devji & Co.*, (1927) I. L. R. 51 Bom. 855 (The solicitor has at common law a lien over property recovered or preserved or the proceeds of any judgment obtained for the client by his exertions); *In re Barjar Hosanje Vakil.*, (1939) 41 Bom. L. R. 1091.

(s) This is a defence to Form No. 453. See notes under the said Form.

(s) Cf. *Bell v. Lever Brothers*, (1932) A. C. 161 (where the action failed as to unilateral mistake, on the ground that the defendant owed no duty to plaintiff to disclose the improper transactions).

**CLAIM by Prior Mortgagee against Mortgagor and Puisse
Mortgagee for Sale. (t)**

1. On 19..., defendant No. 1 executed a mortgage in favour of the plaintiffs and the defendant No. 3, in respect of certain immovable properties situate within (or partly within

- (t) **Parties—who to sue :** All persons interested in the mortgage must be parties to the suit, either all as plaintiffs or some as plaintiffs and others as defendants : *Das v. Mani Ram*, A. I. R. 1936 Pat. 439. Where mortgaged property is conveyed to two mortgagees as tenants in common, there being no covenant to repay to each separately, if one mortgagee desires payment, his co-mortgagee not consenting to proceedings, his proper course is to sue for a mortgage decree in respect of the whole sum secured joining his co-mortgagee as a defendant : *Sunitabala v. Dhara Sundari*, (1918-19) L. R. 46 I. A. 272 ; *Govind Chandra v. Jamaluddin*, (1933) I. L. R. 60 Cal. 777 (If one mortgagee is dead, his heirs must join in the suit), Cf. *Parsotam Saran v. Mulu*, (1887) I. L. R. 9 All. 68 (F. B.). A benamdar may institute a suit in his own name : *Subramanian Chettyar v. Shivalker*, A. I. R. 1937 Rang. 508.
- (t) **Parties—who to be sued :** O. XXXIV, r. 1, C.P. Code, which is subject to other provisions of the Code, e.g., O. XXXI, r. 1, O.I., rr. 3 and 9, O. XXX. Where a Mahomedan mortgagor or mortgagee dies, ordinarily all his heirs should be made parties to a suit relating to the mortgagee : *Haidar Ali v. Md. Shafiuddin*, A. I. R. 1932 Cal. 34. But it has been held that a failure to implead some of the heirs of a mortgagor is no ground for dismissing the entire suit and that the suit may be decreed so far as the shares of the heirs actually joined are concerned : *Shahasaheb v. Sadashiv*, (1919) I. L. R. 43 Bom. 575 ; Cf. *Mt. Eadan v. Mt. Ram Dulari*, A.I.R. 1940 Oudh. 230. As regards joint Hindu family, the Privy Council held, in *Sheo Shankar v. Jaddo Kunwar*, (1914) I. L. R. 36 All. 383, that "There seems to be no doubt upon the Indian decisions (from which their Lordships see no reason to dissent) that there are occasions, including foreclosure actions, when managers of joint Hindu families so effectively represent all other members of the family that the family as a whole is bound." Cf. *Atmaramsao v. Bhupendranath*, A. I. R. 1940 Nag. 149 ; *Ram Ajodhya v. Firangi*, A. I. R. 1936 Pat. 3.
- (t) **Effect of non-joinder :** O. XXXIV, r. 1 is subject to O. I, r. 9, of the Code. The effect of these two rules is that a decree can be passed so far as regards the rights of the parties actually on the record, unless the party omitted is a necessary party in the sense that, in his absence, no relief can be given at all : *Karrar Husain v. Jai Narain*, A. I. R. 1927 All. 290. Cf. *Govind Chandra v. Jamaluddin*, (1933) I. L. R. 60 Cal. 777. Where a person, e.g., a puisne mortgagee who ought to have been joined as a party is not joined as a party and a decree is passed in the suit, the decree cannot affect his rights : *Umes Chunder v. Zahoor Fatima*, (1889-90) L. R. 17 I. A. 201 ; *Ikt Ram v. Shafi Lal*, (1917-18)

and partly outside) the local limits of the jurisdiction of this Court. The following are the particulars of the said mortgage :

Date :

Sum secured :

Rate of interest :

Due date :

Properties mortgaged :

2. Subsequently, on, defendant No. 1 executed another mortgage in respect of the aforesaid properties, in favour of defendant No. 2.

L. R. 45 I. A. 130. See Mulla's Civil Procedure Code, note, under O. XXXIV, r. 1. Where the prior mortgagee obtains a decree for sale to which the puisne mortgagee is not made a party and in execution thereof purchases the property himself and obtains possession, the puisne mortgagee, who subsequently obtains a decree for sale without making the prior mortgagee a party and in execution thereof purchases it himself, has no right to forcibly dispossess the prior mortgagee. The prior mortgagee, if he is so dispossessed, is entitled to recover possession of the property from the puisne mortgagee. Thereafter, it is open to the prior mortgagee as purchaser of the mortgagor's interest to redeem the puisne mortgagee or to the puisne mortgagee to redeem the prior mortgagee : *Sheo Sahai v. Suraj Bakhsh Singh*, (1937) I. L. R. 12 Luck. 690. Where the first mortgagee without impleading the second mortgagee brought a suit on his mortgage and purchased the property in execution of a decree obtained by him, in a suit brought by the second mortgagee for redemption of the first mortgage, *Held*, that the first mortgagee should be made to account for the rents and profits of the property from the date on which he went into possession : *Hare Krishna v. Gojendra Nath*, I. L. R. (1938) 2 Cal. 643.

- (t) **Interest—If a charge :** In the absence of a contract to the contrary, a mortgagee is entitled to treat interest due under a mortgage as a charge under the mortgaged property : *Suraj Mal v. Chander Bhan*, A. I. R. 1939 Lah. 129. 'Mortgagee is entitled to claim interest from the date of suit till the date for redemption at the rate fixed in the mortgage deed : *Malik Gulam Mohammad v. Rajeshwar*, A. I. R. 1940 Lah. 333.
- (t) **Costs—personal liability for :** The Court in its discretion can make any person who is a party personally liable for a whole or part of the costs : *Venkateswara v. Krishna*, (1937) 2 M. L. J. 896 ; *Bai Shevantibai v. Janardan*, A. I. R. 1939 Bom. 322 ; *Seth Derikishan v. Champalals*, (1939) N. L. J. 512 ; *Surayya v. Krishnamurthi*, A. I. R. 1939 Mad. 583.
- (t) **Jurisdiction :** A suit for enforcement of mortgage is a suit respecting immovable property within the meaning of Sec. 16, C. P. Code, and is a suit for land within the meaning of Cl. 12 of the Letters Patent of the Cal., Bom., and Mad. High Courts. Under Sec. 17 of the C. P. Code, if the property is situate within the jurisdiction of different Courts, the

3. Defendant No. 3 refused to join this suit as a co-plaintiff although thereunto verbally requested by the plaintiffs on

4. The sum of Rs. is now due to the plaintiffs and defendant No. 3 from defendants Nos. 1 and 2 on the said mortgage.

Particulars of claim :

The plaintiff claims—

Decree under O. XXXIV, r. 4 of the Code of Civil Procedure in Form No. 9 in Appendix D to the First Schedule thereto, in favour of the plaintiffs and the defendant No. 3.

PLAINT.

459.

MORTGAGE.

Simple or English Mortgage.

CLAIM by Puisne Mortgagee against Mortgagor and Prior Mortgagee.

1. On 19..., the defendant No. 1 executed a mortgage in favour of the plaintiff in respect of certain immovable properties situate within (or partly within and partly outside) the local limits of the jurisdiction of this Court. The following are particulars of the said mortgage : (Particulars as in Form No. 458).

2. The said mortgage is subject to a prior mortgage dated, created by the defendant No. 1 in favour of the defendant No. 2 in respect of the said properties. The following are particulars of the said mortgage :

3. The sum of Rs. is now due to the plaintiff on the mortgage executed by the defendant No. 1 in his favour.

Particulars of claim :

The plaintiff claims—

Decree under O. XXXIV, rr. 4 and 7 of the Code of Civil Procedure in Form No. 10 in Appendix D. to the First Schedule thereto.

PLAINT.

460.

MORTGAGE.

suit may be instituted in any Court within whose jurisdiction a portion of the property is situate. On the Original Side of the High Court, in such cases, the suit may be instituted with the leave of the Court under Cl. 12 of the Letters Patent. Cf. *Pramathanath v. Kanakendra*, I. L. R. (1938) 2 Cal. 604.

(t) **Limitation :** 12 years under Art. 132, Ind. Lim. Act. •

Simple Mortgage.

CLAIM by Mortgagee against the Legal Representative of the Mortgagor claiming a Title Paramount. (u)

1. On.....19..., one A. B., a Hindu governed by the Mitakshara, since deceased, executed a mortgage in favour of the plaintiff in respect of certain immovable properties, hereinafter called 'the said property,' situate within (or partly within and partly outside) the local limits of the jurisdiction of this Court. The following are the particulars of the mortgage : (Particulars as in Form No. 458).

- (u) **Joinder of persons claiming a title paramount :** The question whether issues of title paramount should or should not be decided in a mortgage suit is dependent on each particular case. The rule that in a suit to enforce a mortgage any pleas in the nature of a claim by way of title paramount are not to be introduced must be taken to exclude a claim by strangers whose interest in the property can in no circumstances be affected by the act of the mortgagor. A claim of self-acquisition by a member of a joint Hindu family can by no means be put on the same footing as a claim by a stranger to the mortgage, because even if that plea is negatived, the claimant will still have an interest in the property which may be bound by the decree in the suit : *Mahalakshamma v. Ramayya*, A. I. R. 1937 Mad. 178. Cf. *Maung San Myaing v. U Pon Gyaw*, A. I. R. 1924 Rang. 240 (case of a stranger claiming title paramount). The question as to whether in a mortgage suit a person impleaded as a defendant as possessing an interest in the equity of redemption and claiming to have an independent or paramount title to the subject-matter of the suit is bound to set up a paramount title as a defence in the mortgage suit itself, has been canvassed in a number of cases. In some cases, it has been held that he is not bound to do so : *Girija v. Mohim*, (1915-16) 20 C. W. N. 675 ; *Asmatulla v. Gamir*, (1928-29) 33 C. W. N. 659 ; *Sonahannessa v. Abdul Hamid*, (1931) I. L. R. 58 Cal. 1222 ; in others, he should not be permitted to set it up : *Champabati Dassee v. Mahomed Yakub*, (1934-35) 39 C. W. N. 1100 ; in others, he is bound to do so : *Srimanta Seal v. Bindubasini*, (1923) 38 C. L. J. 183 ; in others, he should be dismissed from the action, but where a paramount title has been adjudicated upon, the defeated party cannot be allowed to raise the contention that the Court was wrong to decide the question : *Ghanshyam Das v. Ragho Singh*, (1931) I. L. R. 10 Pat. 234 ; *Jaggewar v. Bhuban*, (1906) I. L. R. 33 Cal. 425. According to decision of the Judicial Committee in *Radha Kishun v. Khurshed Hussein*, (1919-20) I. L. R. 47 I. A. 11, a defendant who did not set up the defence of paramount title in a mortgage suit to which he was a party will be precluded from claiming that title in a subsequent suit only if in the plaint in the previous suit a distinct case had been alleged in derogation of the said title ; folld. in *Suraj Chandra*

2. The said property at all material times was the separate property of the said A. B.

3. A. B. died in....., intestate, without issues, leaving him surviving no other heir except the defendant, his nephew (predeceased brother's son).

4. In..... 19..., the plaintiff verbally demanded payment of the sum due to him under the said mortgage from the defendant, but the defendant repudiated the plaintiff's claim, asserting that the said property was the self acquisition of his father and could not therefore be subjected to a mortgage by A.B.

Particulars of claim :

The plaintiff claims—

(1) A declaration that the said property at all material times was the separate property of A.B., deceased.

(2) Decree under O. XXXIV, r. 4 of the Civil Procedure Code in Form No. 5A in Appendix D to the First Schedule thereto.

PLAINT.

461.

MORTGAGE.

Simple Mortgage.

CLAIM based on the Personal Covenant to pay. (v)

1. On 19..., the defendant borrowed Rs. from the plaintiff and executed a mortgage in favour of the plaintiff in respect of certain immovable properties specified therein.

2. By the said mortgage the defendant bound himself personally to pay the mortgage-money with interest at *per cent. per annum* on

v. Beharilal, (1938-39) 43 C. W. N. 1126. It should be noted that O. XXXIV is subject to O. 1, r. 3. of the Code, and, in proper cases, the Court ought to decide questions of paramount title in order to avoid multiplicity of suits. Cf. *Bisheshar Dayal v. Jafri Begam*, A. I. R. 1937 All. 251 ; *Ganba Paiku v. Ganpatsao*, A.I.R. 1937 Nag. 376.

(v) **Simple mortgage :** Sec. 58 (f), T. P. Act.

(v) **Splitting up of reliefs :** O. XXXIV, r. 14, C. P. Code, provides an exception to O. II, r. 2 (3). A mortgagee, therefore, can sue the mortgagor on the personal covenant and omit to sue for sale of the mortgaged property : Cf. *Moli Ram v. Basheshar*, A. I. R. 1939 Pesh. 34. After decree he may bring the mortgaged property to sale by instituting a fresh suit for sale, notwithstanding anything contained in O. II, r. 2 of the Code : *Indarpal v. Mewa Lal*, (1914) I. L. R. 36 All. 264.

3. The defendant has not paid any portion of the said loan.

Particulars of claim :

Principal amount	...	...	Rs.
Interest up to .....	...	...	"
Total			Rs.

The plaintiff claims—

- (1) Rs.
- (2) Further Interest.

PLAINT.

462.

MORTGAGE.

Priority.

CLAIM by Mortgagee Decree-holder for Declaration of Further Charge and Priority over Subsequent Mortgagee. (w)

1. The plaintiff was the mortgagee of a Zamindari property (Towzi No.) situate within the local limits of the jurisdiction of this Court, hereinafter called 'the said property'. The following are the particulars of the said mortgage : (Follow Form No. 458.)

(v) **Personal covenant to pay :** In all mortgages a personal covenant to repay the mortgage money must be presumed unless there is something in the nature and terms of the mortgage deed to negative it : *Qadir Parast Khan v. Mehr Nur Mohammad*, (1935) I. L. R. 16 Lah. 612 ; *Gopal Singh v. Ismail*, A. I. R. 1935 Pesh. 10 ; Cf. *Sochet Singh v. Hidayat Ullah*, (1932) I. L. R. 13 Lah. 508. A personal covenant to pay is implied and is an essential part of every simple mortgage : *Jangi Singh v. Chandar Mol*, (1908) I. L. R. 30 All. 388. It is true that in the absence of any express covenant the assignee of the equity of redemption would not ordinarily become liable under the personal covenant in the mortgage, but on a conveyance for value of lands subject to a mortgage, and expressed to be so conveyed, there is, in the absence of express agreement, an undertaking implied by law on the part of a purchaser to indemnify the vendor against personal liability on foot of the mortgage : *Janki Saran v. Md. Ismail*, A. I. R. 1932 Pat. 273. Cf. *Mathura Singh v. Pulakhari*, A. I. R. 1940 Pat. 512. A decree on the personal covenant to pay may be made when the mortgage is found invalid : *Jagannadham v. Official Assignee*, A. I. R. 1931 Mad. 124.

(v) **Limitation :** Art. 116, Ind. Lim. Act : *Ratnasabapathy v. Devasigamony*, (1929) I. L. R. 52 Mad. 105 (F. B.) ; *Kishen Sahai v. Raghunath*, (1929) I. L. R. 51 All. 473 ; *Umapada v. Haripada*, (1930-31) 35 C. W. N. 1030.

(w) **Reference :** *Monohar Das v. Huzarimull*, (1930-31) L. R. 58 I. A. 341, 349 (The authority conferred upon the mortgagee by that deed to pay

2. The mortgage deed contained, amongst others, the following covenant by the mortgagor :

"I shall duly pay into the collectorate revenue of the mortgaged property held in zamindary right. If I do not pay, you shall be competent to pay the same and the money so paid shall continue to be realisable from the mortgaged property like the money of the bond".

3. In 19..., the plaintiff instituted a suit in this Court (Suit No. of) on the said mortgage against the defendant No. 1, mortgagor, and the defendant No. 2, the puisne mortgagee, in respect of the said property.

4. The plaintiff in the said suit obtained a preliminary decree on and a final decree on

5. The plaintiff thereafter took out execution proceedings in mortgage execution case No. of

6. While these execution proceedings were pending, the defendant No. 1 allowed the Government revenue on the said property for the year to fall into arrears and the plaintiff, to protect his interest and stop the revenue sale, deposited Rs., the amount of the arrears, under the provisions of S. 9 of Act XI of 1859, on

The plaintiff claims—

(1) A declaration that in respect of the amount so paid, together with interest at *per cent. per annum*, from, the plaintiff is entitled to a first charge on the sale proceeds in the said mortgage suit No. of

(2) Payment of the said sum together with interest and costs of the suit out of the said sale proceeds.

PLAINT.

463.

MORTGAGE.

Mortgage by way of Conditional Sale.

CLAIM by Mortgagee for Foreclosure. (x)

the Govt. revenue in respect of which the mortgagors made default is not limited in point of time. It is necessarily intended to continue so long as the mortgagee remains interested under the mortgage in the mortgaged properties. When the payment is so made it becomes by the very terms of the deed a further charge upon the properties).

(x) **Suit for foreclosure :** Under the Tr. of Pty. Act, 1882 as amended by the Tr. of Pty. Amendment Act XX of 1929, Sec. 67 the remedy by

1. By a registered mortgage by way of conditional sale, dated, the defendant, for the consideration of Rs., ostensibly sold certain immovable properties situate within the jurisdiction of this Court (particularly described in Schedule "A" hereto annexed) to the plaintiff on condition that in default of payment of the said principal sum with interest at 6 per cent. *per annum* and all costs and charges and expenses properly incurred or to be properly incurred by the plaintiff in respect of his claim under the said mortgage together with interest thereon at the aforesaid rate, on, the sale should become absolute (or, on condition that on payment etc. the sale should become void, or the buyer should transfer the property to the seller, as the case may be).

2. The defendant has made default in payment.

Particulars of claim :

Principal sum	...	...	Rs.
Interest up to date of suit	...	...	"
Costs charges and expenses properly incurred in respect of the mortgage security together with interest thereon at the rate aforesaid as per particulars set out in schedule "B" hereto annexed	...	...	"
Total	...	...	Rs.

The plaintiff claims—

Decree under O. XXXIV, r. 2, of the Code of Civil Procedure in Form No. 3-A in App. D to the First Schedule thereto.

way of foreclosure is allowed only in the case of (i) a mortgage by conditional sale and (ii) an anomalous mortgage where there is an express stipulation in that behalf: *Kalika v. Ajudhia*, (1929) I. L. R. 51 All. 780. For foreclosure decree, see O. XXXIV, r. 2, and Forms Nos. 3 and 3A, App. D., C. P. Code. For definition of mortgage by conditional sale, see Sec. 58(c), Tr. of Pty. Act, 1882.

- (x) **Costs of suit :** A mortgagee is entitled to all costs properly incurred by him; *Maharaj Bahadur Singh v. Basiruddin*, (1925) 41 C. L. J. 607. He is also entitled to costs subsequent to decree: O. XXXIV, r. 10.
- (x) **Other costs charges and expenses :** Cf. Sec. 72 of the Tr. of Pty. Act, 1882, and O. XXXIV, r. 10, C. P. Code.
- (x) **No foreclosure as to portion of mortgaged property :** In the absence of a covenant in the mortgage deed for payment of separate amounts or fractions of the mortgage money to the mortgagees separately, a suit by one of several co-mortgagees for his share only of the mortgage-money is not maintainable: *Ramachandra v. Sivaram*, A. I. R. 1936

PLAINT.

464.

MORTGAGE.

Usufructuary Mortgage.

CLAIM by Mortgagor for Redemption of a
Usufructuary Mortgage. (y)

1. The plaintiff is the mortgagor of lands of which the defendant is the usufructuary mortgagee. The said lands are situate within (or partly within and partly outside) the local limits of the jurisdiction of this Court.

Mad. 895. Where a mortgage is split up by the sale to the mortgagee of the equity of redemption of a portion of the property mortgaged, the mortgagee can foreclose, in respect of the portion not sold to him for a proportionate amount of the mortgage-money: *Bisheshar v. Laik Singh*, (1883) I. L. R. 5 All. 257. Cf. *Arunachalam v. Ramasamy*, A. I. R. 1928 Mad. 933.

- (x) **Subsequent interest** : See O. XXXIV, r. 11, C. P. Code.
- (x) **Limitation** : There is no Article in the Ind. Lim. Act which expressly refers to foreclosure except Art. 147. This Article was interpreted by the *Judicial Committee* as applying to English mortgages only: *Vasudeva v. Srinivasa*, (1906-07) I. L. R. 34 I. A. 186. By Sec. 67 of the Tr. of Pty. Act, as amended by Act XX of 1929, the English mortgagee can sue only for sale and not for foreclosure or sale as he could do before the amendment. As a result of the amendment and the construction put upon Art. 147 by their Lordships of the Judicial Committee, the said Article has become redundant. In some cases Art. 132 has been applied to suits to foreclose a mortgage by conditional sale as being suits to enforce payment of money charged upon immovable property: *Balaram v. Mangta Dass*, (1907) I. L. R. 34 Cal. 941, 945 (S. B.); *Nilcomal v. Kamini*, (1893) I. L. R. 20 Cal. 269; *Sheoram Singh v. Babu Singh*, (1926) I. L. R. 48 All. 302; *Ganga Prasad v. Bishunath*, A. I. R. 1933 Oudh 81; *Mata Din v. Iftukhar Husain*, A. I. R. 1930 Oudh 178, 182. Some learned authors think that limitation for a suit for foreclosure is governed by Art. 120, as being a suit not specially provided for in the Lim. Act. Cf. Mulla's Tr. of Pty. Act, 2nd Edn., p. 421; Rustomji's Limitation, 5th Edn., pp. 1521, 1522.
- (y) **Who may sue for redemption** : By Sec. 91, Tr. of Pty. Act, as redrafted by Sec. 46 of the Tr. of Pty. Amendment Act XX of 1929, besides the mortgagor, any of the following persons may redeem, or institute a suit for redemption of, the mortgaged property, namely, (a) any person (other than the mortgagee of the interest sought to be redeemed) who has any interest in, or charge upon, the property mortgaged or in or upon the right to redeem the same; (b) any surety for the payment of the mortgage-debt or any part thereof; or (c) any creditor of the

2. The following are the particulars of the said mortgage :
(Same as in Form No. 458).

3. The mortgage deed *inter alia* provided —

(a) The mortgagee would realise and receive the rents and profits of the mortgaged property and, after defraying thereout the costs and expenses, of and incidental to management, credit the net income thereof towards his dues on the said mortgage and submit an account of his dealings with the income of the said properties to the plaintiff whenever called upon in writing to do so.

(b) The mortgagor would be entitled to redeem at any time on payment of the entire balance for the time being remaining due.

4. The defendant took possession of the mortgaged properties on and has remained in possession thereof.

mortgagor who has in a suit for the administration of his estate obtained a decree for sale of the mortgaged property.

(y) **Who may be sued :** In a redemption suit, the mortgagor is entitled to make not only the mortgagee but all persons who have derived title from the mortgagee, as parties to the action and the Court is not debarred from granting relief to the mortgagor against the mortgagee as well as the persons who have derived title from the mortgagee, e.g., a sub-mortgagee : *Venkataramani Ayyar v. Rangaswami Chetty*, A.I.R. 1927 Mad. 703. Even apart from Sec. 91, an attaching creditor may in certain cases be permitted to intervene and be made a proper party to the suit for the purpose of safe-guarding his rights. But if the attaching creditor proceeds to sell the property in execution of his decree, the Court sale releases the property altogether from attachment and with it the right of redemption which the statute confers on him and such rights as he can allege as an attaching creditor also go with it and he is no longer a necessary party. He can only agitate such rights as the judgment-debtor has. The fact that the attaching creditor himself becomes the purchaser is immaterial : *Annamalai Othettiar v. Srinivasaraghava*, A.I.R. 1938 Mad. 293.

(y) **Cause of action—when right to redeem arises :** See Sec. 60, Tr. of Pty. Act, which requires payment or tender at the proper time or place. Where a day is fixed for the payment of the principal debt, the mortgagor cannot redeem before the appointed time. But there is nothing in law to prevent the parties from making a provision that the mortgagor may discharge the debt within the specified period : *Bakhtawar v. Husaini*, (1913-14) L.R. 41 I.A. 84. Cf. *Asharfi Lal v. Zamir Fatima Bibi*, A.I.R. 1940 All. 29. A mortgagor may sometimes be allowed to redeem before the fixed date on equitable grounds, e.g., where the mortgagee did not comply with the other terms of the deed : *Narasimha v. Seshayya*,

5. The defendant submitted to the plaintiff an account unsupported by vouchers on showing that the sum of Rs., that is, Rs..... for principal and Rs..... for interest was due on the said mortgage. The plaintiff did not accept the correctness of the said account, and pending examination of the accounts by him, and, without prejudice, he, on the same day, tendered to the defendant at his aforesaid place of residence the said sums, but the defendant refused to accept the same. The plaintiff brings the said sum into Court.

The plaintiff claims—

(1) To redeem the said property and to have the same reconveyed to him and have possession thereof.

(2) Rs..... mesne profits from, the date of the tender, and further mesne profits until possession is delivered.

(3) An account of the sums received and disbursements made by the defendant as mortgagee, and payment of the surplus amount to be found due to the plaintiff upon the taking of such account together with interest thereon at 6 *per cent. per annum* from

A.I.R. 1925 Mad. 825 ; on appeal, *Seshayya v. Lakshminarasinha*, A.I.R. 1930 Mad. 160 ; *Chhotku v. Baldeo*, (1912) I.L.R. 34 All. 659, 662. In the case of a usufructuary mortgage as soon as the principal and interest have been satisfied, the mortgagor is entitled to redeem irrespective of the fact that a time is fixed for payment : *Ankinedu v. Subbiah*, (1912) I.L.R. 35 Mad. 744 ; *Seshayya v. Lakshminarasimha*, A.I.R. 1930 Mad. 160.

- (y) **Right of mortgagor to recover possession** : See sec. 62, Tr. of Pty. Act. as amended by sec. 25 of the Tr. of Pty. Amendment Act XX of 1929. Cf. *Kishen Gopal v. Abdul Latif*, A.I.R. 1940 Oudh 97.
- (y) **Extinguishment of the right of redemption—by act of parties** : The 'act of parties' means an act subsequent to the mortgage transaction. There can be no exception of the right of redemption by an agreement contained in the transaction itself : *Ambu v. Kelu*, (1929) I.L.R. 53 Mad. 805. Cf. *Jagarnath Prasad v. Chunni Lal*, A.I.R. 1940 All. 416.
- (y) **Redemption of portion of mortgaged property** : The Court has no power to compel the mortgagee to submit to a piecemeal redemption : *Mirza Qaiser Beg v. Sheo Shanker*, (1931) I.L.R. 53 All. 391 : *Yadalli Beg v. Tukaram*, (1921) I.L.R. 48 Cal. 22, 28 (P.C.). Cf. *Amulya Krishna v. Raruli Co-op. Bank*, A.I.R. 1940 Cal. 150. Where, however, there has been a severance of the security and the integrity of the mortgage has been broken, the mortgagor or the person having the equity of redemption may insist on the apportionment of the mortgage-debt upon the

PLAINT.

465.

MORTGAGE.

Usufructuary Mortgage.

CLAIM by Mortgagor for Redemption of a Usufructuary

Mortgage. (z)

(Another Form)

1. Same as Paragraphs 1 and 2 of Form No. 464.

several mortgaged properties and on partial redemption : *Mt. Azizunnissa v. Romal Singh*, (1930) I.L.R. 9 Pat. 930 ; *Kallan Khan v. Maradan Khan*, (1906) I.L.R. 28 All. 155 ; *Kamini v. Satya Niranjana*, (1918-19) 23 C.W.N. 824 (where mortgagee became owner of the part of the mortgage security.)

- (y) **Liability of mortgagee in possession** : Sec. 76, Tr. of Pty. Act, 1882, as amended by Sec. 40 of the Tr. of Pty. Amendment Act XX of 1929. The mortgagee is responsible for such sums as were actually received by him or on his behalf and for such sums, if any, as might have been received by him but for his own neglect or fault : *Banarsi Prasad v. Ram Narain*, (1903) I.L.R. 25 All. 287 (P.C.) ; cf. *Md. Sadiq v. Harakh Narain*, A.I.R. 1936 Pat. 583. Every mortgagee is bound to render account unless he establishes a contract in terms of Sec. 77 of the Act : *Kamla Prasad v. Bamdeo*, A.I.R. 1935 Pat. 148 ; *Hare Krishna v. Gajendra*, A.I.R. 1939 Cal. 15. A suit merely for accounts cannot be maintained by the mortgagor unless he asks for redemption : *Hari v. Lakshman*, (1891) I.L.R. 5 Bom. 614. If the mortgagee does not keep any accounts nor file them in Court, his claim for interest must be disallowed : *Shadi Lal v. Lal Bahadur*, A. I. R. 1933. P.C. 85. If the mortgage debt is fully paid off out of the usufruct and the mortgagee thereafter continues in possession, the mortgagor is entitled to interest on the surplus money from the date of suit : *Ismial Hasan v. Mahdi Hasan*, (1924) I.L.R. 46 All. 897, 902. The mortgagee is liable for loss occasioned by failure on his part to perform any of the duties imposed by Sec. 72. Cf. *Chandra v. Dwarka*, A.I.R. 1936 Lah. 42. Cf. *Duraiswami v. Venkata*, A.I.R. 1940 Mad. 233 ; *Karson v. Meghji*, (1940) 42 Bom. L.R. 917.
- (z) **Deposit** : S. 83, Tr. of Pty. Act. The right of deposit arises when the right of redemption accrues : Sec. 60.
- (z) **Notice of deposit** : It is the duty of the Court to see that the notice of the deposit is served upon the mortgagee : *Nibaran v. Parbati*, (1922) 35 C. L. J. 202.
- (z) **Effect of deposit** : As soon as a deposit is made, interest ceases on the mortgage from that date : S. 84, Tr. of Pty Act.
- (z) **Acceptance of deposit by mortgagee—effect of** : If the mortgagee withdraws the amount deposited, the withdrawal must be deemed to have been made in full discharge of the mortgage debt : *Gupteswar v. Radha Mohan*, A. I. R. 1937 Pat. 253.

2. The mortgage deed, *inter alia*, provided—

(a) That the mortgagee would realise and receive the rents, issues and profits of the mortgaged property in lieu of interest.

(b) The mortgagor would be entitled to redeem the mortgage at any time on payment of the principal amount.

3. The defendant took possession of the mortgaged property on and has remained in possession thereof.

4. On, 19..., the plaintiff deposited in this Court the said principal sum of Rs. to the account of the defendant, under the provisions of Section 83 of the Transfer of Property Act, 1882, whereupon the Court caused a written notice of the deposit to be served on the defendant on, but the defendant has not applied to receive the said deposit.

The plaintiff claims—

(As in Form No. 464.)

PLAINT.

466.

MORTGAGE.

Usufructuary Mortgage.

CLAIM by Mortgagor against Usufructuary Mortgagee for unpaid Balance of Consideration Money. (a).

1. On 19..., the plaintiff, for the consideration of Rs., executed a usufructuary mortgage deed in favour of the defendant in respect of certain immovable properties specified therein.

2. The mortgage deed, *inter alia*, contained the following covenants :

(a) The mortgagor to forthwith deliver possession of the mortgaged property to the mortgagee.

(b) The mortgagee to retain such possession and to receive the rents and profits accruing from the said property in lieu of interest.

(z) **Note :** See notes under Form No. 464.

(a) **Reference :** *Sheopati Singh v. Jagden Singh*, (1930) I.L.R. 52 All. 761, 765, 766 (The suit is not really one for specific performance of a mere contract to lend money, but to compel the defendants to perform their part of the contract when they have obtained delivery of possession of the property The next point that remains for consideration is whether the relief to be granted to the plaintiffs should be a decree directing the defendants to pay the amount to R. K. or whether it should be a decree for that amount in favour of the plaintiffs themselves

(c) The mortgagor to be entitled to redeem on payment of the principal mortgage money only after the expiry of twelve years without any accounting.

(d) The mortgagee to pay Rs..... out of the consideration money to the mortgagor and the remainder to one R. K., a previous mortgagee of property not covered by this deed.

3. The plaintiff put the defendant in possession of the mortgaged property in terms of the mortgage deed, on, and has performed the whole of his part of the contract.
4. At the time of the execution of the mortgage deed the defendant paid the plaintiff Rs..... The defendant has not paid the balance of the consideration money or any part of it either to the said R. K., or to the plaintiff.
5. In consequence of the breach of contract aforesaid on the part of the defendant, the plaintiff has suffered damage.

Particulars of damage :

The plaintiff claims ;—

Rs..... and Rs..... damage.

PLAINT.

467.

MORTGAGE.

Equitable Mortgage.

CLAIM by Equitable Mortgagee for Declaration of Charge and Sale. (b)

..... Where the previous encumbrance creates a charge on the property transferred, the transferee is entitled to retain the amount in his own hands in order to pay off the prior encumbrance in cases where the property is transferred free from such encumbrance. That is not the case here. The discharge of R. K.'s mortgage would be entirely for the benefit of the executants and would not affect the property transferred to the defendants, for, R. K.'s mortgage did not cover the property transferred to the defendants : *Thakar Das v. Amar Chand*, A.I.R. 1938 Lah. 21 ; *Wahid Ali v. Biptu Chamar*, A.I.R. 1935 Pat. 125 (A mortgagor who has executed a usufructuary mortgage but has not received the full consideration is entitled either to such balance or damages for non-payment which may be assessed as the balance due. But he cannot claim proportionate return of the land and mesne profits for such proportion.) ; Cf. *Sardar Khan v. Ram Mal*, A.I.R. 1936 Lah. 196 (Mortgagor's right to recover consideration is transferable.).

- (b) **Equitable mortgage—what is :** See Sec. 68 (f), Tr. of Pty. Act, 1882, as amended by the Govt. of India (Adaptation of Indian Laws) Order

1. On 19...., the defendant executed a promissory note for Rs. in favour of the plaintiff agreeing to repay the said sum on with interest at 9 *per cent. per annum*.

2. On the same day, subsequent to the said loan, the defendant deposited with the plaintiff at the several documents of title specified in the schedule hereto with intent to create a security on the property to which the same relate for the payment of the said loan to the plaintiff.

3. The defendant has not made any payment towards the said loan.

1937. An equitable mortgage by transfer of title deeds is recognised and enforceable by law in the Punjab although the Tr. of Ppty. Act does not apply to the province : *Ram Mohan v. Bharat National Bank*, A. I. R. 1921 Lah. 253.

- (b) **Equitable mortgage—requisites of :** The requisites of an equitable mortgage are, (1) *a debt*, which may be an existing or a future debt : *Himalaya Bank v. Quarry*, (1895) I. L. R. 17 All. 252 ; *Imperial Bank of India v. U Rai Gyaw Thu & Co*, (1922-23) I.L.R. 50 I.A. 283 ; (2) *deposit of title deeds* : The terms “documents of title” and “title deeds” denote such a document or documents as show a *prima facie* or apparent title to the property in the depositor. Merely because a document relates to title to the property it is not a “document of title” or “a title deed” within Ss. 58 and 59. The document or documents of title deposited must not only relate to the mortgagor’s title to the property but must disclose an apparent title in the mortgagor to the property or to some interest therein ; *V. E. R. M. A. R. Chettyar Firm v. Ma Joo Teen*, (1933) I. L. R. 11 Rang. 239 (F.B.). An equitable mortgage by deposit of title deeds may be valid if only some of the material documents of title to the property have been deposited. If the deeds deposited *bona fide* relate to the property, are material evidence of the mortgagor’s title and are shown to have been deposited with the intention of creating a charge, a valid mortgage of the property will be created, although a complete title may not be shown by the deeds : *Surendra Mohan v. Mohendra Nath*, (1932) I. L. R. 59 Cal. 781. A deposit of some of the title deeds relating to a property is enough to create a valid equitable mortgage over the entire property, if it was the intention of the parties that the mortgage should be in respect of the entire property to which the documents of title relate : *Ramanathan v. Dowlat Singjee*, A. I. R. 1938 Mad. 865. If the documents deposited show no kind of title, no mortgage is created : *Venkataramayya v. Narasinga Rao*, (1911) 22 M. L. J. 454 ; (3) *Intention* : The mere fact that there is a subsequent or contemporaneous loan is not sufficient in law to warrant a presumption apart from any other evidence that the contemporaneous or antecedent deposit of title deeds was necessarily made as security for the loan : *Behram v. Sorabji*, (1914) I. L. R. 38 Bom. 372 ; *Indian Cotton*

Particulars of claim :

The plaintiff claims—

(1) A declaration that the property to which the said documents of title relate are charged with the payment of the said loan to the plaintiff.

(2) Decree under O. XXXIV, r. 4 of the Civil Procedure Code in Form No. 5A in Appendix D to the First Schedule thereto.

Co. v. Hari Poonjoo, I.L.R. (1937) Bom. 763 ; *Ralli Brothers v. Punjab National Bank*, (1930) I. L. R. 11 Lah. 564. Cf. *V. E. R. M. A. R. Chettyar Firm v. Ma Joo Teen*, (1933) I. L. R. 11 Rang. 239 (F. B.).

- (b) **Place of deposit :** It is not necessary that the property to which the title deeds relate should be situate within one of the towns mentioned in Clause (f) of Sec. 58 : *Indian Cotton Co. v. Hari Poonjoo*, I. L. R. (1937) Bom. 763 ; *Madho Das v. Ram Kishen*, (1892) I. L. R. 14 All. 238 ; *Srinath v. Godadkur*, (1896) I. L. R. 24 Cal. 348. But the delivery of title deeds must take place within the towns mentioned in the said clause : *Surajmull v. Gopeeram*, (1931-32) 36 C. W. N. 1028. Cf. *Indian Cotton Co. v. Hari Poonjoo*, *supra*.
- (b) **Registration :** When upon a mortgage by deposit of title deeds a document is drawn up constituting the bargain between the parties the document is not admissible in evidence to prove the mortgage unless it is registered under the Indian Registration Act, and oral proof of the mortgage is inadmissible : *Subramonian v. Lutchman*, (1922-23) L.R. 50 I.A. 77 ; *Hari Shankar v. Kedar Nath*, A.I.R. 1939 P.C. 167. It is in each case a question of fact, as to whether the writing itself constitutes the bargain between the parties or whether the mortgage had been completed by the deposit of title-deeds and the advance of money on such deposit, and the writing is merely evidence of an already completed transaction. In the former case, the writing falls within Sec. 17, Registration Act, and, if unregistered, is inadmissible : *Ram Sarup v. Shiv Dayal*, A.I.R. 1940 Lah. 285.
- (b) **Priority :** Where a mortgage made to secure future advance does not express the maximum sum to be secured thereby, the effect of Secs. 79 and 80 of the Tr. of Ppty. Act, 1882, is that the mortgagee does not obtain, in respect of an advance subsequently made, priority over a mortgage of the same property made before that advance, even if the second mortgagee has notice of the prior mortgage : *Imperial Bank of India v. U Rai Gyaw Thu & Co.*, (1922-23) L.R. 50 I.A. 283 (case decided before the Amending Act XX of 1929).
- (b) **Remedies of an equitable mortgagee :** In India there is no distinction between legal and equitable mortgages as in English law, where the legal mortgage will always prevail against equitable unless the holder of the legal has done or omitted to do something which prevents him in equity from asserting his paramount rights. In India, a mortgage

PLAINT.
468.
MORTGAGE.

Subrogation.

**CLAIM by Subrogee for Enforcement of the Rights of the
Mortgagee whose Mortgage has been redeemed. (c)**

1. By a mortgage deed, dated 19..., the defendant mortgaged certain immovable properties, situate within (or, partly within and partly outside) the local limits of the jurisdiction of this Court, hereinafter called 'the said property,' to one A. B. The following are the particulars of the said mortgage : (Follow Form No. 458.)

2. By a registered instrument, dated, made between the plaintiff and the defendant, the defendant agreed that the plaintiff would be subrogated to the rights of A. B. on payment off of the amount due under the said mortgage.

3. On 19..., the plaintiff paid Rs..... to A.B., in full satisfaction of his claim under the said mortgage.

by deposit of documents of title, where validly made, is a "mortgage" in the sense of the Tr. of Pty. Act, including Secs. 78, 79 and 80 : *Imperial Bank of India v. U Rai Gyaw Thu & Co.*, (1922-23) L.R. 50 I.A. 283, 291, 292. In India, an equitable mortgage carries with it the remedies to which a simple mortgage may have recourse and those remedies alone : *Ma Hnin Yiek v. K.A.R.K. Firm*, A.I.R. 1939 Rang. 321, 323 (F.B.)

(b) **Limitation** : Art. 132 of the Ind.Lim.Act, as amended by Act XXI of 1929.

(c) **Subrogation** : Sec. 92, Tr. of Pty. Act, 1882, as amended by Act XX of 1929, which deals with conventional subrogation (as in this case) and subrogation by operation of law. See Mulla's Tr. of Pty. Act, 2nd Edn., p. 512. There is a well established distinction between cases in which a person who has a pre-existing interest in property pays off a prior charge on that property for the protection of his own interest and cases in which a person acquires an interest in property only by reason of his advancing money to pay off an existing mortgage debt. The first clause of Sec. 29, T. P. Act, must be held to relate to the first type of cases above referred to and the third clause to the second type : *Lakshmi Amma v. Shankara*, (1936) I. L. R. 59 Mad. 359 (F. B.). If three persons A. B. and C. advance money with which a prior mortgage is redeemed in full, they are entitled to claim subrogation in proportion to the amounts they have respectively paid : *Kamlapati Devi v. Jageshwar*, (1939) I. L. R. 18 Pat. 342. A person who claims to be subrogated to the rights of a mortgagee must pay the entire amount of the incumbrance in question. Payment of a portion only of the

Particulars of claim :

The plaintiff claims—

(1) A declaration that he is the subrogee of the rights of A. B. under the said mortgage.

(2) Decree under O. XXXIV, r. 4 of the Civil Procedure Code in Form No. 5A in Appendix D to the First Schedule thereto.

DEFENCE.**469.****MORTGAGE.****Equitable Mortgage.****DEFENCE by Mortgagor to a Claim by an Equitable Mortgagee. (d)**

1. The loan mentioned in paragraph 1 of the plaint has been discharged by payment (stating how and when).

incumbrance is not sufficient. Such a qualification of the right of subrogation applies whether the right be claimed under the statute or under the pre-existing law : *Janaki Nath v. Pramatha Nath*, A. I. R. 1940 P. C. 38. Where a prior mortgage is redeemed partly by the mortgagor and partly by the vendees of the mortgaged property out of the sale consideration and in terms of covenants in the sale deeds in their favour, without any agreement by any registered instrument that the vendees should be subrogated to the rights of the prior mortgagee who was paid off, the vendees, as against the puisne mortgagee, are not entitled to the rights of subrogation under Sec. 92, T. P. Act : *Hira Singh v. Jai Singh*, I. L. R. (1937) All. 880 (F.B.). In the Punjab where the T. P. Act does not apply, an oral agreement has been held to be sufficient to confer a right of subrogation on the lender : *Punjab National Bank v. Jagdish Sahai*, A. I. R. 1936 Lah. 390 (case decided under Sec. 74 of the Act, now repealed).

- (c) **Limitation :** According to the Madras High Court, the rights of the subrogated mortgagee are the rights of the original mortgagee before he brought the suit and time begins to run from the original date of the mortgage : *Halsnad v. Mahabala*, A. I. R. 1937 Mad. 826. But according to the Allahabad and Patna High Courts, the cause of action for such suits arises not from the date when the right to sue on the original mortgage accrued but from the date when the mortgage was paid off. Thus, a subsequent mortgagee who pays off the decretal amount on account of a prior mortgage and redeems it, acquires the rights of the mortgage decree-holder to recover his money by enforcement of the fresh charge within 12 years of redemption : *Alam Ali v. Beni Charan*, (1936) I. L. R. 58 All. 602 (F. B.), folld. in *Kamlapati Devi v. Jageshwar*, (1939) I. L. R. 18 Pat. 342.

- (d) See notes under Form No. 466.

2. The defendant denies that he deposited the documents of title mentioned in paragraph 2 of the plaint with intent to create the alleged or any security on the property to which the same relate.

Or,

The said documents of title do not show any kind of title (or do not relate to the defendant's title to the property).

Or,

The said documents of title were handed over to the plaintiff at.....and not at.....

Or,

The defendant denies that the said documents of title were deposited as alleged in paragraph 2 of the plaint. The defendant says that at the time of the deposit he executed a memorandum whereby he purported to create a mortgage in favour of the plaintiff in respect of the properties to which the documents of title relate. The said memorandum is not registered.

DEFENCE.

470.

MORTGAGE.

DEFENCES by Mortgagor to a Claim by Mortgagee for Sale or Foreclosure, including Defences under the Bengal Money-Lenders Act, 1940. (e)

The mortgagor may, amongst others, take one or more of the following defences :—

1. The mortgage deed was obtained by coercion or fraud or undue influence (*give particulars in each case*).

2. The defendant did not receive any part of the consideration alleged in paragraph of the plaint. The defendant left the consideration money with the plaintiff under a verbal arrangement that the plaintiff should pay off the debts the defendant owed to one C. D. The plaintiff has not paid any sum out of the consideration money to the said C. D.

(e) **Defence of coercion, undue influence, fraud :** See under "Special Defences," Pt. II, Chap. XVII.

(e) **Defence of want of consideration :** See 'Consideration' under "Special Defences," Pt. II, Chap. XVII, pp. 394-397.

(e) **Defence of damdupat :** This is a rule of the Hindu law of contract which is still in force in the Bombay presidency and in the presidency town of Calcutta but is not recognised outside that town or in the Madras presidency. This rule has now been adopted by the various provincial Money-Lenders Acts. Cf. Bengal Money-Lenders Act, 1940, Sec. 39(1),

3. Before the institution of the suit the defendant had paid the plaintiff the aggregate sum of Rs. The plaintiff's claim together with the amount already paid by the defendant exceeds twice the principal of the original loan.

4. The sum claimed on account of interest up to is greater than the principal outstanding on such date.

5. The defendant is not liable to pay any interest more than 8 *per centum* simple calculated from the date of execution of the bond.

6. On 19..., the accounts between the parties were adjusted and the defendant acknowledged in writing that the sum of Rs. was due for principal and Rs. for interest, up to that date. In the said adjustment interest was calculated at the bond rate of *per cent.* which is in excess of the rate which the plaintiff can claim under the law. The defendant claims that the said adjusted account be re-opened and he be released of all liability in excess of the limits imposed by law and the plaintiff be ordered to refund to the defendant such sum as may be found due to him upon the taking of the account.

7. The loan in question is not a commercial loan although it is so stated in the bond in suit.

8. The loan mentioned in paragraph in the plaint was advanced by the plaintiff after the date notified in Sec. 8 of the Bengal Money-Lenders Act and at the time when the said loan was advanced the plaintiff did not hold an effective license.

9. The plaintiff has not in respect of the claim in suit complied with the provisions of Sections 24 and 25 of the Bengal Money-Lenders Act, 1940 (*give particulars*).

clauses (a) and (b). Cf. Secs. 6 and 7. Bihar Money-Lenders (Regulation of Transactions) Act, 1939, and Sec. 4, Assam Money-Lenders Act, 1934.

(e) **Defence as to rate of interest :** Sec. 30(1)(c), Bengal Money-Lenders Act, 1940. Cf. Secs. 5, 6 and 7, Bihar Money-Lenders (Regulation of Transactions) Act, 1939, and Sec. 4, Assam Money-Lenders Act, 1934.

(e) **Defence that the loan is not a commercial loan :** Cf. Sec. 40, subsection (3) and (4), Bengal Money-Lenders Act, 1940.

(e) **Defence that the plaintiff is not the holder of an effective license :** Sec. 13, Bengal Money-Lenders Act, 1940. The effect of this section is that no decree in the suit shall be made until the lender pays into Court such penalty as the Court thinks fit, not exceeding the amount three times the license fee specified in Sec. 10 and if the Money-Lender

PLAINT.
471.
MORTGAGE.

Mortgage of Movables : Priority.

**CLAIM by Prior Mortgagee without Possession against
subsequent Mortgagee with Possession. (f)**

1. On..... 19..., the defendant No. 1 by a registered document hypothecated to the plaintiff a printing press specified in schedule "A" hereto, hereinafter called 'the said press', as security for a loan of Rs..... repayable on demand.

2. The plaintiff did not take possession of the said press under the hypothecation, and it remained in the possession of the defendant No. 1.

3. On....., the defendant No. 1 by another registered document hypothecated the same printing press to the defendant No. 2 as security for a loan of Rs. 2,500/-. At the time of the said transaction the defendant No. 2 had notice of the prior charge created by the defendant No. 1 in favour of the plaintiff in respect of the said press.

fails to pay the penalty within the time allowed, the Court shall dismiss the suit. Cf. Sec. 4, Bihar Money-Lenders (Regulation of Transactions) Act, 1939.

- (c) **Defence that account should be re-opened :** Cf. Secs. 36 and 38, Bengal Money-Lenders Act, 1940. Cf. Sec. 1, Bihar Money-Lenders (Regulation of Transactions) Act, 1939.
- (e) **Defence that the provisions of Secs. 24 and 25 of the Bengal Money-Lenders Act have not been complied with :** See sec. 27 of the Act, which empowers the Court in such circumstances to disallow wholly or in part the interest and also costs. Cf. Secs. 7 and 20, Bihar Money-Lenders Act III of 1939.
- (f) **Mortgage of movables how created :** Mortgage of movable property can be created orally without delivery of possession to the mortgagee : *Peoples Bank v. F. F. Campbell & Co.*, A. I. R. 1939 Lah. 398 ; *Co-op. Hindusthan Bank v. Surendra*, (1931-32) 36 C. W. N. 263 ; *Abdul Habib v. Maung Tun Kyaing*, (1931) I. L. R. 9 Rang. 182. A written hypothecation does not require registration : *Backer Khorasane v. Ahmed Esmail*, (1927) I. L. R. 5 Rang. 633.
- (f) **Mortgage of non-existent movables :** Hypothecation of not only the movables existing at the time but also in respect of movables which might be subsequently acquired is valid in India : *H. V. Low & Co. v. Pulinbiharilal*, (1932) I. L. R. 59 Cal. 1372 ; *Co-op. Hindusthan Bank v. Surendra*, (1931-32) 36 C. W. N. 263, folld. in *Sonaram v. Sitaram*, (1940-41) 45 C. W. N. 50.
- (f) **Remedies of the mortgagee :** A mortgagee of movable property is

4. The defendant No. 2 filed a suit on his said mortgage in this Court (Suit No..... of) without impleading the plaintiff as a party thereto, and obtained a preliminary mortgage decree on, and a final decree on.....

5. The said press was sold in execution of the defendant No. 2's decree on..... for Rs....

6. The defendant No. 2 is denying the right of the plaintiff to claim a first charge on the said sale proceeds.

7. The sum of Rs..... due to the plaintiff on his hypothecation bond dated..... remains unpaid.

The plaintiff claims—

(1) A declaration that he is entitled to a first charge on the said sale proceeds in respect of his claim.

(2) Payment to him out of the said sale proceeds the sum of Rs..... together with costs of the suit in priority to the defendant No. 2. *

entitled to a right of sale quite as much as a mortgagee of immovable property : *Basivireddi v. Kamaraju*, (1933) I. L. R. 56 Mad. 560 ; *Peoples Bank v. F. F. Campbell & Co.*, A. I. R. 1939 Lah. 398 ; cf. *Mahamaya v. Haridas*, (1915) I. L. R. 42 Cal. 455.

(f) **Priority** : The effect of hypothecation is to be decided on principles of equity, and accordingly where there is a dispute as to the priority between two hypothecatees the principle of *qui prior est tempore, potior est jure* should apply : *Bibhuti Bhushan v. Baidya Nath*, (1935-36) 40 C. W. N. 625. If a prior encumbrancer without obtaining possession seeks to enforce his right against a subsequent encumbrancer who has exercised the powers which he possesses to obtain possession of the property hypothecated to him it is incumbent upon him to prove that the subsequent encumbrancer had notice of the charge to which the first encumbrancer was entitled : *Abdul Habib v. Maung Tun Kyaing*, (1931) I. L. R. 9 Rang. 182, folld. in *Dayalji Pragji v. Karachi Electric Supply*, A. I. R. 1940 Sind 177 ; *Co-op. Hindusthan Bank v. Surendra*, (1931-32) 36 C. W. N. 263 (When there is a simple mortgage of movables with power of sale in favour of one party, but the mortgagee does not take possession and there is a subsequent pledge of the same properties in favour of another party who takes possession, such pledge is valid and will have priority over the mortgage.)

(f) **Bona fide purchaser from mortgagor in possession** : Where a person purchased goods which were mortgaged with a third person, but the purchaser was not aware of the mortgage when he purchased the goods from the mortgagor who was in possession of the same : *Held*, that he took them free from the mortgage : *Backer Khorasane v. Ahmed Esmail*, (1927) I. L. R. 5 Rang. 633 ; *Narasiah v. Venkataramiah*, (1919) I. L. R. 42 Mad. 59.

PLAINT.

472.

NEGLIGENCE.

CLAIM by Buyer against Manufacturer for Negligence. (g)

1. The defendant is a manufacturer of aerated waters, sold as a drink to the public, bottled and labelled by him, with a label bearing his name and sealed with a metal cap.

2. On, a bottle of ginger beer of the defendant's manufacture was purchased for the plaintiff by his servant from a retailer who carries on business under the name of at.....

3. The bottle was made of dark opaque glass and the plaintiff had no reason to suspect that it contained anything but pure ginger beer.

4. The plaintiff poured some of the ginger beer out into the tumbler and drank the contents of the tumbler. In proceeding to pour the remainder of the contents of the bottle into the tumbler the plaintiff found that a snail which was in a state of decomposition floated out of the bottle. The decomposed remains of the snail were not and could not be detected until a greater part of the contents of the bottle had been consumed by the plaintiff.

5. The said ginger beer was in fact unfit for human consumption.

(f) **Limitation :** 6 Years under Art. 120, Ind. Lim. Act : *Narasingha v. Prolhadman*, (1919) I.L.R. 46 Cal. 455 ; *Jamna Dei v. Lala Ram*, (1917) I. L. R. 39 All. 74.

(g) **Reference :** *Donoghue v. Stevenson*, (1932) A.C. 562 (*Per Lord Macmillan* : "The law takes no cognizance of carelessness in the abstract. It concerns itself with carelessness only where there is duty to take care and where failure of the duty has caused damage (p. 618). For a manufacturer of aerated water to store his empty bottles in a place where snails can get access to them and to fill his bottles without taking any adequate precaution by inspection or otherwise to insure that they contain no deleterious foreign matter may reasonably be characterised as carelessness without applying too exacting a standard but it is not enough to prove the defendant to be careless in his process of manufacture. The question is, Does he owe a duty to take care and to whom does he owe that duty ? (p. 619). I have no hesitation in affirming that a person who for gain engages in the business of manufacturing articles of food and drink intended for consumption by members of the public in the form in which he issues them is under a duty to take care in the manufacture of these commodities for human consumption ; he intends and contemplates that they shall be consumed. By reason of that very

6. As a result of the nauseating sight of the snail and as a result of consumption by the plaintiff of a portion of the said ginger beer, the plaintiff suffered from shock and severe gastro-enteritis.

7. The plaintiff has suffered damage by reason of the negligence of the defendant in not taking reasonable care that the ginger beer sold to the plaintiff was free from defect likely to cause injury to health.

Particulars of special damage :

The plaintiff claims—

Rs.....damages.

PLAINT.

473.

NEGLIGENCE.

CLAIM by Invitee, a Relative of Patient against Hospital

Authorities for Negligence. (h)

1. The defendants are the trustees of a hospital called Hospital at

2. On, the plaintiff booked a private ward of the said hospital for Rs..... for treatment of her invalid son,, who occupied the said ward from the afternoon of

fact he places himself in a relationship of all the potential consumers of his commodities and that relationship which he assumes and desires for his own end imposes upon him a duty to take care to avoid injuring them (p. 620).” This case has been followed and explained in *Grant v. Australian Knitting Mills*, (1936) A.C. 85, 97, 105, 107. For liability of wholesaler in tort and retailer in contract to purchaser for sale of a dangerous article, where no warning was given to the retailer by the wholesaler as to the danger and none was given by the retailer to the purchaser, see *Parker v. Olozo, Ltd.*, (1937) 3 All E.R. 524.

(g) **Negligence when actionable :** Negligence in law is the breach of duty to take care, and want of care is only actionable at the suit of a person, who has suffered damage because the defendant has acted in breach of a common law duty towards him or of a statutory duty towards the public at large or of a class of the public of which he is a member : *P. B. Bose v. M. R. N. Chettyar Firm*, (1938) Rang. L. R. 303.

(h) **Reference :** *Weigall v. Westminster Hospital*, (1936) 1 All E. R. 232, C. A. (The plaintiff in this case was an invitee. *Per Slesser L. J.* at pp. 235, 236, “The definition of an invitee : A person who enters premises—including this room—upon business in which he and the occupier have a common interest, seems to me completely satisfied by the condition under which this lady went into this room..... A person who invites another on to his premises is not an insurer..... The

3. On, the plaintiff went to the said hospital to consult Mr. A. B., an honorary surgeon of the said hospital with whom she had made a personal contract for the treatment of her son. A.B. conducted her to the Sisters' office, a small room, which as a matter of convenience and to the knowledge of the defendants, the visiting surgeons used as a consultation room when they desired to converse with patients' relatives. As the plaintiff entered the said room, she trod on a mat which slid along the floor beneath her feet and she fell heavily and suffered personal injury.

Particulars of injury :

4. The said injury was caused by the negligence of the defendants' servants.

Particulars of negligence :

The floor was kept highly polished for antiseptic reasons. The mat was an unusual danger and the defendants failed in their duty towards the plaintiff to use reasonable care to prevent damage from the said danger which they knew or ought to have known.

5. By reason of the facts hereinbefore complained of, the plaintiff has suffered damage.

Particulars of special damage :

The plaintiff claims—

Rs..... damages.

PLAINT.

474.

duty of the invitor towards the invitee is to use reasonable care to prevent damage from unusual danger which he knows or ought to know ; if the danger is not such that he ought to know it, his liability does not extend to it..... In this case, the floor has been specially treated for sanitary purposes : constantly rubbed and highly polished. Being so, it was a floor which presented circumstances of unusual danger. When in conjunction with that floor is placed a small mat on which anybody might be likely to tread, I think this was a case where the hospital ought to have known that there was likely to be danger from this conjunction."). Cf. *Pitt v. Jackson*, (1939) 1 All E. R. 129, K. B. D. (Where the plaintiff, a licensee who in passing along a passage in the defendant's house, slipped upon some polished linoleum, fell and sustained injuries. The plaintiff had observed that the linoleum was polished, but had not suspected of being slippery : *Held*, by Croom-Johnson J., "The linoleum did not constitute a trap and there was no failure by the defendant in any duty owed to a licensee."). Cf. *Lakhmi-chand v. Ratanbai*, A. I. R. 1927 Bom. 115 (case of licensee).

(b) **Limitation :** One year under Art. 22, Ind. Lim. Act.

NUISANCE.**Private Nuisance.****CLAIM for Injunction and Damage for Nuisance,
caused by Noise. (i)**

1. The defendant is the owner and occupier of premises No...
..... and the plaintiff is the owner and occupier of the adjoining
house No.....

2. The defendant's house was used purely for residential
purposes until September, 19..., when the groundfloor of the house
was reserved by the defendant for performance of marriage cere-
monies, pujas, etc. by the Hindu community, free of rent.

3. Since....., 19..., the said groundfloor has been used
for marriage ceremonies and for pujahs.

Particulars :

(Here set out the periods during which the marriage
ceremonies and pujas were held).

- (i) **Reference :** *Shaikh Ismail v. Nirchinda*, I. L. R. (1937) Mad. 51 (Per Pandrang Row J., "Every person is entitled against his neighbour to the comfortable and healthful enjoyment of the premises occupied by him, and in deciding whether in any particular case his right has been interfered with and a nuisance thereby caused, it is necessary to determine whether the act complained of is an inconvenience materially interfering with the ordinary physical comfort of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions obtaining among Indian people), follg. *Vanderpant v. Mayfair Hotel Co.*, (1930) 1 Ch. 138; *Colls v. Home and Colonial Stores*, (1904) A. C. 179. Cf. *Andreae v. Selfridge & Co.* (1938) Ch. 1; *Walker v. Brewster*, (1867) L. R. 5 Eq. 24 (Per Sir W. Page Wood, V. C., at p. 34, "I have a strong opinion that the setting up of a powerful brass band, which plays twice a week for several hours in the immediate vicinity of a gentleman's house is a nuisance which this Court would restrain. I have still a clearer opinion that the noise of fire works, to say nothing of the damage that may be occasioned by falling rocket sticks is a serious nuisance). Cf. *Leeman v. Montagu*, (1936) 2 All E. R. 1677 (noise by poultry).
- (ii) **No nuisance without damage :** Damage is the gist of the action. The plaintiff in an action of nuisance based on mere discomfort must show that the discomfort is substantial : *Waller v. Selfe*, (1851) 4 De G. & Sm. 315, 322. The question is not whether the plaintiff suffers what he regards as substantial discomfort but whether the average man who resides in that locality would take the same view of the matter : Cf. *Sturges v. Bridgman*, (1879) 11 Ch. D. 852, 865; *Rushmer v. Polsue & Alfieri*, (1906) 1 Ch. 234. The rule that the standard is determined

4. During the performances of these ceremonies and pujas, a noise was produced by loud and discordant instruments like the tom-tom, cymbals and so on, and it continued long after 11 P.M. preventing the plaintiff and the members of his family from having proper sleep during nights and causing them a great deal of discomfort and suffering. The defendant has done nothing in spite of the plaintiff's verbal protests, to minimise the noise so as to save annoyance to the plaintiff.

5. The defendant threatens and intends, unless restrained from doing so, to continue the wrongful acts complained of and to use the groundfloor of his house more and more frequently for such ceremonies and pujas in future.

The plaintiff claims—

(1) An injunction restraining the defendant from carrying on or permitting to be carried on in his said premises the said ceremonies and pujas or such other things so as or in such manner as by the loud noises to cause a nuisance to the plaintiff or the members of his family or his servants occupying the same, and

(2) Rs..... damages.

PLAINT.

475.

NUISANCE.

Private Nuisance.

by the locality where the nuisance is created has never been applied where the nuisance complained of consists of material injury to property : *St. Helens Smelting Co. v. Tipping*, (1865) 11 H. L. C. 642.

- (i) **Parties to suit :** (a) As to the person entitled to sue : For interference with the actual enjoyment of the property only the tenant in possession can sue : *Malone v. Laskey*, (1907) 2 K. B. 141 ; but the landlord may sue if the injury is of such a nature as to affect his estate by permanent depreciation of property : *Mott v. Shoolbreed*, (1875) L. R. 20 Eq. 22. A reversioner may sue if the injury is of a permanent character : See Pollock on Torts, 14th. Edn., pp. 341, 342 ; (b) As to liability : The person who actually creates the nuisance is primarily liable. The owner or occupier is liable on certain conditions. Cf. *Sedleigh-Denfield v. St. Joseph's Society*, (1939) 1 All E. R. 725, C. A. See Pollock on Torts, 14th Edn., pp. 342, 343.
- (ii) **Limitation :** Two years under Art. 36, Ind. Lim. Act. In a suit for compensation; Sec. 23 would be applicable if there is a continuance of the injury caused by the defendant. Limitation will run when the injury ceases. For injunction, 6 years, under Art. 120.

**CLAIM for Injunction and Damage for Nuisance caused by
Noise and Dust. (j).**

1. The plaintiff is the owner of premises No..... Street, where he carries on the business of an hotel proprietor.

2. The defendant company had acquired a building site to the immediate south of the said premises and were in the course of having the buildings on that site demolished with a view to constructing new buildings in their place.

3. The demolition operations began on 19..., and the said operations are still continuing. Several cranes and pneumatic hammers are being used during the day and up to late hours at night in connection with such operations.

4. The noise which took place and are still taking place and the quantity of dust and grit let loose by these operations were and are insufferable and have resulted in a steady outflow of guests from the said hotel, which has had a deleterious effect on the recovery of the plaintiff's business and has caused him damage.

Particulars of special damage :

5. The defendant company threatens and intends, unless restrained from so doing, to continue the said nuisance.

The plaintiff claims—

(a) An injunction restraining the defendant company, its servants and agents from continuing the nuisance.

(b) Rs..... damage.

- (j) **Reference :** *Andreae v. Selfridge & Co.*, (1938) Ch. 1. (When one is dealing with temporary operations, such as demolition and rebuilding, everybody has to put up with a certain amount of discomfort (p. 5). The neighbours must put up with it provided all reasonable and proper precautions were taken to save annoyance to them (P. 9). The use of reasonable care and skill may take various forms : It may take the form of restricting the hours during which work is to be done ; it may take the form of limiting the amount of a particular type of work which is being done simultaneously within a particular area ; it may take the form of using proper scientific means of avoiding inconvenience. Whatever form it takes, it has to be done, and those who do not do it must not be surprised if they have to pay the penalty for disregarding their neighbours' rights (p. 10). The defendant can be made liable only in respect of matters on which it has crossed the permissible line (p. 11). In this case the plaintiff has suffered an actionable nuisance and is entitled to not a nominal sum but a substantial sum based upon those principles. What that sum is to be is a matter as to which the individual can satisfy himself as to what is fair (p. 11).).

PLAINT.**476.****NUISANCE.**

Private Nuisance : Injury to Property.

**CLAIM for Injunction and Damage for Nuisance caused by
noxious and offensive Fumes. (k)**

1. The plaintiff is the owner and occupier of premises No. Calcutta, consisting of a dwelling house used by the plaintiff as his residence and gardens and outhouses occupied therewith.

2. The defendant company are the owners of a gas-works undertaking for the supply of gas both within and outside the limits of the town of Calcutta. The plaintiff's house is situate between 200 to 250 yards from, and to the south of, the said gas-works.

3. On a portion of the plaintiff's property immediately adjoining the defendant company's premises there is a plantation of trees 25 yards in width and 100 yards in length which had been planted by the plaintiff in the year to screen off the gas-works from the house.

4. The fumes, smell and steam come in large quantities from the gas-works and are carried by the prevailing wind across the plantation on to the plaintiff's premises causing a serious, growing and permanent injury to the plaintiff's property. They have des-

(j) **Limitation** : For compensation 2 years under Art. 36, and for injunction, 6 years under Art 120, Ind. Lim. Act.

(k) **Reference** : *Wood v. Conway Corporation*, (1914) 2 Ch. 47. (In this case, it was argued on behalf of the defendant corporation that they could not cure or abate the nuisance. *Cozens-Hardy M. R.* held at p. 56, "It is really irrelevant whether they can or cannot do so." *Buckley L. J.* held at p. 60, "If the result is an unfortunate one for them they have brought it on themselves. Upon the facts it seems to me that an abundant case of nuisance is made out. I think the plaintiff is entitled to the injunction he has obtained." *Channell J.* at pp 60, 61 held, "It is a case in which the Court cannot reasonably act upon its discretion and give damages in lieu of an injunction. The damage which will be caused to the defendants by this injunction is, measured pecuniarily, far in excess of the damage which would be caused to the plaintiff by the continuance of the nuisance but that is not enough to enable the Court to make such an order as this, if it is to do justice between the parties."). Cf. *S. A. Basil v. Corporation of Calcutta*, I. L. R. (1940) 2 Cal. 131.

(k) **Limitation** : For compensation 2 years under Art. 36, and for injunction 6 years under Art. 120, Ind. Lim. Act.

troyed and injuriously affected the trees to such an extent that the top of some of the trees are dying whilst others are dead ; and unless the nuisance is stopped, it will end by destroying the plantation altogether.

The plaintiff claims—

(a) An injunction to restrain the defendant company from carrying on or permitting to be carried on upon their gas-works the business or undertaking of manufacture of gas so as or in such manner as by the discharge of noxious or offensive fumes or vapours or otherwise to cause a nuisance or injury to the plaintiff's property or to the plaintiff or the members of his family or his servants occupying the same, and

(b) Rs. damage.

PLAINT.

477.

NUISANCE.

Private Nuisance : Injury to Property.

CLAIM for Damages against Owner for Collapse of House on adjoining Premises. (1)

(Another form)

1. The plaintiff is the owner of a shop at No. Street in

2. To the east of and adjoining the said shop is a house of which the defendant is the owner. The groundfloor of the said house is let out to as a monthly tenant to be used as a shop. The said house is considerably higher than the plaintiff's shop.

(1) **Reference :** *Wringe v. Cohen*, (1939) 4 All E. R. 241 (This case deals with the question as to when it is necessary to prove knowledge of want of repair in an action for damages due to a defect in or the want of repair of the premises in an action based on nuisance. It was held that if, due to want of repair, premises upon a highway become dangerous and a passer-by or adjoining owner suffers by their collapse the occupier or the owner who has undertaken the duty of repair, is answerable, whether or not he knew, or ought to have known, of the danger. It is only where the danger arises from the act of a trespasser or by a secret and unobservable process of nature, neither the occupier nor the owner responsible for repair is answerable, unless with knowledge or means of knowledge he allows the damage to continue. The defendant was therefore liable in damages to the plaintiff).

(1) **Limitation :** For compensation, 2 years under Art. 36, Ind. Lim. Act.

3. The defendant was under an obligation, by express agreement with the said tenant, to repair the said house.

4. The wall of the gable-end of the house was in a defective condition for want of repairs and was a danger to passers-by and adjoining owners.

5. On, the said wall constituting the gable-end next to and above the plaintiff's shop collapsed and fell on and destroyed the roof of the plaintiff's shop.

6. The plaintiff has suffered damage.

Particulars :

The plaintiff claims—

Rs. damage.

PLAINT.

478.

NUISANCE. .

Private Nuisance : Personal Discomfort and Injury to Property.

CLAIM for Injunction and Damages for Nuisance caused by Noise and offensive Smell. (m)

1. The first plaintiff was the absolute owner of the house and premises No....., hereinafter called 'the said house'. By an Indenture of Settlement, dated 19..., the first plaintiff conveyed the said property to himself and to the second plaintiff upon trusts for the benefit of himself and the second plaintiff. At all material times the plaintiffs occupied the ground floor of the said house and let out the first floor thereof to a tenant on a monthly rental of Rs.....

2. The defendant was and is the occupier of an open piece of land adjoining the said house. In, the defendant erected thereon a block of stables for the accommodation of 75 horses, and another block for 35 hackney carriages. .

(m) **Reference :** *Bai Bhicaji v. Perojshaw Jivanji* (1916) I.L.R. 40 Bom.

401 (Having regard to O. I, r. 1, C. P. Code there can be no objection to the plaintiffs' suing in the double capacity, namely, as trustees to protect the reversion and as residents injured by the nuisance (p. 408). What would be a very real nuisance in a select and refined residential quarters would not be a nuisance in a slum (p. 409). Cf. *Sturges v. Birdyman*, (1879) 11 Ch. D. 852 (The Court will not have the comfort of the individual subordinated in certain circumstances and certain conditions to the convenience of the general public. (p. 410). See *Andreae v. Selfridge & Co.*, (1938) Ch. 1 ; *St Helen's Smelting Co. v. Tipping*, (1865) 11 H.L.C. 642 ; *Wood v. Conway Corpn.*, (1914) 2 Ch. 47 ;

3. The stables so erected have rendered the said house uncomfortable and unhealthy. The stables are always spread over with horse-urine and dung, the sewage is kept in an unclean and extremely insanitary condition and the smells arising therefrom are foul, noxious and offensive. Considerable disturbance is made by constant noise in bringing the carriages in at all hours of the night, stamping of the horses and also in their unharnessing and grooming.

4. By reason of the premises, the tenant on the first floor of the said house vacated the same on, and the plaintiffs and their family suffered in health and were obliged to remove to another house. The plaintiffs have thereby suffered damages.

Particulars of special damage :

5. The defendant threatens and intends to continue and repeat the wrongful acts above complained of.

The plaintiffs claim—

(1) Perpetual injunction restraining the defendant, his servants and agents from the continuance or repetition of the said nuisance.

(2) Rs..... special damage and Rs..... general damage.

Behari Lal v. James Maclean, (1924) I.L.R. 46 All. 297 (*Per* Kanhaiya Lal, J., follg. *St. Helen's Smelting Co. v. Tipping*, (1865) 11 H.L.C. 642. "There is a distinction between an action for a nuisance in respect of an act producing a material injury to property, and one brought in respect of an act producing personal discomfort. As to the latter, person must in the interest of the public generally, submit to the discomfort of the circumstances of the place, and the trades carried on around him. The nature of the interference has to be examined in each case in the light of the circumstances of the place where the thing complained of actually occurs, and the degree of inconveniences caused must determine the nature of the relief to which the person complaining may be entitled. "If a man lives in a town," said Lord Westbury, "it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property and for the benefit of the inhabitants of the town and of the public at large. If a man lives in a street where there are numerous shops and a shop is opened next door to him, which is carried on in a fair and reasonable way, he has no ground for complaint, because to himself individually there may arise much discomfort from the trade carried on in that shop". But where an occupation is carried on by one person in the neighbourhood of another, and the result of that

PLAINT.**479.****NUISANCE.****Public Nuisance.****CLAIM by an Individual for Damages for Public Nuisance. (n)**

1. The plaintiff is a medical practitioner of
2. The defendant carries on business as a contractor in the town of
3. On, the defendant wrongfully caused a pit to be excavated near to a public highway known as Street in, without any fence or other protection so as to be dangerous to persons lawfully using the said highway.
4. The plaintiff whilst lawfully passing along the said highway on 19..., at about P.M. fell into the said pit and sustained injuries.

Particulars of injuries :

5. By reason of the premises the plaintiff was prevented from attending to his business for a period of one month and had to incur medical expenses and has suffered loss and damage.

Particulars of special damage :

The plaintiff claims—

- (1) Rs..... damage.

trade or occupation or business is a material or substantial interference with the ordinary physical comfort and convenience of another person, residing in that locality, then very different considerations unquestionably arise.”).

- (m) **Limitation** : For injunction, 6 years under Art 120, and for compensation 2 years under Art. 36, Ind. Lim. Act.
- (n) **Right to sue** : A private person cannot maintain a suit in respect of a public nuisance unless he is able to show that he has suffered special damage thereby : *Manilal Jibhai v. Ishvarbhai*, A.I.R. 1925 Bom. 367 ; *Rajnaraian v. Ekadasi*, (1900) I.L.R. 27 Cal. 793 (case of removal of obstruction on a public way) ; *Aximullah v. Maulvi Hamiduddin*, A.I.R. 1935 Pesh. 190 ; *Kanhai Lal v. Bhorey Lal*, A.I.R. 1939 All. 655 ; *Appayya v. Narasimhalu*, A.I.R. 1938 Mad. 338. Compare sub-section 2 of Sec. 91, C.P. Code, which enacts that nothing in that section shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provisions.
- (n) **Special damage—what constitutes** : Where an obstruction to a public road causes a particular inconvenience of a substantial kind to the plaintiff he can bring a suit to remove it without the consent of the Advocate-General : *Ardeshir v. Aimai*, (1929) I.L.R. 53 Bom. 187. The Court ought to consider, even although a particular form of nuisance

PLAINT.
480.
NUISANCE.

Public Nuisance.

**CLAIM by Individuals for Removal of Obstruction to a
Public Road. (o).**

1. The plaintiffs at all material times were and are the owners of Plot Nos..... and in village in the district of, hereinafter called 'the said lands'.

2. The said lands adjoin a passage which runs from point X on the road to point Y in the village, as shown in the map hereto annexed.

3. From time immemorial until such time as hereinafter mentioned, this passage had been used as a public road which was the only main access to and from the said road for the villages of and of beyond.

4. In 19..., the defendant blocked up the said passage at both ends by a brick wall and has thereby prevented the plaintiffs and the other villagers from using the said road.

5. The defendant has not removed the said obstructions in spite of repeated verbal protest of the plaintiffs.

is not capable of being translated into rupees and annas, whether it is a substantial grievance which constitutes a wrong peculiar to the plaintiff which in the ordinary way Court of Justice would remove by granting an injunction : *Md. Raza Khan v. Md. Askari Khan*, (1924) I.L.R. 46 All. 470.

(n) **Particulars of special damage** : See 'Special Damage' under "Particulars", Pt. II, Chap. XX, pp. 480-484.

(n) **Limitation** : Art. 22, read with Sec. 24, Ind. Lim. Act.

(o) **Right of action** : *Ardesbir v. Aimai*, (1929) I.L.R. 53 Bom. 187, 192

(It is clearly established on the authorities that if once you find the plaintiff is specially damnified by the obstruction of a public thoroughfare, then he may bring his action without the consent of the Advocate-General. These plaintiffs have a special interest in the

preservation of the right of way which will enable them to maintain on their own account an action to prevent the encroachment), follg. *Raj Koomar Singh v. Sahebzada Roy*, (1878) I. L. R. 3 Cal. 20 (F.B.); *Md. Raza Khan v. Md. Askari Khan*, (1924) I.L.R. 46 All. 470. Cf. *Manilal v. Ishvarbhai*, A. I. R. 1925 Bom. 367. The real principle is that a person of an immediate community or section of the public who is deprived of the amenity provided for that particular section may be deemed to have suffered loss without proof of such loss : *Pahlad Maharaj v. Gauri Dutt Marwari*, A.I.R. 1937 Pat. 620 ; *Munusami v. Kuppasami*, I.L.R.,

6. By reason of the premises the plaintiffs have been prevented from using the said passage and have been put to inconvenience of a substantial kind.

The plaintiffs claim—

(1) A declaration that the said passage is a public road.

(2) Mandatory injunction directing the defendant to remove the obstructions on the said passage.

(3) Permanent injunction to restrain the defendant from interfering in the use and enjoyment of the said passage by the plaintiffs.

PLAINT.

481.

NUISANCE.

CLAIM by a Riparian Owner for Nuisance by Pollution of Water in a River. (p)

Form No. 12, Appendix C to R. S. C., 1883.

1. The plaintiff is the owner (or, lessee) and occupier of a farm known as, through which there runs a river known as

(1939) Mad. 870 ; *Municipal Committee, Delhi v. Mohammad Ibrahim*, (1935) I.L.R. 16 Lah. 517. (For the owners of houses abutting on a public highway the question of frontage means a great deal and if anything is done by those in whom the highway vests which interferes with the rights of the owners with regard to the highway and which tends to diminish the comforts of the occupants of the house, the owners will undoubtedly have an actionable claim against them. In such cases it is not necessary to prove that any special injury has taken place before a person wronged by the committee can take action against it. The principle of English law which requires proof of special damage in such cases is not applicable to India.) ; *Mandakinee v. Basanta Kumaree*, (1933) I. L. R. 60 Cal. 1003 ; *Sheonarayan v. Dindayal*, A.I.R. 1931 Nag. 189.

(o) **Public and private nuisance—distinction between :** The difference between a public and private nuisance is that in regard to the former the rights which are common to all subjects have been infringed ; generally speaking such rights are unconnected in any way with possession or title to immovable property. A private nuisance on the other hand is one which affects a particular section of the community those who particularly come within the scope of its operation : *Khurshed Husnain v. Secy. of State*, A.I.R. 1937 Pat. 302.

(o) **Limitation :** 6 years under Art. 120, Ind.Lim.Act.

(p) **Law as to riparian owners :** The law as to riparian owners is the same in India as in England : Cf. Sec. 7, III. (a), Ind. Easements Act. Cf. *Maung Bya v. Maung Kyi*, (1924-25) L. R. 52 I. A. 385.

2. The defendant or persons in his employ pollute the water in the said river by passing into the same the refuse of the defendant's dye-works, situate higher up the said river.

The plaintiff claims an injunction to restrain the defendant, his servants and agents, from sending from the said dye-works into the said river any matter so as to pollute the waters thereof, or to render them unwholesome or unfit for use, to the injury of the plaintiff (or, as the case may be).

The plaintiff will also claim damages in respect of the said nuisance.

DEFENCE.

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NUISANCE.

Private Nuisance.

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- (p) **Riparian rights—extent of:** A riparian owner is a person who owns land abutting on a stream and who as such has a certain right to take water from the stream. His right to the use of the stream does not depend upon the ownership of the soil of the stream and he can take water first of all for domestic use and then for other uses connected with the land of which irrigation of the lands which form the property is one. The right is a natural right and not in the strict sense of the term an easement. In particular it is not capable of being lost *non utends* and the maxim *tantum prescript possessum* has no application: *Secretary of State v. Sannidhiraju Subbarayudu*, (1931-32) 59 I. A. 56. Cf. *Debi Pershad v. Joynath*, (1896) I. L. R. 24 Cal. 865 P. C. (for riparian owner's right to flow of water without interruption and without substantial diminution), expld. in *Ah Li v. U San Baw*, A.I.R. 1939 Rang. 446. For artificial water courses, see *Yesu Sakharam v. Ladu Nana*, (1926) I. L. R. 51 Bom. 243; *Raman Nayar v. Purameswaran*, A. I. R. 1935 Mad. 975.
- (p) **Pollution of water:** Pollution of water is actionable without proof of special damage: *Ballard v. Tomlinson*, (1835) 29 Ch. D. 115 (Case of pollution by the defendant of the plaintiff's well, by collecting sewage in his disused well, the defence being that he was not bound to do anything. Held, "The immediate *damnum* namely, the pollution of the water might be possibly no legal *damnum*, but allowing sewage to escape into another's property is of itself an *injuria* which needs no *damnum*." Cf. *Foster v. Warblington Urban Council*, (1908) 1 K. B. 648 (where the same principle has been applied against a local authority whose extension of sewage works had spoiled the plaintiff's oyster ponds).
- (p) **Limitation:** For injunction, 6 years under Art. 120, and for compensation, 3 years under Art. 37, Ind. Lim. Act.

**DEFENCE to a Claim for a Nuisance causing personal
Inconvenience. (q)**

1. The defendant denies that at any material time the plaintiff was the owner or occupier of the house, No.....

2. The defendant denies that he did any of the acts alleged in paragraph of the plaint.

3. In the alternative, the defendant says that none of the said acts did in fact interfere with the use or enjoyment of the said house by the plaintiff or cause any inconvenience, discomfort or suffering to him or to any other inmates of the said house as alleged or at all.

4. The defendant will contend that the said acts do not amount in law to a nuisance.

DEFENCE.

**483.
NUISANCE.**

**DEFENCE to a Claim by Riparian Owner for Nuisance by
Pollution of Water. (r)**

1. The defendant denies that he or the persons in his employ pollute the water in the said river as alleged or at all.

Or,

At the time of the acts complained of, the defendant was the owner of the dye-works at and he and his predecessors in title had peaceably, openly and without interruption enjoyed the

(q) **Ineffectual defences :** It is no defence that plaintiff himself came to the nuisance : *Elliotson v. Feetham*, (1835) 2 Bing. N.C. 134. It is no defence that the nuisance though injurious to the plaintiff is beneficial to the public at large : *Shelfer v. City of London Electric Lighting Co.*, (1895) 1 Ch. 287, 316. If nuisance is proved, it is no defence that the wrong-doer took all reasonable care to prevent it : *Rapier v. London Tramways Co.*, (1893) 2 Ch. 588, 599, or that the place from which the nuisance proceeds is a suitable one for the purpose of carrying on the operation complained of : *Cf. St. Helen's Smelting Co. v. Tipping*, (1865) 11 H. L. C. 642. Contributory acts of others is also no defence : *Lambton v. Mellish*, (1894) 3 Ch., 163.

(r) **Legalisation of nuisance by prescription :** In order to establish such a claim, the defendant must show that in doing the acts complained of he was acting openly. *Cf. Liverpool Corporation v. Ogghill*, (1918) 1 Ch. 307. Subject to these conditions if the nuisance has been continuously in existence for twenty years, a prescriptive right is acquired as an easement. The nuisance must have been a nuisance for that period : *Cf. Sturges v. Bridgman*, (1879) 11 Ch. D. 852. Salmond on Torts, 8th. Edn., pp. 246, 247.

(r) **Acquisition of right of easement :** See sec. 26, Ind. Lia. Act.

right as an easement for the space of twenty years, of throwing the refuse of the said dye-works into the said river, and the acts complained of were done in the exercise of the said right.

2. The acts complained of have not produced any damage to the plaintiff.

PLAINT.

484.

PARTITION.

Joint Hindu Family.

CLAIM for Partition of Joint Hindu Family Property. (s).

1. One A. B., a Hindu governed by the Dayabhaga, died February 5th, 19..., intestate, leaving behind him properties specified in Schedule "A" hereto, and leaving him surviving the plaintiff and the defendants, his sons and legal representatives.

(s) **Partition—necessary conditions :** The necessary conditions for a suit for partition are: first, there must be unity of title and, secondly, there must be unity of possession: *Wajihunnissa v. Bankebehari*, A.I.R. 1930 Pat. 177 (F.B.); *Maung Ba Tu v. Ma Thet Su*, (1927) I.L.R. 5 Rang. 785. Thus, a benamdar cannot maintain a suit for partition: *Atrabannessa Bibi v. Safatullah*, (1916) I.L.R. 43 Cal. 504. It is essential that the plaintiff should be in actual or constructive possession of the properties. If it is established that he is not in possession at all of any portion of the joint property, that there has been a complete ouster, he must sue for recovery of possession and partition: *Sabjan Bibi v. Ashanulla Bepari*, (1927) I. L. R. 54 Cal. 524; *Nandkeshwar v. Sudarshan*, A.I.R. 1923 Pat. 162 (he would be entitled to joint possession and partition). The plaintiff must also state the extent of his share in joint property: *Hare Krishna v. Umesh*, (1921) 6 P.L.J. 373. A partition can be effected only as between co-owners. By co-owners is meant either joint tenants in common or coparceners, all of whom must at the date of partition have a legal interest in the property partitioned: *Po Maung v. Anug Din*, (1923) 1 Bur. L.J. 26.

(s) **Position of parties :** In a partition suit every party stands in a position of a plaintiff with reference to another and that of a defendant with reference to some other: *Loke Nath v. Radha Gobinda*, A.I.R. 1926 Cal. 184. It is the right of every defendant in a partition suit to have his own share divided off and given to him and he is *qua* his claim to a share on partition in the position of a plaintiff; but if the plaintiff's suit fails on any ground, the reason of the rule fails to apply and the maxim applicable is, "*Cessants ratione, cessat ipsa lex*": *Chhotiram Mangammal v. Lalchand*, A.I.R. 1922 Sind 4; *Muhammad Sahoob v. Mayamad Ammal*, A.I.R. 1933 Mad. 789. Cf. *Hassan Mohammad v. Hukam Chand*, A.I.R. 1934. Lah. 872.

(s) **Parties to suit :** Every adult coparcener is entitled to sue for partition of the coparcenary property at any time, except in Bombay where a son

2. The plaintiff and the defendants are in joint possession of the said properties.

3. The plaintiff and the defendants have each an undivided 1/4th share in the said properties.

without the assent of his father is not entitled to a partition if the father is joint with the other coparceners : *Apaji v. Ramchandra*, (1892) I.L.R. 16 Bom. 29 ; *Rameshwar v. Lachmi*, (1904) I.L.R. 31 Cal. 111. Under the Dayabhaga law, a son is not entitled to a partition of the coparcenary property against his father. In the Punjab, a son cannot maintain a suit for partition in the life-time of his father : *Punjab National Bank v. Jagdish*, A.I.R. 1936 Lah. 390. A minor suing for partition must allege and prove facts showing that the partition will be for his benefit : See Mulla's Hindu Law, 9th Edn., pp. 379, 380. For right of purchaser of an undivided interest of a coparcener to claim partition, see Mulla's Hindu Law, 9th Edn., p. 383, and *Chatterji v. Maung Mye*, A.I.R. 1940 Rang. 53. For right of a Hindu widow to claim partition under the Hindu Women's Right to Property Act, 1937, see Sec. 3 (3) of that Act as amended by Act IX of 1938. In a partition suit persons who have an interest in the partition are proper parties : *Annapurna Debya v. Golapmani* (1922) 35 C.L.J. 530. "The plaintiff in a partition suit should implead as defendants, (i) the heads of all branches, (ii) females who are entitled to a share on partition, (iii) the purchaser of a portion of the plaintiff's share, the plaintiff himself being a coparcener, (iv) if the plaintiff himself is a purchaser from a coparcener, his alienor" : Mulla's Hindu Law, 9th Edn., p. 408. Cf. O.XXXI, Mad. High Court O.S. Rules. A mortgagee is not a necessary party : *Mt. Janka v. Shiam*, A.I.R. 1924 Oudh 307. They are sometimes given leave to watch the proceedings : See Pt. II, Chap. VI, p. 54 ; *Jadunath v. Parameswar*, A.I.R. 1940 P.C. 11. If partition is claimed between two branches of the family it is not necessary to join all co-parceners : *Bishambar v. Kanshi*, (1932) I.L.R. 13 Lah. 483.

- (a) **Partial partition** : It is the general rule that a partition should embrace all the joint properties among the co-sharers ; there is also a complementary rule that a suit for partition cannot include properties in which each of the parties does not claim an interest : *Tarinicharan v. Debendra*, (1935) I. L. R. 62 Cal. 655, folld. in *Risal Singh v. Ohandgi*, A. I. R. 1939 Lah. 34. The general rule is subject to certain qualifications: (i) where properties are held jointly by all the co-sharers with strangers who cannot conveniently be added as parties to the suit : *Harey Harey v. Hari Ohaitanya*, (1935-36) 40 C. W. N. 1237 ; (ii) where part of the joint property consists of land situate outside the local limits of the ordinary original jurisdiction of the High Court : *Punchanun v. Shib Chander*, (1887) I.L.R. 14 Cal. 835 ; *Balaram v. Ramchandra*, (1898) I.L.R. 22 Bom. 922. Cf. Secs. 16 and 17, C. P. Code ; (iii) where some portion of the property is incapable of partition or is from its nature impartible or there is an agreement between co-tenants to

The plaintiff claims—

Partition of the said properties by metes and bounds and allotment to the plaintiff of his divided share in severalty.

make partition of a part only of joint property : *Rajendra v. Brojendra*, (1923) 37 C. L. J. 191. For applicability of the rule to common properties but not joint properties, see *Ganesh v. Gangabai*, A. I. R. 1939 Bom. 114.

- (s) **Cause of action** : A co-tenant who has admittedly a title to an undivided share is entitled to partition as a matter of right and, therefore, he is not required to make demand or to agree upon terms prior to institution of suit : *Rajendra v. Brojendra*, *supra*. Where a partition suit is dismissed for default it does not bar a subsequent suit ; the reason is that, even after the dismissal of the former suit, the jointness continues and there is a continuing cause of action : *Thayyan v. Kannikandath*, A. I. R. 1935 Mad. 458. A previous partition for convenience of possession is no bar to a suit for partition : *Sarat Chandra v. Ganga*, (1938-39) 43 C. W. N. 181. Cf. *Manno Chaudhry v. Munshi Chowdhury*, (1918) 3 Pat. L. J. 188.
- (s) **Costs** : "Ordinarily in a partition suit, pure and simple, the parties are to bear their own costs of the suit up to the stage of the preliminary decree, but when the defendant contends the plaintiff's right to claim partition, he may be made liable for costs incurred by reason of his unfounded opposition : *Harey Harey v. Hari Chaitanya*, (1935-36) 40 C. W. N. 1237. For costs up to the date of the preliminary decree and subsequent costs, see Chap. XVI, r. 18, O. S. Rules, Cal. High Court. The costs of a partition suit has first to be provided for and no party or transferee can get anything except what is left, if anything : *Per Ameer Ali J.*, in *Ramdhone Bulakidas v. Kedarnath*, A. I. R. 1938 Cal. 1.
- (s) **Court fees** : Suit by plaintiff in joint possession to have his share partitioned : Sch. II, Art. 17 (vi), Court Fees Act: *Tara Chand v. Afzal*, (1912) I. L. R. 34 All. 184. If plaintiff is out of possession he must pay *ad valorem* fee on his share : *Rehali Raman v. Harish*, (1919-20) 24 C.W.N. 749. Cf. *Kanhaiya Lal v. Baldeo*, A. I. R. 1925 Pat. 703. If relief is claimed against a member of the family on the ground that he is in adverse possession of a particular item, a separate court-fee in regard to it, as on a claim for possession should be paid : *Kandunni Nair v. Ittunni Raman* (1930) I.L.R. 53 Mad. 540. In a suit for partition and accounts the plaintiff must put an estimate of the amount at which he values the relief for account and pay *ad valorem* on that valuation : *Sita Ram v. Hanuman*, A.I.R. 1927 Pat. 413. A defendant who asks to have his share divided, off must pay court-fee according to his share : *Murarrao v. Sitaram*, (1899) I. L. R. 23 Bom. 184 ; *Natesa v. Krishna*, A. I. R. 1939 Mad. 576. According to the Patna High Court, there is nothing in law which requires a defendant to pay court-fees : *Hemchandra v. Prem Mahto*, A. I. R. 1926 Pat. 154.
- (s) **Mode of partition** : When a co-sharer has put up buildings on the land,

PLAINT.

485.

PARTITION.

Joint Hindu Family.

CLAIM by a Coparcener for Partition, and Accounts against the Karta. (b)

1. The plaintiff and the defendants are members of a joint Hindu family governed by the Mitakshara and their relationship with each other will appear from the pedigree set out hereunder.

2. The plaintiff and the defendants jointly own and possess the properties set out in Schedule "A", hereto.

3. Since, when A. B., father of the plaintiff, died, the defendant No. 1 has acted as the Karta of the joint family and the manager of the joint family properties.

4. The defendant No. 1 acting as such Karta and manager has misappropriated some of the joint family properties and has misapplied the income thereof to purposes which are not family purposes.

he cannot claim compensation but may be allotted a portion of the land which contains the buildings : *Nutbehari v. Nanilal*. (1936-37) 41 C.W.N. 613. Where money is spent on improvements of the joint property by a co-owner, an equity is created in his favour : *Amulyacharan v. Prakashchandra*, (1933) I. L. R. 60 Cal. 591. Partition should be done with due regard to the possession of the parties : *Jai Dayal v. Narain Das*, A. I. R. 1932 Lah. 127. Cf. *Dhian Singh v. Dalip Singh*, (1939) 18 Lah. L. T. 10.

- (s) **Limitation** : The plaintiff can file a suit for partition at any time during joint possession of the property. If plaintiff is out of possession and seeks to recover possession, limitation is 12 years from the date when the exclusion becomes known to the plaintiff (Art. 127, Lim. Act). Art. 120 will apply to a purchaser of the interest of a coparcener : *Shevanti-bai v. Janardan*, A. I. R. 1939 Bom. 322. Cf. *Gundayya v. Siddappa*, A. I. R. 1937 Mad. 599.
- (t) **Karta's liability to account** : In the absence of proof of misappropriation or fraudulent and improper conversion by the manager of a joint family estate, he is liable to account on partition only for assets which he has received, not for what he ought to or might have received if the family money had been profitably dealt with : *Perrazu v. Subbarayadu*, (1920-21) I. L. R. 48 I. A. 280 ; *Parameswar v. Gobind*, (1916) I. L. R. 43 Cal. 459, 465 ; *Narendra v. Abani*, I. L. R. (1938) 1 Cal. 652.
- (t) **Questions of title** : In a suit for partition, it is incumbent upon the Court, before the preliminary decree is made, to determine whether the properties included in the suit are the joint properties, as alleged, of the parties to the litigation. Where there is conflicting claim to share in

Particulars :

5. The defendant No. 1 is wrongfully claiming that Items 1 and 2 of the said Schedule "A" are his self-acquired or separate property.

6. The respective shares of the parties in the joint family properties are as follows :

The plaintiff claims—

(1) A declaration as against defendant No. 1 that Items 1 and 2 of Schedule "A" hereto form part of the joint family properties.

(2) That defendant No. 1 be directed to render a true and faithful account of his dealings with the joint family properties since, and payment to the plaintiff his..... share in the sum to be found due upon the taking of the accounts.

(3) Partition of the joint family properties by metes and bounds in accordance with the shares of the parties, and allotment to the plaintiff of his share in severalty.

DEFENCE.**486.****PARTITION.**

Joint Hindu Family.

DEFENCES to a Claim for Partition. (u)

The defendants may take one or more of the following defences :

1. The plaintiff is not a son or legal representative of A. B., deceased, and is not entitled to the alleged or any share in any of

the land under the same right under which partition is sought, the determination of the conflict is incidental to the partition and cannot be avoided before partition is decreed. The Court has ample authority to direct the successive trials of the issues separately affecting different defendants and even to record interlocutory judgments thereon to be made the basis of the final judgment at the conclusion of the trial of the whole case : *Annapurna Debya v. Golapmani* (1922) 35 C. L. J. 530.

(t) **Possession of plaintiff—If material :** In a partition suit it is not very material as to whether the plaintiff is or is not actually in possession of his share. But in the Mufassil Court it is important, because, if plaintiff is out of possession he must ask, first of all, to be restored to possession of his share and pay additional *ad valorem* fee upon his plaint : *Ahamuddin Tamijuddin v. Amiruddin*, (1918) 44 I.C. 216.

(u) This is a defence to Form No. 484.

(u) **Defence of adverse possession :** See 'Adverse Possession' under "Special

the properties specified in schedule "A" to the plaint. The plaintiff has never been in possession of any of the said properties.

2. If, which is denied, the plaintiff is a son of A. B. deceased, the defendants say that in 19..., the plaintiff demanded of them a share of the profits of the said properties. By letter dated, the defendants denied the plaintiff's title, and they have since been in exclusive continuous possession of the said properties to the knowledge of the plaintiff (or without any attempt at concealment). Accordingly, the plaintiff's title, if any, to the said properties has been extinguished by adverse possession of the defendants.

3. No part of the properties included in Schedule "A" to the plaint is within the local limits of the jurisdiction of this Court, (or, if the suit is filed on the original side of the High Court, Items 1, 2 and 3 of Schedule "A" to the plaint are outside the local limits of the ordinary original civil jurisdiction of this Court, and no leave to sue under Clause of the Letters Patent of the High Court, was obtained by the plaintiff at the time of the institution of the suit).

4. The suit is one for partial partition and should not be entertained. The following properties have been omitted from the list of joint family properties :

5. Items and of Schedule "A" to the plaint are the separate property of defendant No. 1 and do not form part of joint family properties.

6. The defendant No. 1 has spent Rs..... out of his separately-acquired money in improving item No. 5 of the Schedule "A" to the plaint and claims that on partition the same should be allotted to him.

7. There was a private partition between the plaintiff and the defendants in 19..., in respect of the said properties and, ever since the said partition, the plaintiff and the defendants have been in separate possession and enjoyment of the properties respectively allotted to them and the parties have acquiesced in the result of the said partition. The said partition is a bar to re-partition of the said properties.

8. The plaintiff's share in the said properties is and

Defences", Pt. II, Chap. XVII, p. 384 and 'Adverse Possession between Co-owners' under 'Particulars', Pt. II, Chap. XX, p. 463.

(u) For other Defences : See notes under Form No. 483,

not The respective shares of the defendants in the said properties are as follows :

9. The defendants want their respective shares to be partitioned and allotted to them.

PLAINT.

487.

PARTNERSHIP.

1. Suit between Partners.

CLAIM by a Partner for Dissolution of Partnership. (v).

1. Under a verbal agreement (or articles of partnership in writing) the plaintiff and the defendant have been carrying on business together in copartnership since, under the style of, upon the term that the net profits of the business should be divided between them equally and they should in like proportion bear all losses including loss of capital.

2. Disputes and differences have for some time arisen between the plaintiff and the defendant as such partners whereby it has become impossible to carry on the said business save at a loss (or, with advantage to the partners).

Or,

The defendant has wilfully (or persistently) committed breach of the agreements relating to the management of the affairs of the firm.

Particulars :

3. Accounts were last settled between the partners on the..... day of (or, no settlement of accounts has been made between the partners since the commencement of the partnership).

The plaintiff claims—

- (1) Dissolution of the partnership.
- (2) Accounts.
- (3) Appointment of a receiver.

(v) **Dissolution by the Court—grounds for :** Sec. 44, Ind. Partnership Act, 1932. *Tulsi Ram v. Dina Nath*, A.I.R. 1926 Lah. 145 (Partnership entered into for a fixed term may be dissolved when the mutual confidence which the partners reposed in each other has ceased); *Banwari Lal v. S. K. Shukrullah*, A.I.R. 1940 Pat. 204.

(v) **Suit for account and dissolution—parties to :** See Pt. II, Chap. IX, pp. 217-219.

(v) **Form of decree :** Forms Nos. 21 and 22, Appendix D, Sch. I, C.P.Code. See *Magan Behari v. Ram Partap*, I.L.R. (1939) All. 563.

(v) **Place of suing :** See 'Contract of Partnership' under "Causes of Action", Pt. II, Chap. X, p. 289.

PLAINT.**488.****PARTNERSHIP.****1. Suit between Partners.****CLAIM by a Partner for Winding up of a dissolved Partnership with an alternative Prayer for Dissolution. (w)**

1. The plaintiff, under a verbal agreement made on, entered into partnership at will with the defendant for carrying on a commission agency business under the name of, upon the term that the partners would contribute equally to the capital and share equally the profits and losses of the said business.

2. Disputes and differences arose between the plaintiff and the defendant as such partners soon after the commencement of the business and, accordingly, the said partnership was by mutual verbal agreement dissolved on (or, on, the plaintiff gave notice in writing to the defendant of his intention to dissolve the firm).

3. No settlement of account has been made between the partners since the commencement of the partnership.

The plaintiff claims —

(1) A declaration that the partnership stood dissolved on

(2) Alternatively, that the partnership be dissolved by decree of the Court.

(3) An account be taken of the partnership business.

(4) Appointment of a receiver pending winding up.

(v) **Non-registration :** The provisions of sub-secs. (1) and (2) of Sec. 69, Ind.Part.Act, do not affect the enforcement of any right to sue for the dissolution of a firm or for accounts : Sub-sec. 3 (a) to the said section. Cf. *Shibba Mal v. Gulab Rai*, A.I.R. 1939 Aft. 735. See *Chhagan Lal v. Firm Mangal Sain*, A.I.R. 1938 Lah. 767.

(w) **Reference :** Sec. 40, Ind. Partnership Act, 1932, provides that a firm may be dissolved with the consent of all the partners or in accordance with a contract between the partners. Sec. 46 of the said Act provides that on the dissolution of a firm every partner has a right to have the business wound up. Under Sec. 43 of the Act, where the partnership is at will, the firm may be dissolved by any partner giving notice in writing to all the other partners of his intention to dissolve the firm. The firm is dissolved as from the day mentioned in the notice as the date of dissolution or, if no date is mentioned, as from the date of communication of the notice.

PLAINT.**489.****PARTNERSHIP.****1. Suit between Partners.****CLAIM for Dissolution of Partnership and Accounts. (x)**

(Form No. 78, Mad. High Court O.S. Rules).

1. (Set out the occupation and residence of the plaintiff and also his address for service.)

2. (Set out the occupation and residence of each of the defendants.)

3. The plaintiff and the said C.D., the 1st defendant, and the said E.F., the 2nd defendant etc. have since the day of been carrying on business of as partners at under articles of a partnership in writing, dated the day of and signed by them respectively (or) under a verbal agreement between them made on the day of

4. Under the partnership agreement the plaintiff and the said defendants are entitled to the profits and are liable to the said losses of the said business in the following proportions :—to the plaintiff, six-sixteenths ; to the 1st defendant, seven-sixteenths ; and to the 2nd defendant, three-sixteenths.

5. The said L.M., the 3rd defendant, and the said N.O., the 4th defendant, are not partners in the said business, but entitled as remuneration for their service therein, to the following shares in the net profits thereof :—to the 3rd defendant from the day of one-sixteenth and to the 4th defendant from the day of one-sixteenth.

6. In accordance with the arrangement in the preceding paragraph mentioned, the plaintiff and the 1st and 2nd defendants are entitled to profits as follows :—From the said day of to the plaintiff, six-sixteenths ; to the 1st defendant, six-sixteenths ; to the 2nd defendant three-sixteenths and from the day of to the plaintiff, five-sixteenths ; to the 1st defendant, six-sixteenths and to the 2nd defendant three-sixteenths.

(x) **Note :** Paragraphs 1 and 2 of the above plaint must be inserted in every plaint filed on the Original Side of the Madras High Court under O. II, r. 3 of the O. S. Rules of the said High Court, which requires that the full name, residence, and description of each party and the plaintiff's address for service should be set out at the beginning of the

7. Accounts were last settled between the partners on the day of (or no settlement of accounts has been made between the partners since the commencement of the partnership).

8. Disputes have arisen between the plaintiff and the 1st and 2nd defendants, as such partners as aforesaid, whereby it has become impossible to carry on the said business in partnership with advantage to the partners.

9. The plaintiff desires to have the said partnership dissolved, and is ready and willing to bear his share of the debts and liabilities of the firm according to the terms of the partnership agreement, (or by the terms of the partnership agreement, the same is determinable at six months' notice and was determined by a notice in writing given on the day of by the plaintiff to the 1st and 2nd defendants).

(Or, 8. The 1st defendant has refused and still refuses to concur in taking and settling the accounts of the partnership notwithstanding that no such account has been taken or settled since the day of).

9. The plaintiff desires to have the said partnership wound up and is ready, etc.).

The plaintiff prays—

(a) That the said partnership may be dissolved as and from this day (or, be declared to have been dissolved on the day of).

(b) That the accounts of the partnership business may be taken by the Court (without a dissolution of the partnership) as from day of

(c) That the assets may be realized and that each party may be ordered to pay into Court any balance due from him upon such partnership account, and that the debts and liabilities of the said partnership may be discharged, and that the

plaint. This is a special rule which applies only to the presidency town of Madras. The above Form, it is submitted, is by no means perfect. The word 'said' before the word 'losses' in paragraph 4 should be omitted. The first part of paragraph 9 is, it is submitted, redundant. The words 'The plaintiff prays' should be changed into 'The plaintiff claims'. The reliefs ought to be recast, specially relief (c), and put in simpler form. No facts have been pleaded to entitle the plaintiff to reliefs (d) or (e). Relief (f) is redundant.

(x) See Notes under Form No. 486.

costs of the suit may be paid out of the partnership assets and that any balance remaining as such assets, after such payment and discharge and the payment of the said costs may be divided between the plaintiff and defendants, according to the terms of the said articles (or deed or agreement) and arrangement or that, if the said assets shall prove insufficient, the plaintiff and the 1st and 2nd defendants may be ordered to contribute in such proportions as shall be just to a fund to be raised for the payment and discharge of such debts, liabilities and costs.

(d) For the appointment of a Receiver.

(e) For an injunction to restrain the 1st defendant from retaining, receiving, disposing of, or otherwise dealing with, the property and effects of the partnership.

(f) For such other relief as the Court shall think fit.

PLAINT.

490.

PARTNERSHIP.

1. Suit between Partners.

CLAIM by a Partner for Partial Accounts without Dissolution of the Firm. (y).

1. Under a deed of partnership dated, the plaintiff and the defendant have since the day of been carrying on business of at under the style of.....

2. The said partnership deed, *inter alia*, provided as follows :

(a) The plaintiff and the defendant to share the profits and the losses of the business in equal proportion.

(b) The defendant to be the managing partner of the business.

(c) The defendant as such managing partner to keep

(y) **Cause of action :** It is now well settled that unless the relief of rendition of accounts cannot be given without a dissolution of partnership as when the general accounts of the partnership business are demanded, it would be necessary to sue for dissolution of partnership ; but when the suit relates to matters incidental to partnership and seeks to compel the partners to discharge the obligations undertaken by them under the agreement of partnership, it would not be necessary to sue for a dissolution of partnership : *Binjraj v. Kisanlal*, A.I.R. 1933 Nag. 127. See also 'Partners' under "Classes of Persons", Pt. II, Chap. IX, p. 219 ; cf. Lindley on Partnership, 10th Edn., pp. 590-596.

(y) **Limitation.** Art. 120, Iqd.Lim.Act, *Binjraj v. Kisanlal*, *supra* at p. 130.

accounts and to render accounts of the business at the close of each year in the month of.....

(d) The net profits of the business at the close of each year to be divided among the partners.

3. The defendant has not rendered any accounts of the business for the year and refuses to do so in spite of demand in writing made by the plaintiff on

4. By reason of the premises, the plaintiff has been prevented from getting his share of profits of the business for the said year.

The plaintiff claims—

(1) To have a full and true account of the partnership business for the year.....

(2) Payment of his half share of the net profits for the said year as may be found due upon the taking of accounts.

PLAINT.

491.

PARTNERSHIP.

1. Suit between Partners.

CLAIM by a Partner for Secret Profit made by his Copartner. (z).

1. Under articles of partnership in writing, dated, the plaintiff and the defendant have since the day of been carrying on business in partnership as sugar refiners at under the style of, hereinafter called 'the firm'.

2. At all material times the defendant acted as the managing partner of the firm.

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- (z) **Reference :** *Bentley v. Craven*, (1853) 18 Beav. 75 (The Master of the Rolls, in delivering judgment observed, "The case is this,—Four partners established a partnership for refining sugar; one of them is a wholesale grocer, and from his business is peculiarly cognisant with the variations in the sugar-market, and has great skill in buying sugar at a right and proper time for the business. Accordingly the business of selecting and purchasing the sugar for the sugar refinery is entrusted to him. He being the person to buy, it is his duty and business to employ his skill in buying for the sugar refinery at the time he thinks most beneficial. Having, according to his skill and knowledge, bought sugar at a time when he thought it likely to rise and it having risen, and the firm being in want of some, he sells his own sugar to the firm without letting the partners know that it was his sugar that was sold. Being the agent for the firm for buying sugars, he sold his own sugar to the firm and made a profit, and the firm was held entitled to that profit accordingly"). See *Lindley on Partnership*, 10th Edn., p. 382.

3. At all material times the defendant also carried on business as wholesale grocer at and from his business was specially cognisant with the variations in the sugar-market.

4. Relying on his skill in buying sugar at the right and proper time, the plaintiff entrusted the defendant with selecting and making all purchases of sugar for the firm.

5. On 19..., the defendant supplied the firm withmaunds of sugar at Rs..... *per* maund, which was then the market price. The defendant had previously purchased the said sugar at a time when the price was lower, that is, Rs..... *per* maund, and he sold the said sugar to the firm when the price had risen without letting the plaintiff know that it was his own sugar that was sold at a profit.

6. By the sale of the said sugar to the firm the defendant made a secret profit of Rs....., for which he is accountable to the firm.

7. On 19..., the plaintiff discovered that the defendant had made the secret profit as aforesaid.

The plaintiff claims—

(1) Payment to the firm of the said sum of Rs.....

(2) Alternatively, that an account be taken of the amount of secret profits made by the defendant in the aforesaid transaction, and payment to the firm of the sum to be found due upon the taking of account.

PLAINT.

492.

PARTNERSHIP.

1. Suit between Partners.

CLAIM for Winding up of the Affairs of a dissolved Partnership and for Appointment of a Receiver and Manager. (a)

1. The plaintiff on entered into partnership articles with the defendant for carrying on business in under the style of for the term of years.

2. By the partnership articles the plaintiff was to do the can-

(a) **Remedies after dissolution :** Secs. 42 and 46, Ind. Part. Act, 1932.
Under Sec. 42, subject to contract between partners, a firm is dissolved if constituted for a term by the expiry of that term. Under Sec. 46, on the dissolution of a firm every partner or his representative is entitled to have the business wound up.

(a) **Receiver and manager :** Cf. *Radha Kanta v. Benode Behari* A. I. R. 1934 Cal. 444 ; *Taylor v. Neate*, (1888) 39 Ch. D. 538.

(a) **Limitation :** Art. 106 (if already dissolved), Art. 120 (if not yet dissolved).

vassing work, and the defendant was to look after the management, and to remain in charge of the accounts and the funds of the said business, and that both were to contribute equally to the capital, and to share equally the profits and losses, of the said business.

3. Accordingly, the said business was carried on until when the term fixed by the partnership articles expired, and the partnership stood dissolved.

4. No settlement of accounts has been made between the plaintiff and the defendant as partners since the commencement of the partnership.

5. There are certain existing debts of the partnership which have to be paid and certain contracts with third parties which have to be performed. (*Give particulars*).

6. There are disagreements between the plaintiff and the defendant as to the mode of discharging the said debts and executing the said contracts.

The plaintiff claims—

(1) A declaration, if necessary, that the partnership stood dissolved on

(2) Partnership accounts and winding up of the affairs of the partnership.

(3) Appointment of a receiver and manager pending winding up.

PLAINT.

493.

PARTNERSHIP.

2. Suit between Partners and Non-partners.

CLAIM by Seller for Price of Goods against Partners, including a Partner who has retired. (b)

1. At the time of the transaction hereinafter mentioned, the defendants carried on a business in in partnership under the style of at The said partnership business is hereinafter called 'the firm'.

2. The plaintiff, at the request in writing dated

-
- (b) **Liability of a partner who has retired from the business :** A retiring partner is liable to any third party for acts of the firm done 'before his retirement : See Pt. II, Chap. IX, p. 234 : cf Sec. 32, Ind. Part. Act. See, 'Suits against the firm' under "Classes of Persons", Pt. II, Ch. IX, p. 234.

made by the defendant No. 1 on behalf of the firm, supplied certain goods specified in Schedule "A" hereto to the firm on

3. The said goods supplied by the plaintiff were of the value of Rs.....

The plaintiff claims—

Rs.....

DEFENCE.

494.

PARTNERSHIP.

2. Suit between Partners and Non-partners.

DEFENCE by a retired Partner to a claim for Price of Goods. (c)

1. This defendant retired from the said firm on and, after such retirement, the remaining partners, namely, the defendants Nos. 1 and 2, took over the assets and liabilities of the said firm and continued to carry on the business of the said firm.

2. At the time of such retirement, it was orally agreed between the plaintiff, the defendants No. 1 and 2 (the members of the reconstituted firm) and this defendant that the plaintiff would not hold this defendant liable for the price of the said goods but would look to the defendants Nos. 1 and 2 for payment. This defendant has thereby been discharged from all liability to the plaintiff in respect of the price of the said goods.

PLAINT.

495.

PASSING OFF.

1. Trade Mark.

CLAIM against the Defendants for "Passing off" their Goods as the Plaintiffs' Goods. (d)

1. The plaintiff firm carries on business in Bombay under the style of

2. The defendant is a merchant carrying on business in Bombay.

(c) See 'Partners' under "Classes of Persons", Pt. II, Chap. IX, p. 234.

(d) **Reference :** *Bundi Portland Cement v. A. H. Essaji*, A. I. R. 1936 Bom. 418 (In deciding the question, whether the get-up adopted with regard to the goods is such a colourable imitation, that it is likely to deceive the public, it should be found out on the face of the goods sold by, or belonging to the defendant and having regard to the surrounding circumstances that it is likely to deceive a casual unwary purchaser into the belief that in buying the goods of the defendant he is really buying the goods of the plaintiff. The ordinary presumption that a

3. The plaintiffs have for more than years manufactured and sold cement in Bombay and other Indian markets, in bags bearing three letters "B. B. B." on them with the word "Portland" above such letters and the word "Cement" below them.

4. The plaintiffs' cement sold in bags bearing the said mark, has acquired a high reputation and is well known in the market as the "B. B. B." brand, and the cement so called has come to mean the cement of the plaintiffs' exclusive manufacture.

5. Since the defendant has been importing into Bombay and selling in Bombay and other Indian markets, large quantities of Japanese cement in bags bearing the letters "R. R. R." with the word "Portland" above such letters and the word "Cement" below the same.

6. The get-up of the defendant's bags and more particularly the letters "R. R. R." placed between the words "Portland" and "Cement" are a colourable imitation of the plaintiffs' bags and trade-mark calculated to mislead a purchaser into the belief that in purchasing the defendant's cement he is purchasing the cement of the plaintiffs.

7. About the beginning of the year, the plaintiffs came to know of the sale of cement by the defendant as aforesaid and, by letter dated, the plaintiffs called upon the defendant to desist but he has not done so.

8. The cement so sold by the defendant is of inferior quality and the sale thereof as the cement of the plaintiffs' manufacture has already caused and is likely to cause a great loss of trade reputation and consequent damage to the plaintiffs.

man intends the natural and ordinary consequences of his act is applied to passing off action): *Swadeshi Mills v. Juggi Lall*, (1927) I. L. R. 49 All. 92; *Mohideen Bawa v. Rigaud Perfume*, (1932) I. L. R. 10 Rang. 133; *Herbert Whitworth v. Jamnadas*, A. I. R. 1928 Bom. 227 (No trader has a right to use a trade mark so nearly resembling that of another trader as to be calculated to mislead incautious purchasers. The use of such a trade mark may be restricted by injunction, although no purchaser has actually been misled, for the very life of a trade mark depends upon the promptitude with which it is vindicated.); *Hiranand v. Sardar Meharsingh*, A. I. R. 1938 Sind 38 (The question for decision as to whether an alleged colourable imitation has or has not deceived anybody is to be decided with reference to the ultimate purchaser. In passing off cases, the probability of misleading, not experts or persons who know the real facts, but ordinary or unwary customers, is the mischief to be guarded against. Non-deception of middlemen and

9. The defendant threatens and intends to continue to sell the said imported cement not of plaintiffs' manufacture and to pass off the same as cement of plaintiffs' manufacture.

vendors is immaterial.), on appeal, A. I. R. 1940 Sind 83 ; *Firm Daulat Ram v. Firm Vera Mall*, A.I.R. 1938 Lah. 803 ; *Thomas Bear v. Prayag Narain*, A.I.R. 1940 P.C. 86 ; *Shanmugha v. Shanmughavel*, A.I.R. 1940 Mad. 145 (Where a name has acquired a secondary signification as exclusively denoting the goods of a particular trader, mere dissimilarity in get-up of goods of another trader of similar name is immaterial and affords no protection to the latter.) ; *Gujrat Ginning etc. Co. v. Swadeshi Mills*, A.I.R. 1939 Bom. 118 ; *Gaw Kan Lye v. Saw Kyone Saing*, A.I.R. 1939 Rang. 343 F. B. (In the case of distinctive marks all that is necessary for the plaintiff to prove is that the mark used by the defendant is likely to deceive purchasers of the class who buy the goods bearing the plaintiff's mark, and it is not necessary to prove actual deception.).

- (d) **Trade-mark—distinction between the incidents of a registered and un-registered trade-mark :** In India before the passing of the Trade Marks Act V of 1940, the right to use particular trade mark was confined to the article to which it was affixed, but it was open to the plaintiffs to establish by proper and sufficient evidence that the particular trade mark had been so identified and associated with the plaintiffs' products that their name would suggest itself to a purchaser on seeing it on any other product which the plaintiffs allege is a product "allied" to, or of the same description. There is, however, this limitation that the acquisition of an exclusive right to a trade mark in connexion with a particular article of commerce cannot entitle the owner of the right to prohibit the use by others of such mark in connexion with goods of a totally different character : *Anglo-Indian Drug and Chemical Co. v. Swastik Oil Mills*, A.I.R. 1935 Bom. 101.
- (d) **Note :** In India, the Trade Marks Act V of 1940, provides for registration of trade-marks, and by S. 5 (1) a trade mark may be registered only in respect of particular goods or classes of goods. By S. 20 (2) nothing in the said Act shall be deemed to affect rights of action against any person for passing off goods as goods of another person or the remedies in respect thereof.
- (d) **Damages :** There is no cut and dried rule which can be laid down by a Court of law for the estimation of damages in case of infringement of trade-mark. But instead of making a speculative assumption of sales by defendant by trusting to their own goods without the misleading trade-mark, the safer basis would be to calculate on the falling off in plaintiff's trade which came in after the pirated mark was introduced : *Juggi Lal v. Swadeshi Mills Co.*, (1929) I.L.R. 51 All. 182 ; *Hormus Ardeshar v. Ardeshar*, (1934) I.L.R. 61 Cal. 571 ; *Draper v. Trist*, (1939) 3 All E.R. 513 (*Per* Goddard, L.J., at p. 526, "The Law has always, been particularly tender to the reputation and goodwill of traders. If

The plaintiffs claim—

(1) An injunction to restrain the defendant and his agents from using the letters "R.R.R." between the words "Portland" and "Cement" as descriptive of or in connection with cement made or sold or offered for sale by the defendant and not manufactured by the plaintiffs without clearly distinguishing such cement from plaintiffs' cement.

(2) Rs..... damages, or in the alternative, an account of profits and payment of the amount that will be found due to the plaintiffs upon the taking of accounts.

PLAINT.

496.

PASSING OFF.

2. Trade Name.

CLAIM against the Defendants for "Passing off" their Goods as the Plaintiffs' Goods. (e)

1. The plaintiffs have for more than.....years manufactured and sold in England, India and the Colonies, a belting of their manufacture under the name of "Camel Hair Belting." The said belting is of superior quality and has acquired a very valuable trade reputation in the Indian market and has come to mean that the belting so called is belting of the plaintiffs' exclusive manufacture.

2. The defendants are a firm of merchants carrying on business in.....

a trader is slandered in the way of his business, an action lies without proof of damage. That does not mean to say that the plaintiff cannot give evidence showing that he has suffered damage in fact. The more he can show that he has suffered damage in fact, the larger the damages he can recover. The more the defendant can show that he has suffered no damage in fact, the less he will recover."),

(d) **Limitation :** Art. 40, Ind. Lim. Act.

(e) **Reference :** *John Smidt v. Reddaway & Co.* (1905) I. L. R. 32 Cal. 401 (This case follows *Reddaway v. Banham*, (1896) A. C. 199, which was an action by the same plaintiffs against other defendants for the identical relief. It was held in the last mentioned case that "a trader is not entitled to pass off his goods as the goods of another trader by selling them under a name which is likely to deceive purchasers, whether immediate or ultimate, into the belief that they are buying the goods of that other trader although in its primary meaning the name is merely a true description of the goods."); cf *Reddaway v. Frictionless Engine Packing Co.*, (1902) 19 R.P.C. 505 (Where the same plaintiffs sought to restrain the defendant from selling Camel Hair

3. The defendants have lately imported into India machine-belted of German manufacture which they have sold and are offering for sale under the name of "S. S. Camel Hair Belting" and have passed off and are passing off the same as the Camel Hair Belting of plaintiffs' manufacture.

4. The sale by the defendants of belting under the name of "S. S. Camel Hair Belting" is likely to mislead the public into the belief that the said belting is of plaintiffs' manufacture.

5. The belting so sold by the defendants is of inferior quality and the sale thereof as the belting of the plaintiffs' manufacture has already caused and is likely to cause a great loss of trade reputation and consequent damage to the plaintiffs.

6. The defendants threaten and intend to continue to sell the said imported belting under the name of "S. S. Camel Hair Belting" not of plaintiffs' manufacture and to pass off the same as the Camel Hair Belting of plaintiffs' manufacture.

Belting under the name "Frictionless Engine Packing Co.'s Camel Hair Belting." *Held*: the prefix of the proper name was sufficient to distinguish defendants' "Camel Hair Belting" from plaintiffs.; cf. *Valentine Meat Juice Co. v. Valentine Extract Co.*, (1900) 83 L.T. 259 (It does not matter a pin's point whether the deception arises from the use of a name which is, as it happens, the name of defendant or whether it arises from the use of any other description which in a sense, may be accurate of that which he sells for the thing which he says has come to be known in the market as meaning some thing made by somebody other than himself); *Parsons v. Gillespie*, (1898) A.C. 239; *Mahomed Esuf v. Rajaratnam Pillai*, (1910) I. L. R. 33 Mad. 402 (For a man to be entitled to restrain another from using a particular name with reference to a commodity he must show that the public has grown to associate that particular name with himself as the manufacturer of, or dealer in, the article.); *Unani Dawakhana v. Hamdard*, (1930) I. L. R. 12 Lah. 224; *Wm. Dimech v. G. A. Chretien*, A. I. R. 1931 P. C. 15; *Venkatachalam v. Rajagopala*, (1932) I. L. R. 55 Mad. 966 (The plaintiff must prove that the name had acquired a secondary meaning and had come to mean goods manufactured by themselves and not by other manufacturers before the question whether the defendants had infringed the plaintiff's right could be considered. The mere fact that the plaintiffs' goods of that name had acquired a considerable reputation is not enough. Nor the fact that in a particular place by its universal use the name had acquired a secondary signification will entitle the plaintiff to have an injunction in every part of the country). Cf. *Herbert Whitworth v. Jamnadas*, A. I. R. 1928 Bom. 227.

(e) Cause of action : *Drapes v. Trist*, (1939) 3 All E.R. 513 (*Per* Goddard, L.

The plaintiffs claim—

(1) An injunction to restrain the defendants and their agents from using the words “Camel Hair” as descriptive of or in connection with belting made or sold or offered for sale by the defendants and not manufactured by the plaintiffs without clearly distinguishing such belting from plaintiffs’ belting.

(2) Rs..... damages, or, in the alternative, an account of profits and payment of the amount that will be found due to the plaintiffs upon the taking of accounts.

DEFENCE.

497.

PASSING OFF.

1. Trade Mark.

DEFENCE of Denial of Infringement and of Acquiescence. (f)

1. The defendant denies that the plaintiffs’ cement sold in bags bearing the letters “B.B.B.” between the words “Portland” and

J., at pp. 525, 526. “The action is one of that class which is known as an action on the case, akin to an action of deceit. In an action on the case, the cause of action is the wrongful act or default of the defendant. The right to bring the action depends on the happening of damage to the plaintiff. A man, for instance, may be negligent, and the consequences of his negligence may not cause damage for 12 months. The cause of action is the breach of duty. The right to bring the action depends upon the happening of the damage. This class of cases, however, forms an exception, or an apparent exception, to the ordinary action of deceit, because, in an ordinary action of deceit, the plaintiff’s cause of action is false representation, but he cannot bring the action until the damage has accrued to him by reason of that false representation. In passing off cases, however, the true basis of the action is that the passing off by the defendant of his goods as the goods of the plaintiff injures the right of property in the plaintiff, that right of property being his right to the goodwill of his business. Law assumes, or presumes, that, if the goodwill of a man’s business has been interfered with by the passing off of goods, damage results therefrom. He need not wait to show that damage has resulted. He can bring his action as soon as he can prove the passing off, because it is one of the class of cases in which the law presumes that the plaintiff has suffered damage. It is in fact, I think, in the same category in this respect as is an action for libel”).

(c) **Damages :** See notes under Form No. 495.

(f) This is a defence to Form No. 495.

(f) **Defence of acquiescence :** See *Mohideen Bawa v. Rigad Perfume* (1932), I.L.R. 10 Rang. 133, and ‘Acquiescence’ under “Special Defences” Pt. II, Chap. XVII, pp. 383, 384.

"Cement" has come to mean the cement of the plaintiffs' exclusive manufacture.

2. The defendant denies that the get up of his bags or the use of letters "R.R.R." between the words "Portland" and "Cement" is a colourable imitation of the plaintiffs' bags or trade mark or that it is calculated to mislead a purchaser into the belief that in purchasing the defendant's cement he is purchasing the cement of the plaintiffs.

3. If, which is not admitted, the defendant has infringed the plaintiffs' alleged trade mark, the defendant says that he has been extensively selling his cement in bags bearing the letters "R.R.R." between the words "Portland" and "Cement" since.....in ignorance of the plaintiffs' alleged trade mark, and the plaintiffs, who should have known that ignorance, stood by and allowed the defendant to build up a large business in cement in bags bearing the said letters "R.R.R." as aforesaid and have thereby acquiesced in the sale of the said cement by the defendant and are not entitled to take legal proceedings to prevent any further sale of the said cement by the defendant.

PLAINT.

498.

PATENTS AND DESIGNS.

CLAIM for Infringement of a Patent. (g)

1. The plaintiff was the true and first inventor of (here describe the invention). The nature of the said invention is particularly described in the specification dated

2. On 19..., a Patent No..... was granted to the plaintiff for the term of 16 years from that date.

(f) See notes under Form No. 495.

(g) **Invention** : Invention means any manner of new manufacture and includes an improvement and an alleged invention : Sec. 2 (8), Ind.Pat. & Des. Act, 1911. Manufacture comprehends not only production but also the means or method of producing them, so that a new process or an invention or an improvement on an old process will be a manufacture within the meaning of the Act : *Lallubhai v. Shamaldas*, A. I. R. 1934 Bom. 407. The subject-matter of a patent must be a new manufacture or art, for if there is no new manufacture or art, there is no subject-matter and therefore no invention. An improvement on something known may also afford new subject-matter ; so also a new combination of different matters already known : *Lallubhai v. Ohimanlal & Co.*, (1936) I.L.R. 60 Bom. 261. Cf. *Kraft v. Mc Anulty*, A.I.R. 1931 P.C. 279.

3. The defendant has since 19..., infringed the plaintiff's said patent. The following are particulars of breaches constituting the infringement :

4. The defendant threatens and intends to continue the said infringement.

The plaintiff claims—

(1) An injunction to restrain the defendant, his servants and agents from committing further infringement of the said invention during the continuance of the patent.

(2) Rs..... damages, or an account of profits.

(3) Delivery up or destruction of all articles, in defendant's possession, custody or control, contracted in infringement of the said patent.

(g) **Patent—essentials of :** The two features necessary to the validity of a patent are novelty and utility, but the real test is the novelty of the invention. There must be an absence of prior public user, and if the user is secret or experimental, the profits made by the inventor from his invention must not be excessive. There is a distinction under the section between public user and private user only, so also there is a distinction between public user of the invention by working it commercially, and public user of the invention from the point of view of publication : *Lallubhai v. Chimanlal & Co.*, (1936) I.L.R. 60 Bom. 261. Cf. *Gillette Industries v. Yeshwant*, A.I.R. 1938 Bom. 347. For distinction between public user and private user, see also, *Lallubhai v. Shamaldas*, A.I.R. 1934 Bom. 407. Cf. Sec. 38, Ind. Pat. & Designs Act. As to whether want of novelty is the same thing as want of subject-matter, see *H. B. Nier v. G. Reinhart*, (1938-39) 43 C.W.N. 697.

(g) **Infringement of patent :** The question of infringement of a patent is a mixed question of law and fact. A patent may be infringed in several ways, one of which is by using the invention or any colourable imitation thereof in the manufacture of articles or by putting the invention in practice in any other way. The plaintiff therefore has got to prove that his process has been counterfeited or imitated by the defendants. It is necessary for him to give the particulars of the breaches constituting the alleged infringement of his rights. A patent may sometimes be infringed by taking a part only of the invention, but that depends on whether the part for which protection is asked is a new and material part especially in the case of a combination. If it is not new and material, the Court must consider what is the substance of the invention, and to do so it has to consider the relative importance of all the parts of the invention : *Lallubhai v. Chimanlal & Co.*, (1936) I.L.R. 60 Bom. 261.

(g) **Suit for infringement :** Sec. 29 (1), Ind. Pat. & Designs Act, 1911. Under Sec. 11 of the Act, no proceedings shall be taken in respect of an in-

PLAINT.

499.

PATENTS AND DESIGNS.

CLAIM for Infringement of a registered Design. (h).

1. The plaintiffs are the proprietors of a new and original design registered under the Patents and Designs Act, 1911, which is for use of textile goods manufactured by them. A specimen of the said design is annexed hereto and marked "A".

2. The plaintiffs have copyright in the said design during five years from..... 19...., the date of registration.

3. The defendants are manufacturers of textile goods.

4. The defendants have since..... 19..., without the plaintiff's license and consent, been selling and offering for sale in and other parts of India goods manufactured by themselves, bearing a design which is an infringement of the plaintiffs' registered design. The following are particulars of breaches constituting the infringement :

fringement committed before the advertisement of the acceptance of the application. For reliefs, see Sec. 31 of the Act.

- (g) **Grant of relief in respect of particular claims :** Sec. 35A, Ind. Patents & Designs Act, 1911.
- (g) **Assignment of patent :** Sec. 3 of the Act. Cf. *Hiralal Banjara v. Bashiram Sharma*, A.I.R. 1940 Cal. 474.
- (g) **Jurisdiction :** A patentee may institute a suit in a District Court having jurisdiction to try the suit against any person who, during the continuance of a patent acquired by him under this Act in respect of an invention, makes, sells or uses the invention without his license, or counterfeits it, or imitates it : Sec. 29 (1), Ind. Pat. & Des. Act, 1911. Cf. Sec. 19, C P. Code and cl. 12 of the Letters Patent of the Cal., Bom. and Mad. High Courts.
- (g) **Limitation :** Under Art. 40, Ind. Lim. Act, 3 years from the date of infringement. Every fresh act of infringement would give a fresh cause of action for a suit for compensation thereof.
- (h) **Design—definition of :** Sec. 2 (5), Ind. Pat. and Des. Act, 1911.
- (h) **Copyright—definition of :** Sec. 2 (4), Ind. Pat. and Des. Act, 1911. Copyright can be had on registration : Sec. 47 of the said Act.
- (h) **Piracy of registered design—what constitutes :** Sec. 53 (1), Ind. Pat. and Des. Act, 1911. Cf. *Calico Printers v. Mitsubishi S. Kaisha*, A.I.R. 1938 Bom. 413.
- (h) **Remedies of the owner of copyright :** Sec. 53 (2), Ind. Pat. and Des. Act, 1911. Cf. *Lallubhai v. Chimanlal & Co.*, (1936) I.L.R. 60 Bom. 261.
- (h) **Registered proprietor—meaning of :** Sec. 2 (14), Ind. Pat. & Des. Act, 1911. The proprietor must be the author or one who has acquired the design from the author or a person on whom such rights have devolved. The

5. The defendants intend and threaten to continue the said infringement.

The plaintiffs claim —

(1) Perpetual injunction restraining the defendants, their servants and agents from repetition of the acts hereinbefore complained of during the period of the plaintiffs' copyright in the said design.

(2) Rs. damages.

DEFENCE.

500.

PATENTS AND DESIGNS.

DEFENCE to a Claim for Infringement of Design. (i).

1. The design had been registered in British India previous to the registration of the plaintiff's design.

Or,

The said design had been published in British India prior to the date of its registration.

Or,

The said design is not a new or original one.

2. The defendant denies that he infringed the plaintiff's alleged design. He denies (here deny specifically the alleged acts of infringement).

DEFENCE.

501.

PATENTS AND DESIGNS.

DEFENCE to a Claim for Infringement of Patent. (j)

words 'registered proprietor' mean a person who is in fact the proprietor and who has also been registered as such and not merely a person who is registered as a proprietor. It is open to the defendant to plead that plaintiff was not the proprietor of the particular design and that it was not a new invention or design of the plaintiff on the date of his registration. The onus of proving this is on the defendant: *Md. Abdul Karim v. Md. Yasin*, (1934) I.L.R. 55 All. 1032.

(i) This is a defence to form No. 499.

(ii) Sec. 51A, Ind.Pat. and Des.Act, 1911. For defence that the design is not a new or original one, see *Qadar Bakhsh v. Ghulam Mohammad*, A.I.R. 1934 Lah. 709. Cf. *Sikandar Shah v. Rahim Bakhsh*, A.I.R. 1940 Pesh. 38.

(j) Defences : Every ground on which a patent may be revoked under the Pat. & Des. Act, 1911, shall be available by way of defence to a suit for infringement: Sec. 29 (2) of the Act. For exemption of innocent infringer from liability for damages, see Sec. 30 of the Act. For grounds for revocation of patent, see Sec. 26 of the Act. Particulars should be given as to whom the defendant alleges to be the true and

The defendant, may take, amongst others, one or more of the following defences :

1. The alleged invention was not, at the date of application for a patent, a new invention within the meaning of the Ind. Patents and Designs Act, 1911. Before the date of the letters patent, the alleged invention had been used at by at the several dates hereinafter set out :— (or, had been published in the specifications of the following patents :—, or had been published in the following books :—). The defendant will contend that in none of the claims in the said patent there is any patentable improvement upon existing prior knowledge.

2. The plaintiff was not the true and first inventor of the said invention. (Give particulars showing that plaintiff was not the first inventor).

3. The alleged invention is of no utility (or, is in no way useful or beneficial to the public) and is not the proper subject-matter of a patent.

4. The original application (or specification) did not fulfil the requirements of the Indian Patents and Designs Act, 1911. (State why).

5. The plaintiff knowingly or fraudulently included in the application for a patent (or in the original or any amended specification) as his invention, some thing which was not new (or whereof he was not the inventor), namely,

6. The original (or any subsequent application relating to the invention, or the original or any amended specification) contains a wilful or fraudulent mis-statement, namely,

7. The whole (or a part) of the invention (or the manner in which a whole or part is to be made and used) as described in the original or amended specification is not thereby sufficiently described, and this deficiency was fraudulent (or is injurious to the public).

8. The defendant denies that he infringed the plaintiff's patent. He denies that (here deny specifically the alleged breaches).

9. At the date of the infringement the defendant was not aware, nor had reasonable means of making himself aware, of the existence of the patent.

first inventor : *Gillette Industries v. Yeshwant*, A. I. R. 1938 Bom. 347.

- (i) **Counter-claim for revocation** : In this country it is not open to a defendant in an infringement suit to set up a counter-claim for revocation and that he must for the purpose of obtaining revocation take separate proceedings : *E. B. Nier v. G. Reinhart*, (1938-39) 43 C. W. N. 697.

PLAINT.

502.

PLEDGE.

CLAIM by Pawnee against Pawnor for Sale of the pledged Goods. (k)

1. On 19..., the defendant borrowed Rs..... from the plaintiff, and verbally promised to repay the said loan with interest at 8 per cent. per annum, and, to secure the due repayment of the said loan, deposited with the plaintiff some ornaments, specified in schedule "A" hereto.

(k) **Pledge—definition of :** Sec. 172, Ind. Cont. Act.

(k) **Pledge—conditions of :** Pawn is not an equitable mortgage but a security intermediate between a simple loan and a mortgage which wholly passes property in the thing conveyed. It is essential to a contract of pawn that the property should be actually or constructively delivered to the pawnee : *Co-op. Hindusthan Bank v. Surendra*, (1932) I. L. R. 59 Cal. 667 ; *Lala Jyoti Prakash v. Lala Mukti Prakash*, (1917-18) 22 C.W.N.297. Government promissory note may be pledged but this must be done as required by Statute by endorsement and delivery : *Lala Jyoti Prakash v. Lala Mukti Prakash*, *supra*.

(k) **Rights of the pawnee :** When movable property is pledged to a person for money lent, he acquires a special property therein ; he has a charge upon it for satisfaction of the loan advanced and he is entitled under Sec. 176 of the Ind. Cont. Act, either to bring a suit against the owner upon the debt or promise retaining the goods pledged as collateral security, or he may sell the things pledged upon giving reasonable notice of the sale : *Nim Chand v. Jagabundhu*, (1895) I. L. R. 22 Cal. 21, *folld.* in *Mahalinga v. Ganapathi*, (1904) I. L. R. 27 Mad. 528, 530 (F. B.). Thus, he has two rights which are concurrent and the right to proceed against the property is not merely accessory to the right to proceed against the debtor personally. For the pledgee may have a right to sue for the sale of property even in the absence of right to sue for a personal decree : *Gulamhusain v. Clara D'Souza*, (1929) I. L. R. 53 Bom. 819 (where the plaintiff, the assignee of a promissory note, was held entitled to the charge on the property which the transferor of the note might possess.). The pledgee has no right of foreclosure in the absence of a special agreement : *Dwarika v. Bagawati*, A. I. R. 1939 Rang. 413.

(k) **Form of decree :** A suit by a pawnee to recover the money advanced by sale of the property pledged is a suit to enforce a charge upon that property : *Nim Chand v. Jagabundhu*, *supra*. There is no distinction in principle between the case of pledge, mortgage or hypothecation of movable property : *Mahalinga v. Ganapathi*, (1904)

2. The defendant has not repaid the said loan or any part thereof.

Particulars of claim :

Principal	Rs.
Interest from .....19..., to	
.....19... "	

Total Rs.

The plaintiff claims—

(1) Rs..... together with costs and interest from the date of the institution of the suit until realisation.

(2) A declaration, if necessary, that the goods specified in Schedule "A" hereto are charged for payment of the plaintiff's claim aforesaid.

(3) That the said goods be sold and the sale proceeds, after defraying thereout the costs and expenses of sale, applied towards satisfaction of the decree.

(4) That if the net proceeds of such sale are found insufficient to satisfy the plaintiff's claim under the decree, liberty be given to the plaintiff to apply for a personal decree for the amount of the balance.

I. L. R. 27 Mad. 528 ; *Gulamhusain v. Clara D'Souza*, (1829) I. L. R. 53 Bom. 819. A mortgagee of movables is entitled to a right of sale quite as much as a mortgagee of immovable property : See notes under Form No. 471. Cf. *Co-op. Hindusthan Bank v. Surendra*, (1932) I. L. R. 59 Cal. 667. The form of decree for sale should therefore be under O. 34, r. 4, in Form No. 5, App. D, C. P. Code, as amended by the T. P. (Amendment) Supplementary Act XXI of 1929. If the plaintiff's claim for a personal decree is barred at the time of the suit, the plaintiff should merely ask for sale of the property pledged. The pledgee has no right of foreclosure since he never had the absolute ownership at law. In a mortgage the right to the property is transferred to the creditor : in the case of a pledge the pledgee has no property in the pawn but merely a right to sell. The principle of avoiding clog on the equity of redemption does not apply to pledges and hence parties can by special agreement introduce a clause into the agreement that on failure to redeem within a certain time, the property pledged would become the property of the pledgee : *Divarika v. Bagawati*, A. I. R. 1939 Rang. 413.

- (k) **Limitation :** A suit for recovery of money secured by a pledge is a suit for money lent. The period of limitation is three years under Art. 57 from the time the loan is made : *Yellappa v. Desayappa*, (1905) I. L. R. 30 Bom. 218 ; *Saiyid Ali v. Debi Prasad*, (1902) I. L. R. 24 All. 251 ;

PLAINT.

503.

PLEDGE.

**CLAIM by Pawnee against Pawnor for Balance of Loan after
Sale of the pledged Goods. (1)**

1. Same as Paragraph 1, Form No. 502.
2. On....., the plaintiff gave the defendant a notice in writing demanding payment of the sum then due to the plaintiff and intimating that in default of payment of the said sum on or before, the plaintiff would sell the said ornaments and appropriate the sale proceeds towards his dues.
3. The defendant did not pay the said sum or any part of it.
4. On....., the plaintiff had the said ornaments sold thro-

Debidin v. Gaya Pershad, A. I. R. 1927 Nag. 346. Where the suit is for the sale of the property pledged, the period of limitation is 6 years from the date of the pledge under Art. 120 : *Nim Chand v. Jagabundhu*, (1895) I. L. R. 22 Cal. 21 ; *Madan Mohan v. Kanhai Lal*, (1895) I.L.R. 17 All. 284 ; *Mahalinga v. Ganapathi*, (1904) I. L. R. 27 Mad. 528 (F.B.).

- (1) **Notice of sale :** Where pawnor makes default, the pawnee may sell the thing pledged, on giving the pawnor reasonable notice of the sale. If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance : Sec. 176, Ind. Cont. Act. Where no period was fixed for the repayment of the loan or the redemption of the pledge in order to enforce the right of sale under Sec. 176, it was necessary for the pawnee to prove : (a) a demand for the amount due ; (b) a default by the pawnor ; (c) a notice of sale giving reasonable time to the pawnor to pay ; and (d) an actual sale : *Alliance Bank of Simla v. Ghamandi Lal-Jaini Lal* (1927) I.L.R. 8 Lah. 373. The words—"He may sell the things pledged on giving the pawnor reasonable notice of the sale"—as used in section 176 of the Indian Contract Act, 1872, mean that the pawnee must give reasonable notice of his intention to sell : it does not necessarily mean that a sale should be arranged beforehand and that due notice of all details should be given to the pawnor : *Kunj Behari Lal v. Bhargava Commercial Bank*, (1918) I. L. R. 40 All. 522. Where the notice given says that failing payment by a certain date we shall arrange for sale of the hypothecated stock, it is merely an intimation that arrangements will be made for a sale, but it is not a notice of the sale that is to be held ; such a notice would require more definite particulars. What such particulars should be must depend upon the peculiar facts of each case. And once a proper notice is given, it is not necessary that a fresh notice is to be given if the contemplated sale is adjourned to a future date : *Co-op. Hindusthan Bank v. Surendra* (1932) I. L. R. 59 Cal. 667.

ugh....., auctioneers, and realised a net sum of Rs..... from the sale.

Particulars :

5. After satisfaction in part of the plaintiff's claim there is still due and owing to the plaintiff from the defendant the sum of Rs.....

The plaintiff claims—

Rs..... with further interest until payment.

PLAINT.

504.

POSSESSION.

Suit under Section 9, Specific Relief Act.

CLAIM to recover Possession of Land under Section 9, Specific Relief Act. (m)

1. The plaintiff, until such time as hereinafter mentioned, was in peaceful possession of land, specified hereunder, since by (here specify the acts of possession).

(m) **Sec. 9, Sp. Rel. Act I of 1877—Scope of enquiry :** In suits under Sec. 9, questions of title are irrelevant, for, like the old assize of novel disseizin in Plantagenet times, the section was enacted to afford a summary remedy against persons who had taken the law into their own hands and had ejected those in possession of land otherwise than through process of law—*Per* Page J., in *Satishchandra v. Madan-mohan*, (1931) I. L. R. 58 Cal. 29. The phrase “otherwise than in due course of law” in Sec. 9 is not synonymous with “illegally”. It means “in the regular normal process and effect of the law operating on a matter which has been laid before a Court, civil or criminal, for adjudication”—*Per* R. C. Mitter J., in *Jogendra v. Birendra*, (1934-35) 39 C. W. N. 394 ; *Daw Po v. U Po Hmyin*, A. I. R. 1940 Rang. 91.

(m) **Possession and dispossession :** A person who enters into peaceful possession of land claiming it as his own although he might not have any title to the land, can sue another person who has forcibly ousted him of possession and who has no better title to the land, because the first person, although he might not have any legal title, had at least possessory title and had commenced to prescribe for a legal title. Peaceful entry is the very essence of possessory title. This proposition does not conflict with the rules that (1) a plaintiff must succeed on the strength of his own title and not on the weakness of the defendant's ; and (2) that a defendant in possession can set up *jus tertii*. The first rule says nothing about the nature of the title which must be shown. As between a trespasser who enters peaceably and another who wrongfully dispossesses him, the title of the former is superior on two grounds : first, because it is prior in point of time, and next, because it is a peaceful title as opposed to a forcible one in the sense that it involves a

2. On 19..., the defendant without the consent of the plaintiff dispossessed the plaintiff of the said land otherwise in due course of law (stating how) and has since been continuing in wrongful possession thereof.

The plaintiff claims—

Recovery of possession of the said land.

wrongful dispossession of the previous occupier. As regards the second rule, it applies when the plaintiff has never been in actual possession or having had possession has been peaceably dispossessed or dispossessed by lawful process, or when the defendant has been placed in possession by the rightful owner either under a good or an imperfect title: *Pannalal v. Bhaiyalal*, A. I. R. 1937 Nag. 281. Cf. *Raj Krishna v. Mukhtaram*, (1910) 12 C. L. J. 605 (In order to entitle the plaintiff to succeed on the ground of possession, he must prove, firstly, that he exercised acts which amounted to acts of dominion; the nature of these acts of dominion varies with the nature of the property; secondly, that the act of dominion was exclusive. If the occupation by the plaintiff, as indicated by those acts, has been peaceable and uninterrupted and has extended over a sufficient length of time, the inference may properly be drawn that the plaintiff was in possession.); *Ajodhya Prasad v. Ghasiram*, A. I. R. 1937 Nag. 326. A Court in a suit under Sec. 9 has no jurisdiction to pass a decree in favour of a plaintiff who claims an undivided share in a property from which he and his co-sharers were ousted. Such a possession is not contemplated by Sec. 9: *Yellayi Sannaya v. Sannaya-julu*, A. I. R. 1940 Pat. 193. A person in joint possession of immovable property is as much in possession of that property as a person who is in exclusive possession and if the person who was in joint possession is dispossessed, there is no reason why he should not be entitled to bring a suit under the section, to be restored to that possession which he enjoyed before he was dispossessed: *Ballabh Das v. Gaur Das*, A. I. R. 1940 All. 261.

- (m) **Scope of claim :** In a suit for possession under Sec. 9, mesne profits cannot be awarded: *Abdul Kadi v. Uthumansa*, A. I. R. 1927 Mad. 722 (1); *Ma Ngwe Bwin v. Maung Po Maung*, A. I. R. 1927 Rang. 142; *Bhopal Singh v. Madho Singh*, 1939 Mar. L. R. 221 (Sind). The defendant cannot be allowed to plead title in such a suit, but Sec. 9 does not in any way preclude the successful assertion of a possessory title in the ordinary way in a proper case even though the suit is brought beyond the 6 months contemplated by that section: *Pannalal v. Bhaiyalal*, A. I. R. 1937 Nag. 281. All that the Court can do under Sec. 9 is to restore the plaintiffs to physical possession. It cannot direct the defendants to remove any structures which they have erected on the land or permit the plaintiffs to pull down the structures. In a suit under Sec. 9, the question of title of the respective parties is not adjudicated upon, and therefore it would be wrong to pass any order regarding the

PLAINT.

505.

PRE-EMPTION.

Mahomedan Law.

CLAIM by Sunni Mahomedan for Pre-emption. (n)

1. By a registered sale deed, dated 19..., one B. S. of, sold the house specified in the schedule "A" hereto, hereinafter called 'the said house', to the defendant for the ostensible consideration of Rs. 2500/-. The real consideration was Rs.....

structures on the land : *Sona Mia v. Prokash Chandra*, A. I. R. 1940 Cal. 464.

(m) **Limitation** : Art. 3, Ind. Lim. Act—A suit under Sec. 9 must be instituted within 6 months after date of dispossession. A suit by the Secretary of State is governed by Art. 149 : *Secretary of State v. Dinshaw Navroji*, A. I. R. 1925 Sind. 275, 279.

(m) **Court fee** : Half the amount of the *ad valorem* fees, under Art. II, Sch. I, Act VII of 1870.

n) **Law of pre-emption** : Mahomedan law of pre-emption is applied to Mahomedans as a matter of "justice, equity and good conscience" except in the Madras Presidency. In the Punjab, Agra and Oudh the law of pre-emption is regulated by statutes. In the province of Bihar, the Mahomedan law of pre-emption is enforceable by and between Hindus. It is also recognized among Hindus of Sylhet and certain parts of Guzrat. It may be applied to a Hindu purchaser by special contract : *Digambar v. Ahmad*, (1914-15) L. R. 42 I. A. 10. Cf. *Durga Singh v. Girwar Dutt*, A. I. R. 1938 All. 191.

(n) **Who may claim pre-emption** : See Mulla's Mahomedan Law, 11th Edn., pp. 186, 187, 188.

(n) **Right of pre-emption** : It is ownership and not possession that gives rise to the right of pre-emption : *Sakina Bibi v. Amiran*, (1888) I. L. R. 10 All. 472 ; *Chariter v. Bhagwati*, A. I. R. 1934 Pat. 596. Further, the right of pre-emption arises only out of a valid, complete and *bona fide* sale : See Mulla's Mahomedan Law, 11th Edn., pp. 188-189 ; *Sitaram v. Jiaul Hasan*, (1920-21) L. R. 48 I. A. 475 (A co-sharer has a right of pre-emption in accordance with the intention expressed by the parties to the sale, that intention having to be looked at to determine what system of law was to apply and what was to be taken as the date of the sale with reference to which the formalities were performed.). Cf. *Naresh Chandra v. Giris Chandra*, (1935) I. L. R. 62 Cal. 979. *Chamru Lal v. Shyam Sundar*, A. I. R. 1940 Pat. 699. The right to claim pre-emption must continue up to the time the decree is passed : *Tafazzul Husain v. Than Singh*, (1910) I. L. R. 32 All. 567. It is necessary that the seller and the pre-emptor should both be Mahomedans. On the question whether the buyer should be a Mahomedan, the High Courts have

2. The plaintiff, the said B. S., and the defendant are all Sunni Mahomedans.

3. The plaintiff at all material times was and is the owner of a house adjoining the said house to the west and is a *Shafi-i-jar*.

4. The plaintiff heard of the sale for the first time on and immediately declared his intention to assert the right of pre-emption.

5. The same day, that is, on 19..., the plaintiff affirmed the said intention and performed the ceremony of *talab-i-ishhad* in the presence of the defendant (or the said B. S.), (or, on the differed. According to the Allahabad and Patna High Courts, it is not necessary. It is necessary according to the Calcutta and Bombay High Courts : See Mulla's Mahomedan Law, pp. 192, 193.

- (n) **Formalities of demand :** The Mussalman law insists that the first formality technically called "the immediate demand" should be observed by the pre-emptor or some one on his behalf immediately on receipt of the news of the sale, otherwise the right of pre-emption falls to the ground. The second formality consists in the repetition of the "demand" with as little delay as possible under the circumstances, in the presence of witnesses either before the vendor or the vendee, or on the premises : *Jadu Lal v. Janki Koer*, (1911-12) L. R. 39 I. A. 101, 108.
- (u) **Tender of price :** The performance of the *talab-i-ishtishad* is not meant to be done for the information of the vendor or vendee, though no doubt its effect may be to give them information. The formality is insisted on with the object of securing evidence that the pre-emptor has really asserted his right and because evidence is wanted in order to establish proof before the Magistrate, and, unlike the *talab-i-mowasibat*, it must be performed in the presence of witness : *Jadu Lal v. Janki Koer*, (1908) I. L. R. 35 Cal. 575, on appeal, (1911-12) L. R. 39 I. A. 101. Where a right of pre-emption under Mahomedan Law is denied, it is not incumbent on the pre-emptor to tender or produce the price at the time of making his claim : *Iccra Lall v. Moorut Lall*, (1869) 11 Suth. W. R. 275. A person having a right of pre-emption does not lose it by refusing to purchase the property at the price at which it is offered to him, because he believes that such price is in excess of the real price, where such belief is entertained and expressed in good faith : *Sri Krishna v. Bachcha*, (1911) I. L. R. 33 All. 637. A decree for pre-emption can be passed in favour of a plaintiff only on payment of either the "actual price" paid by the vendee or on payment of the market value of the property. The fact that the vendees had some influence over the vendor is a circumstance tending to cause doubt on the genuineness of the amount of consideration as entered in the sale deed. That being so, the burden of proving that the ostensible consideration is the real consideration is on the vendees : *Anant Rai v. Bhagwan Rai*, A. I. R. 1940 All. 12 ; *Rafiq Zahra v. Nisar*, (1938) A. L. J. 975. Under Sec. 12 of the

said house), and in the presence of two witnesses specially called to bear witness to the demand being made.

The plaintiff claims—

Possession of the said house on payment of Rs. 2000/- or such other sum as may be adjudged to be the actual price paid by the defendant for the said house.

Oudh Laws Act, 1876, the Court shall fix the fair market value if the price named in the sale-deed is fictitious. Cf. Sec. 25, Punjab Pre-emption Act, 1913, which runs as follows : (1) If in the case of a sale the parties are not agreed as to the price at which the pre-emptor shall exercise his right of pre-emption, the Court shall determine whether the price at which the sale purports to have taken place has been fixed in good faith or paid, and if it finds that the price was not so fixed or paid, it shall fix as the price for the purposes of the suit the market value of the land or property. (2) If the Court finds that the price was fixed in good faith or paid, it shall fix such price as the price for the purposes of the suit : *Ali Akbar v. Multan*, A. I. R. 1936 Pesh. 12. Cf. *Malamechand v. Deoraj*, (1939) M. L. R. 161 ; *Gulxari Lal v. Md. Shafi*, A. I. R. 1938 All. 204. •

- (n) **Partial pre-emption** : Law does not allow partial pre-emption : *Abdul Hafiz v. Manohar Lal*, A. I. R. 1939 Oudh 233. But where sale comprises lands in different pattis, separate suits by different individuals as regards their respective pattis are maintainable : *Ram Ghulam v. Ram Bhajan*, I. L. R. (1939) All. 282.
- (n) **Limitation** : Under Art. 10, Ind. Lim. Act, one year from the date when the purchaser takes under the sale sought to be impeached, physical possession of the whole of the property sold, or, where the subject of the sale does not admit of physical possession, when the instrument of sale is registered. Time is not extended under Sec. 8. A suit for pre-emption is not one for possession and therefore the right to pre-emption is not extinguished by operation of Sec. 28. Consequently, in a suit for redemption against a mortgagee in possession, a right of pre-emption is a good defence although the suit to enforce the right of pre-emption has become time-barred : *Kanharankutti v. Uthotti*, (1890) I. L. R. 13 Mad. 490 ; *Krishna Menon v. Kesaran*, (1897) I. L. R. 20 Mad. 305 (right of pre-emption asserted by one in possession), *folded in Ramasami Pattar v. Chinnan Asari*, (1901) I. L. R. 24 Mad. 449, 464, 465. *Contra*, *Visvanathan v. Ethirajulu*, A. I. R. 1924 Mad. 57. Where the whole or a portion of the subject of sale is not capable of physical possession and there is no registered deed of sale, a suit for pre-emption is governed by Art. 120 : *Ali Gauhar v. Jawahir*, 30 P. R. 1892 ; *Batul v. Mansur*, (1902) I. L. R. 24 All. 17 (P. C.).
- (n) **Parties to suit** : The vendor is not a necessary party to a suit for pre-emption, but if he is in possession, he should be added as a proper party : *Lok Singh v. Balwan Singh*, (1903) 23 A. W. N. 239, *referred to in Harbans v. Tota Sahu*, (1910) I. L. R. 32 All. 14.

PLAINT.

506.

PRE-EMPTION.

Between Non-Mahomedans.

CLAIM by a Hindu for Pre-emption according to Custom. (o)

1. In 19..., the plaintiff purchased from one A. B. an eight-anna share of mauza in the district of Chapra, in the province of Bihar and became the owner thereof.

2. By a registered sale deed, dated 19..., A.B. sold the remaining eight-anna share in the said mauza belonging to him to the defendant for Rs.....

3. The plaintiff and the defendant are Hindus and are natives of the district of in Bihar to whom the Mahomedan law of pre-emption is by custom applicable.

4. Same as paragraph 4 of Form No. 505.

5. Same as Paragraph 5 of Form No. 505.

The plaintiff claims—

Possession of the eight-anna share sold by A.B. to the defendant on payment of Rs..... to the defendant.

(n) **Joinder of causes of action :** Claims for pre-emption in respect of several sales against the same vendee can be joined together against the same vendee in one suit : *Harbans v. Tota Sahu*, (1910) I. L. R. 32 All. 14, 16.

(o) **Pre-emption among Hindus :** The right of pre-emption is one that has been recognised by the Mahomedan law, and originally was limited to that law. Subsequently it was adopted by the Hindus, and became modified in different places by local usage : *Jagannath v. Interpal*, A.I.R. 1935 All. 236. Thus, the Mahomedan law of pre-emption has been by custom applied to the Hindus of Bihar, Sylhet, Ajmer-Marwara and certain parts of Guzrat. It is also applied to house property in certain parts of the United Provinces, such as, the city of Benares, Muzaffarnagar town and the Kumaun Division. But where the custom is judicially noticed as prevailing in a certain local area, it does not govern persons who, though holding lands therein for the time being, are neither natives of, nor domiciled in the district : *Parsashth Nath v. Dhanai Ojha*, (1905) I.L.R. 32 Cal. 988, 990. The right of pre-emption in the above cases will be governed by the rules of the Mahomedan law of pre-emption except to the extent such rules are modified by such custom. Thus, if any custom different from or not co-extensive with Mahomedan law of pre-emption is intended to be relied on, it should be alleged and proved : *Chakauri v. Sundari*, (1906) I.L.R. 28 All. 590. In the absence of proof of modification, if a custom of pre-emption is proved to exist, the custom must be in accordance with Mahomedan

DEFENCE.

507.

PRE-EMPTION.

Among Non-Mahomedans.

DEFENCE to a Claim by a Hindu for Pre-emption according to Custom. (p)

1. The plaintiff is not a native of the district of in Bihar. He is a native of the district of in the United Provinces and has no right of pre-emption.

2. The sale in question is only a fictitious one got up with a view to protect the property from the claims of certain creditors of the vendor.

Or

The sale in question was a sham transaction, got up with a view to cheat the plaintiff. No consideration was paid by the defendant except the sum of Re. 1 and the rest of the consideration was covered by a series of bonds none of which has yet been satisfied.

3. Subject to what is hereinbefore stated, the defendant denies that the plaintiff came to know of the sale for the first time on He knew about the sale on

4. The defendant denies that the plaintiff declared the alleged or any intention to assert the right of pre-emption or that the plaintiff affirmed the said intention or performed the ceremony of *talabi-i-ishhad* as alleged or at all.

5. Alternatively, the defendant says that the plaintiff did not declare his intention to assert the right of pre-emption immediately

law : *Ramnath v. Banwari*, 1936 A.W.R. 419 ; *Jagannath v. Inderpal*, A.I.R. 1935 All. 236. Where a custom is proved to exist, that custom must be held to continue and the onus to prove discontinuance of that custom lies upon the party denying its existence : *Jagannath v. Inderpal*, *supra*.

(o) **How to plead custom** : See 'Custom' under 'Particulars', Pt. II, Ch. XX, pp. 480, 481.

(o) See notes under Form No. 505.

(p) **Defence (Paragraph 1)** See *Parsashth Nath v. Dhanai*, (1905) I. L. R. 32 Cal. 988, 990.

(p) **Defence (Paragraph 2)** See *Parsashth Nath v. Dhanai*, *supra* ; *Jagannath v. Inderpal*, *supra* ; *Durga Singh v. Girwar*, A. I. R. 1938 All. 191.

(p) **Defence (Paragraphs 4 and 5)** See *Jadu Lal v. Janki Koer*, (1911-12) L. R. 39 I. A. 101, 108.

(p) **This is a defence to Form No. 505.**

on receipt of news of the sale and also did not affirm his said intention or perform the said ceremony without delay.

PLAINT.

508.

PROMISSORY NOTE.

CLAIM by Payee against Maker on a Promissory Note. (q)

1. On 19..., the defendant executed in favour of

- (q) **Promissory note—definition of:** Sec. 4, Neg. Inst. Act, 1881. A receipt for money, even if coupled with a promise to pay, is not a promissory note, in as much as it is not intended to be negotiable, and accordingly, it is not inadmissible as a defectively stamped promissory note: *Mad. Akbar Khan v. Attar Singh*, (1935-36) L.R. 63 I.A. 279. Cf. *R. B. Lala Karam v. Mir Ahmad*, (1937-38) 42 C. W. N. 989 (P.C.)
- (q) **Promissory note—where no time specified—limitation:** It is payable on demand: Sec. 19, Neg. Inst. Act, 1881. A promissory note payable on demand is a present debt and is due and payable at once without demand: *D. N. Shaha & Co. v. Bengal National Bank*, (1920) I. L. R. 47 Cal. 861, 864. It is always at maturity: *Official Receiver v. Amritsar National Bank*, A.I.R. 1935 Lah. 825; *Hemadri v. Seshamma*, A.I.R. 1931 Mad. 113. The cause of action on a promissory note payable on demand arises on the date of the note: Art. 73, Ind. Lim. Act; *Ranjit Kumar v. Kisor*, A.I.R. 1940 Cal. 401. Where a promissory note was accompanied with a letter in which the debtor stated that he would pay the principal and interest within one year, *Held*, that the letter amounted to a writing postponing the right to sue within one year, and that limitation would not run till at the expiration of the period mentioned in the writing, and the suit was governed by Art. 80, and not by Art. 73: cf. *Jwala Prasad v. Shama Charan*, (1920) I.L.R. 42 All. 55.
- (q) **Presentment when necessary:** *Peoples Instalment & Savings Bank v. Ram Nath*, A.I.R. 1933 Lah. 133. Sec. 64 of the Neg. Inst. Act requires presentment of a promissory note but provides at the same time that the consequence of non-presentment will only discharge the other parties thereto, but not the maker: *Devi Ditta Mal v. Partap Singh*, A.I.R. 1933 Lah. 176; *Benares Bank v. Hormusji Pestonji*, (1930) I. L. R. 52 All. 696. The exception to Sec. 64 lays down that where a promissory note is payable on demand and is not payable at a specified place, no presentment is necessary in order to charge the maker. Therefore, presentment is necessary to charge the maker of a promissory note payable on demand, only if the note is payable at a specified place: *Sheikh Mohammad v. Abdul Majid*, (1937) I. L. R. 18 Lah. 580. See notes under Form No. 130, pp. 756, 757.
- (q) **Where no place of payment specified:** Debtor must find out his creditor: See "Causes of Action", Pt. II, Chap. X, pp. 282-287, 291-293.
- (q) **Presumption of consideration:** See sec. 118, Neg. Inst. Act and secs. 111 (c) to 114, Evidence Act. Where a defendant admits the execution of

the plaintiff at a promissory note for Rs. 2000/- repay-
able on demand with interest at per cent. per annum.

a pro-note and pleads want of consideration, the onus is on him to substantiate the plea : *Mahomed Hussain v. Ram Lal*, A. I. R. 1924 Lah. 39 ; *Lakshmanaswamy v. Narasimha*, A. I. R. 1937 Mad. 223 ; *Sethupathi v. Chidambaram*, I. L. R. (1938) Mad. 646 (P.C.) ; *Jagmohan v. Mendhai Dube*, A. I. R. 1932 All. 164. If execution is denied, the plaintiff will have to prove not only execution but also consideration : *Mt. Nando v. Mt. Dulara*, A. I. R. 1933 Oudh 394 (1). Cf. sec. 118 (g) and see *Mrs. Niemeyer v. E. M. Mamooji*, A.I.R. 1938 Rang. 461.

- (q) **Suit based on defective promissory note—effect of :** In cases where the original instrument, which forms the basis of the suit, fails, the plaintiff is not allowed to fall back upon the original consideration : *Bharapura v. Diwan Chand*, A. I. R. 1940 Lah. 329.
- (q) **Insufficiently stamped promissory note :** An insufficiently stamped promissory note is inadmissible in evidence for any purpose under sec. 35, Stamp Act, and hence cannot be used as an acknowledgment of liability for the debt : No suit can be based on it, nor can any evidence be given of the terms of the contract embodied in that promissory note : *Jawanmal v. Akaji*, A. I. R. 1940 Nag. 214, *folg.*, *Jogendra v. Sachindra* (1935-36) 40 C. W. N. 399. But where a promissory note is found to be invalid on account of its being insufficiently stamped, a contemporaneous agreement to repay the debt can be proved and a suit by the promisee can be based on such agreement : *Mahadeo v. Ramchandra*, A. I. R. 1940 Nag. 215. But according to the Oudh Court, it would not be open to the plaintiff to prove the terms of the rate of interest : *Babu Lal v. Durga Prasad*, A.I.R. 1940 Oudh 308. Where a cause of action for money is once complete and the debtor then gives a hand-note to the creditor for payment of the money at a future time, the creditor, if the note is inadmissible, may always sue for the original consideration and parole evidence can be allowed of the transaction : *Domoo Khan v. Agha Arshad*, (1933) I. L. R. 12 Pat. 862. But when money is lent on a promissory note and the promissory note is inadmissible, it is not open to the plaintiff to recover his money by proving orally the terms of the contract. It is only when the debt is separable from the promissory note that the debt could be proved, although the promissory note was inadmissible in evidence : *Dhonkal Singh v. Harbans Lal*, A. I. R. 1933 All. 280 ; *Nazir Khan v. Ram Mohan*, (1931) I. L. R. 53 All. 114.
- (q) **Amendment to include original cause of action :** Where a suit is based on a promissory note which is inadmissible, the plaintiff may be allowed to amend his plaint so as to include the claim on the original consideration ; *Sarafalli Mahomedalli v. Mahasukhbhai*, (1933) I. L. R. 57 Bom. 802. Where a person distinctly set out in his plaint that the debtor had borrowed money from him and it is to recover that money that the suit is instituted although he does not alternatively make a claim that he is entitled to recover the money as well on the original loan as on the basis of the hand-note, that is not fatal to the suit, as all the facts

2. The defendant has not paid the said loan or any part of it.

Particulars of claim :

Principal	...	...	...	Rs.
Interest from	.....	to	.....	"

Amount due Rs.

The plaintiff claims—

Rs.....

PLAINT.

509.

PROMISSORY NOTE.

Lost Promissory Note.

CLAIM by Payee on a Lost Promissory Note. (r)

1. On 19..., the defendant executed in favour of the plaintiff a promissory note for Rs....., promising to repay the said sum on demand with interest at *per cent. per annum.*

2. The said promissory note was lost by theft (or, destroyed by fire) on or about

3. By letter, dated 19..., the plaintiff gave the defendant notice that the said promissory note had been lost and called upon him to pay the amount due on the said promissory note and offered to indemnify him against any further claim thereon, but the defendant by his letter, dated 19..., denied having executed the said promissory note.

necessary to a claim on the loan are alleged and proved : *Kesho Das v. Hari Kishun*, A. I. R. 1938 Pat. 205.

(q) **Place of suing :** See "Promissory Notes" under "Causes of Action", Pt. II, Ch. IX, pp. 291-293, also pp. 282-287.

(q) **Parties to suit :** See notes under Form No. 511.

(r) Under O. VII, r. 16, C. P. Code, "Where the suit is founded upon a negotiable instrument, and it is proved that the instrument is lost, and an indemnity is given by the plaintiff, to the satisfaction of the Court against the claims of any other person upon such instrument, the Court may pass such decree as it would have passed if the plaintiff had produced the instrument in Court when the plaint was presented, and had at the same time delivered a copy of the instrument to be filed with the plaint". Cf. sec. 45A, Neg.Inst. Act. When an unstamped copy of an instrument is produced as secondary evidence, it may be presumed that the original was stamped : *Rakia Bi v. Abdul Nabab*, (1932) M. W. N. 432, and that the stamp was duly cancelled : *Atmaram Mohanlal v. Notandas*, A.I.R. 1930 Sind 4.

4. The sum of Rs..... is due on the said promissory note.

5. The plaintiff is ready and willing to indemnify the defendant against the claim of any other person upon the said promissory note.

Particulars of claim :

..... 19..., Principal sum Rs.

Interest from

to..... Rs.

Amount due ... Rs.

The plaintiff claims—

Rs.....

PLAINT.

510.

PROMISSORY NOTE.

Suit based on the Original Consideration.

CLAIM by Payee against Maker on the Original Consideration. (s)

1. On 19..., the defendant borrowed Rs..... from the plaintiff and verbally agreed to repay the said loan on demand with interest at the rate of Rs..... per cent. per annum.

-
- (s) Cause of action on the original consideration: Where the promissory note is not the original contract, but is a mere collateral security or instrument by which payment of the original debt might be facilitated, in other words, the cause of action was complete before the promissory note is given and there is an independent admission of the loan quite apart from the promissory note: *Held* :—that even though the plaintiff is debarred from supporting his claim by the promissory note, he is competent to maintain his suit upon the original contract: *Hakim Rai v. Ganga Ram*, A. I. R. 1926 Lah. 356: *Domoo Khan v. Agha Arshad*, (1933) I. L. R. 12 Pat. 862. Only where there was a completed transaction prior to and independently of the note, is the creditor entitled to recover on the original consideration for which he may make an alternative case, falling back thereupon and proving it by evidence *aliunde*, if his promissory note proves inadmissible. But even in such a case, if the claim in the plaint be based on the promissory note alone, the plaintiff cannot succeed on the original consideration without amending his plaint: *Tarachand Protapmal v. Tamsijuddin*, (1934-35) 39 C.W.N. 1241. When a plaintiff bases his suit for recovery of money lent on a cause of action independent of a promissory note which was executed but is inadmissible in evidence owing to its being insufficiently stamped, he has not got to prove that there was an express promise to repay in-

2. On the said date, but subsequent to the said loan, the defendant, by way of security for the due repayment thereof, executed a promissory note in favour of the plaintiff for Rs..... in terms of the said verbal agreement.

3. The defendant has not paid any part of the said loan.

Particulars of claim :—

The plaintiff claims—

Rs.....

PLAINT.

511.

PROMISSORY NOTE.

CLAIM by Indorsee against Indorser and Maker for Payment. (t)

1. The defendant C. D., by his promissory note dated..... 19..., promised to pay to the defendant A. B. (or order) Rs..... on demand with interest at 6 *per cent. per annum.*

dependent of the note ; because, when as a matter of fact, money is lent there is an implied promise to repay : *Mohatabuddin v. Mahammad Najir*, (1935-36) 40 C. W. N. 473. Cf. *Indra Chandra v. Hiralal*, (1935-36) 40 C. W. N. 696. If the plaintiff makes it clear that the loan was independent of the promissory note and that the promissory note was executed subsequently after the loan was given, the creditor can obtain judgment on the original consideration and need not, in such case, amend the plaint : *Bhusan Chandra v. Kanai Lal*, (1936-37) 41 C.W.N. 537. A less stringent rule has been applied by the Madras High Court in *Chinnayya v. Srinivasa*, A.I.R. 1935 Mad. 206 (Where the loan is not antecedent to or independent of, the bill, but is contemporaneous with it, the lender, when the note turns out to be invalid, can fall back upon the original contract, express or implied, arising from the loan. The effect of sec. 91 of the Act is merely to provide that the contract embodied in the bill shall be proved by the bill itself; but that does not mean or imply that the bill has either destroyed or superseded the original right, for to hold that it does, would amount to holding that the rule of evidence overrides a well-settled principle of substantive law, *viz.*, that a negotiable instrument operates only as a conditional discharge. The bill can be treated only as a contract but not having the effect of superseding the original right.). For amendment of plaint based on note introducing claim on loan, when claim already time-barred, see, *East Bengal Commercial Bank v. Surendra*, (1934-35) 39 C. W. N. 1235.

- (t) **Liability of Indorser :** In the absence of a contract to the contrary, whoever indorses and delivers a negotiable instrument before maturity, without, in such indorsement, expressly excluding or making conditional his own liability, is bound thereby to every subsequent holder, in case of dishonour by the drawee, acceptor or maker to compensate such holder for any loss or damage caused to him by such dishonour, provided due notice of dishonour has been given to, or received by, such

2. On 19..., the defendant A. B. indorsed and delivered the said promissory note to the plaintiff at

3. On 19..., the said promissory note was duly presented to the defendant C. D. for payment, but was not paid, of which the defendant has had notice.

indorser as hereinafter provided. Every indorser after dishonour is liable as upon an instrument payable on demand : Sec. 35, Neg. Inst. Act, 1881. The amount of compensation payable is regulated by sec. 117 of the Act. The maker of a promissory note, in the absence of a contract to the contrary, is liable thereon as principal debtor, and the other parties thereto are liable thereon as sureties for the maker : Sec. 37 of the Act. As between the parties so liable as sureties, each prior party is, in the absence of a contract to the contrary, also liable thereon as a principal debtor in respect of each subsequent party : Sec. 38 of the Act. The liability of a surety where it exists is co-extensive with the principal debtor : Sec. 129, Ind. Cont. Act. Accordingly, a creditor may sue the principal debtor or the surety or both of them in one action.

- (t) **Negotiation :** A promissory note payable to bearer is negotiable by the delivery thereof. A promissory note, delivered on condition that it is not to take effect except in a certain event, is not negotiable (except in the hands of a holder for value without notice of the condition) unless such event happens : Secs. 46 and 47 of the Act. The holder of a negotiable instrument indorsed in blank may, without signing his own name, by writing above the indorser's signature a direction to pay to any other person as indorsee, convert the indorsement in blank into an indorsement in full ; and the holder does not thereby incur the responsibility of an indorser : Sec. 49 of the Act. A negotiable instrument may be negotiated (except by the maker, drawee or acceptor after maturity) until payment or satisfaction thereof by the maker, drawee or acceptor at or after maturity but not after such payment or satisfaction : Sec. 60 of the Act.
- (t) **Conditions precedent :** Presentment, dishonour and notice of dishonour are conditions precedent to the liability of the indorser. The sections relating to presentment are sections 62, 64 to 75A of the Act. Sec. 76 deals with cases when presentment is unnecessary. The liability of the indorser arises out of the indorsement and not on the note. The presentment must be made within a reasonable time after the indorsement and the notice of dishonour should also be given within a reasonable time after dishonour : Secs. 105, 106 of the Act ; *Jagannadha v. Lakshmana*, A. I. R. 1925 Mad. 132. The excuses for not presenting or giving notice of dishonour should be specially pleaded. For notice of dishonour—by whom and to whom it should be given and the mode in which notice may be given, See secs. 93, 94 of the Act. Sec. 98 deals with cases where no notice of dishonour is necessary.

Particulars of claim :

The plaintiff claims—

Rs.

PLAINT.**512.****PROMISSORY NOTE.****CLAIM by Principal against Agent for Damages for taking a Promissory Note in the Name of a Third Party. (u)**

- (t) **Effect of indorsement :** The indorsement of a negotiable instrument followed by the delivery transfers to the indorsee the property therein with the right of further negotiation ; but the indorsement may, by express words, restrict or exclude such right, or may merely constitute the indorsee an agent to indorse the instrument, or to receive its contents for the indorser or for some other specified person : Sec. 50 of the Act.
- (t) **Jurisdiction :** Part of the cause of action arises at the place of indorsement : *Raghoonath v. Gabindnarrain*, (1895) I. L. R. 23 Cal. 451.
- (t) **Limitation :** The liability of the endorser of a promissory note arises only on the date of endorsement. Hence, a suit within period of limitation from the date of endorsement is not barred by limitation as against the endorser. Where the payee has endorsed the promissory note to another person after it became barred by limitation and with a fabricated endorsement of payment, there is no necessity to give notice of dishonour to the endorser : *Kalandan v. Kattiyali*, A. I. R. 1940 Mad. 85.
- (t) **Parties to suit :** A holder of a note is entitled to maintain a suit thereon in his own name against all or any of the parties whose names appear on the bill. Every party to a negotiable instrument is liable thereon to a holder in due course until the instrument is duly satisfied : S. 36 Neg. Ins. Act. The holder may, but is not bound to sue, in the event of dishonour, all the parties liable to him on the note : Cf. O. I, r. 6, C. P. Code ; Ss. 37 and 38 Neg. Ins. Act. It is a fundamental principle of the law relating to negotiable instruments that no one whose name does not appear on the instrument can be held liable thereon : *Maruthamuthu v. Kadir*, I. L. R. (1938) Mad. 563 (F. B.). For right of an allottee on partition, see *Chinna Chonchu Reddi v. Subbaroya Chetti*, 1937 M. W. N. 134 ; *Virappa v. Mahadevappa*, A. I. R. 1934 Bom. 356. For when a firm would be liable on a promissory note executed by a partner, see *Kwong Hip Lone Saw Mills v. C. A. M. A. L. Firm*, A. I. R. 1933 Rang. 131 ; *Sharanbasappa v. Rachappa*, A. I. R. 1933 Bom. 101.
- (u) **Reference :** *Subramanian Chetty v. Muthia Chetty*, (1912) I. L. R. 35 Mad. 639 (A promissory note in consideration of a pre-existing debt is only a conditional payment ; and if the note remain in the hands of the original payee when it is dishonoured, the original debt revives. If, however, the note had been endorsed to a third party a suit on the

1. The defendant was plaintiff's agent of carrying on business on plaintiff's behalf from to

2. One A.B. of owed Rs..... to the plaintiff in his said business.

3. On 19..., the defendant, in the course of his employment as the plaintiff's agent, took from the said A.B. a negotiable promissory note for the amount of the debt in the name of a third party, a man named C.D., and delivered the said promissory note to the said C.D.

4. The plaintiff came to know of the said promissory note on, and on that date the defendant verbally promised to obtain possession of and deliver the said promissory note to the plaintiff after getting it duly indorsed in plaintiff's favour by the said C.D.

5. The defendant has not got the promissory note indorsed as aforesaid and has not made over the same to the plaintiff although a reasonable time has elapsed within which to perform his obligation.

6. By reason of the premises the plaintiff has suffered damage.

Particulars :

Principal sum Rs.

Interest at *per cent.* as mentioned in the
promissory note from to.....

..... "

Total Rs.

The plaintiff claims—

Rs..... damages.

original debt would not be maintainable.). The defendant by taking the note in the name of a third party and allowing it to remain in his possession and neglecting it to hand it over to the plaintiff, put it out of the plaintiff's power to sue the debtor on the original consideration. The plaintiff is entitled to claim from the defendant the amount for which the debtor has executed the note. He cannot maintain a suit against the debtor on the original debt so long as it remained in the hands of a third party.) "A moment's consideration will show that the Courts would not be administering justice if they did not hold this to be the case, because otherwise you could sue for the price of goods, while another man, through possession by your act of the negotiable instrument which had been given for the price, could make the debtor pay the amount over again.", *folg. A debtor, In re : (1908) L.R. 1 K.B. 344, 350.*

PLAINT.**513.****PROMISSORY NOTE.**

CLAIM on a Promissory Note executed by an Agent for and on behalf of his Principal. (v)

1. On 19..., the defendant No. 1 for and on behalf of the defendant No. 2 executed in favour of the plaintiff a promissory note for Rs..... repayable on demand with interest at *per cent. per annum.*

2. Before and at the time of making the said note, the defendant No. 1 verbally represented to the plaintiff that he had been authorised by the defendant No. 2 to borrow the said sum by executing a promissory note for and on his behalf. The plaintiff on the faith of the said representation and induced thereby advanced the said sum to the defendant No. 1 and accepted from him the said promissory note.

3. The said loan still remains unpaid.

Particulars of claim :

The plaintiff claims—

1. Judgment for Rs.....against the defendant No. 2.

2. Alternatively, judgment for Rs..... against the defendant No. 1 as damages for breach of warranty of authority.

DEFENCE.**514.****PROMISSORY NOTE.**

DEFENCE by Maker to a Claim by Payee on a Promissory Note. (w)

The defendant may take one or more of the following defences :—

1. The defendant denies that he made the promissory note sued on.

(v) **Liability of principal :** To make the principal liable the promissory note must be signed for and on behalf of the principal. Where a person signs simply as agent and attorney to another, such words may be regarded as merely descriptive and he would be personally liable on the note : *:Dhirendra v. Nutbary*, (1932-33) 37 C. W. N. 296 ; *Sadasuk Janki Das v. Sir Kishan Pershad*, (1919) I. L. R. 46 Cal. 663.

(w) **Defence of total absence of consideration :** Sec. 43, Neg. Ins. Act. Cf. *Proviso* (1) to Sec. 92, Ind. Evid. Act and Sec. 25 of the Ind. Cont.

2. The defendant did not receive any consideration for the said note. The promissory note sued on was obtained from the defendant upon a representation by the plaintiff that the sum of Rs..... was owing from the defendant to the plaintiff by virtue of, whereas no such sum was owing.

3. The defendant received only part of the consideration mentioned in the said note, namely, Rs.....

4. The defendant made the said note for and on account of the price of 5 tons of cement to be delivered by the plaintiff to the defendant by the 19..., and the plaintiff failed to deliver the said goods or any part thereof (or, the plaintiff delivered only 2 tons and failed to deliver the rest).

5. The defendant made the said note for and on account of the plaintiff giving evidence for the defendant in a criminal case (or, state any other consideration for the note, showing illegality).

6. The said note was obtained by fraud. (Give particulars).

7. The said note was obtained by coercion. (Give particulars).

8. The said note was rendered void after issue by a material alteration, namely, by the alteration of the date from19... to 19... without the knowledge or authority of the defendant.

9. On 19..., before the making of the said note, the plaintiff had agreed in writing to purchase certain properties from the defendant and the amount mentioned in the said note was the earnest money which the plaintiff paid for his purchase. At the time of the making of the said note it was verbally agreed between the plaintiff and the defendant that the said note was to be acted upon only in case of failure on the part of the defendant to complete the transaction. The sale fell through on account of the plaintiff's default and the earnest money was therefore forfeited.

Act. See 'Total absence or total failure of consideration' under "Special Defences", Pt. II, Chap. XVII, p. 395. As to onus of proof, see *Narasamma v. Veeraju*, (1935) I. L. R. 58 Mad. 841.

(w) **Defence of partial absence of consideration :** Secs. 44, 45, Neg. Ins. Act. See 'Partial absence or partial failure of consideration' under "Special Defences", Pt. II, Chap. XVII, pp. 396, 397.

(w) **Defence of total or partial failure of consideration :** Sec. 43, Neg. Ins. Act. Cf. *Proviso* (1) to Sec. 92, Ind. Evid. Act and see notes above.

(w) **Defence of illegality of consideration :** Secs. 23 and 24, Ind. Cont. Act. See 'Illegal consideration' under "Special Defences", Pt. II, Chap. XVII, pp. 398-400.

10. The said note has been discharged by payment.

(Give particulars of payment).

11. The defendant was a minor at the time of making of the said note.

12. On 19..., the plaintiff accepted from the defendant certain jewellery (specify the same) in full satisfaction of the amount due on the said note.

13. The note sued on was payable at and was not presented there for payment.

- (w) **Defence that the note was obtained by fraud :** Sec. 17, Ind. Cont. Act. Cf. *Proviso* to Sec. 92, Ind. Evid. Act. See 'Fraud' under "Special Defences", Pt. II, Chap. XVII, p. 412. Cf. *Raza Ali v. Rahat Husain*, A.I.R. 1933 All. 754 (Presumption under S. 118 how rebutted).
- (w) **Defence of material alteration :** Sec. 87, Neg. Ins. Act. As to what constitutes material alteration, see *Krisna Kisor v. Sreemati Nagendrabala*, (1920-21) 25 C.W.N. 942 ; *Gour Chandra v. Prasanna Kumar*, (1906) I.L.R. 33 Cal. 812. Alteration of a date is a material alteration : *Namdev v. Swadeshi Mandali*, A.I.R., 1926 Bom. 491 ; *Iqbal Bahadur v. Doorga Prasad*, A.I.R. 1935 Oudh 434. In case of material alteration the plaintiff is not entitled to any decree—not even for the amount admitted to be borrowed by the defendant : *Laduram v. Bansidhar*, (1937) I.L.R. 16 Pat. 527. He is not entitled to a decree on the original cause of action : *Sheo Nayak v. Babau*, A.I.R. 1937 All. 439. Where a party sues on an instrument which, on the face of it, appears to have been altered, it is for him to show that the alteration has not been properly made : *C. S. Pillay v. K. K. Konar*, A.I.R. 1935 Rang. 131. Cf. *Krushnacharana v. Gourochandro*, (1939) 2 M.L.J. 686. See 'Alteration' under "Special Defences", Pt. II, Chap. XVII, pp. 385, 386.
- (w) **Defence of condition precedent to the attaching of obligation :** It is necessary to distinguish a collateral agreement which alters the legal effect of the instrument from an agreement that the instrument should not be an effective instrument until some condition is fulfilled, or, to put it in another form, it is necessary to distinguish an agreement in defeasance of the contract from an agreement suspending the coming into force of the contract contained in the promissory note. Where the promissory note is, by the express terms, payable on demand, that is at once, the obligation under the note attaches immediately. A collateral agreement not to make demand until certain specified condition is fulfilled has the intention and effect of suspending the coming into force of that obligation, which is the contract contained in the promissory note. Thus, the oral agreement constitutes a condition precedent to the attaching of the obligation and is within the terms of *Proviso 3* of Sec. 92 of the Evid. Act : *Rowland v. Adm.-General of Burma*, A.I.R. 1938 P.C. 198 ; *Umrao Singh v. Raunak Singh*, A.I.R. 1939 Pat. 495 ; *Walter Mitchell v. A. K. Tennent*, (1925) I.L.R. 52 Cal. 677 ; *Tyabi*

515.

DEFENCE.

PROMISSORY NOTE.

DEFENCE by Maker to a Claim by Indorsee on a Promissory Note. (x)

The defendant may, amongst others, take the following defences :

1. The plaintiff is not a *bona fide* holder in due course. The note sued on was obtained from this defendant by the payee by

Trading Co. v. Ghulamali I.L.R. (1939) Kar. 523; *Chhaganlal v. Jagjiwandas*, A.I.R. 1940 Bom. 54.

- (w) **Defence of want of capacity :** Cf. Sec. 26, Neg.Ins.Act. A promissory note executed by a minor is void : *Ma Hnil v. Hashin Ebrahim*, (1919) 38 M.L.J. 353 (P.C.). Even where an infant has induced a person to contract with him by means of a false representation that he was of full age, he is not estopped from pleading his infancy in avoidance of the contract. Though Sec.* 115, Evidence Act, is general in its terms, it must be read subject to the provisions of the Contract Act declaring a transaction entered into by a minor to be void : *Khan Gul v. Lakha Singh*, (1928) I.L.R. 9 Lah. 701; *Ramanuja v. Gopalan*, A.I.R. 1934 Mad. 561. A minor is not precluded by Sec. 120, Neg.Ins.Act. from denying the validity of the note on the ground of want of capacity. The Courts may require the minor to return the benefit he has received : See 'Minor' under "Classes of Persons", Pt. II, Chap. IX, pp. 197-205.
- (w) **Defence of accord and satisfaction :** See under "Special Defences," Pt. II, Chap. XVII, pp. 381-383.
- (w) **Defence of non-presentment :** *Sheikh Mohammad v. Abdul Majid*, (1937) I.L.R. 18 Lah. 580.
- (x) **Defence that the plaintiff is not a holder in due course :** Sec. 58, Neg. Ins. Act. Under Sec. 58, when a negotiable instrument has been obtained from any maker by fraud or for an unlawful consideration, the ordinary presumption that the holder is a holder in due course is rebutted and the case comes under the *proviso* to Sec. 118 (g) and the burden of proving that the holder is a holder in due course lies upon the holder. As required by S. 9, the holder has not only to show that he is a holder for value but further he has to show that he became the holder of the instrument before it became payable and without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title : *Ramanadan v. Gundu*, A. I. R. 1928 Mad. 1238. Unless a person proves that he is a holder in due course within the meaning of Sec. 9, he cannot have any higher or superior rights against the drawer than the intermediate holders themselves would have, and that the person knows of the defect of title of the intermediate holders is enough to disentitle that person to the benefits of a holder in due course : *Kurundaliammal v. Kunhi Kannan*, A. I. R. 1930 Mad. 141. Cf. *Banku Behari v. Secy. of State*, (1909) I. L. R. 36 Cal. 239. Where a

means of an offence or fraud, or for an unlawful consideration (giving particulars in each case), or that the plaintiff was aware that the defendant had paid the payee (indorser) in full before the indorsement.

Or,

The defendant is not the maker of the note sued on. The signature on the note purporting to be his signature is a forgery.

DEFENCE.

516.

PROMISSORY NOTE.

DEFENCE by Indorser to a Claim by Indorsee on a Promissory Note. (y)

1. The note sued on was not presented for payment.
2. The note sued on was payable at and was not presented for payment at that place.
3. The note sued on was not presented for payment within a reasonable time after it was received by the plaintiff.
4. The defendant did not receive the alleged or any notice of dishonour of the note sued on.

note payable on demand is negotiated, it is not deemed to be overdue, for the purpose of affecting the holder with defects of title, of which he had no notice, by reason that it appears that a reasonable time for presenting it for payment has elapsed since its issue: *D. N. Shaha & Co. v. Bengal National Bank*, (1920) I. L. R. 47 Cal. 861, 864. Where an endorsee of a promissory note payable on demand is not aware that the promissory note has been discharged or that any demand was made, he must be deemed to be a holder in due course even if as a matter of fact the endorsement in his favour was made after the discharge: *Venkataratnam v. Kanakasundara*, A. I. R. 1936 Mad. 879. Cf. *Shahabuddin v. Venkatachulam*, A. I. R. 1938 Mad. 911. Where an endorsee is not proved to be a holder in due course, he is entitled only to such rights as the endorser of the note had: *Pappi Amma v. Rama Iyer*, A. I. R. 1937 Mad. 438.

- (x) **Defence of forgery** : See Bhashyam and Adiga's Neg. Ins. Act, 7th Ed., pp. 321-324.
- (x) **Statutory estoppel against maker** : See Ss. 120, 121 Neg. Ins. Act, and 'Statutory estoppel' under "Special Defences", Pt. II, Ch. XVII, pp. 407-408. The maker cannot in a suit by an indorsee from the payee, question the title of the indorsee or the payee on the ground that the payee was only the benamdar, or on the ground that there was no delivery to the person whose name appears as payee: *Sinnachami Chettiar v. Ramaswami Chettiar*, A. I. R. 1939 Mad. 858.

5. The defendant indorsed the note sued on adding the words "without recourse".

6. The liability of the defendant on the note sued on has been discharged, because the plaintiff, without the consent of the defendant, destroyed or impaired the defendant's remedy against, a prior party, by striking out that prior party's name.

DEFENCE.

517.

PROMISSORY NOTE.

DEFENCE by Maker to a Claim by Payee on the Original Consideration. (z)

1. The defendant denies the verbal agreement mentioned in paragraph 1 of the plaint.

2. The defendant says that there was no agreement between the parties independently of the note mentioned in paragraph 2 of the plaint.

3. The said note is insufficiently stamped.

4. Further, the said note was rendered void after issue by a material alteration, namely, by the alteration of the date from, to without the knowledge or authority of the plaintiff.

- (y) Defence of non-presentment : See Ss. 64-75, Neg. Ins. Act. See notes under Form No. 514..
- (y) Defence of non-presentment within a reasonable time : S. 74, Neg. Ins. Act.
- (y) Defence that no notice of dishonour was given : S. 93, Neg. Ins. Act. See notes 'Liability of indorser' under Form No. 511.
- (y) Defence of exclusion or limitation of liability by express words in the indorsement : S. 51, Neg. Ins. Act.
- (y) Statutory estoppel against indorser : S. 122, Neg. Ins. Act. Cf. *Bishen Chand v. Kishore Singh*, (1883) I. L. R. 5 All. 302 (where the indorser was estopped from setting up the forgery of a hundi as a bar to the suit). The indorser, however, is not estopped from denying the validity of the instrument : *Alagappa Chetty v. Alagappa Chetty*, (1921) I. L. R. 44 Mad. 187.
- (z) Defence that there was no agreement independently of the note : See notes under Form No. 510.
- (z) Defence of material alteration : A plaintiff suing on a promissory note with which he has tampered is not entitled to a decree on the original consideration : *Laduram v. Bansidhar*, (1937) I. L. R., 16 Pat. 527 ; *Bindeshry v. Pergas Singh*, A. I. R. 1939 Pat. 235. See "Alteration" under "Special Defences", Pt. II, Ch. XVII, pp. 385, 386.

PLAINT.

518.

RECTIFICATION.

Of Instruments : Mutual Mistake.

CLAIM to have a Wrong Description in a Sale Deed rectified. (a).

1. By an agreement in writing, dated....., the defendant agreed to sell and the plaintiff agreed to purchase 8 biswas of land situate in mahal and entered in Khata-Khewat No. 2 in Mouza

2. In the sale deed which was executed by the defendant on, pursuant to the said agreement, it was by mutual mistake recorded that the property sold was entered in Khata-Khewat No. 1.

3. On, the plaintiff applied to the Revenue Court for mutation of his name in respect of the said 8 biswas of land but, on the objection of the defendant that there had been no sale in favour of the plaintiff in Khata-Khawat No. 2, the said application was dismissed on

4. The said sale deed in so far as it purports to record that the property sold was entered in Khata-Khewat No. 2 does not truly express the common intention of the parties thereto, who were under a common mistaken supposition that their intention was rightly

- (a) **Grounds for rectification of instruments :** Sec. 31, Sp.Rel.Act, 1877 : "When, through fraud or a mutual mistake of the parties, a contract or other instrument in writing does not truly express their intention,". Where there is no mistake or fraud and the alteration was made with the knowledge of both the parties, the plaintiff is not entitled to any relief : *Mahomed Eusuff v. Umedali*, (1934) 59 C.L.J. 360. In order to justify rectification there must be proof of a common intention different from the expressed intention and a common mistaken supposition that the intention is rightly expressed in the instrument ; it matters not by whom the actual oversight or error was made which caused the expression to be wrong : *Bepin Krishna v. Priya Brata*, (1921-22) 26 C.W.N. 36, 44.

- (a) **Rectification of instruments—limits of :** There cannot be any rectification of an instrument where third parties have acquired rights in good faith and for value. Thus, a second mortgagee who has advanced money with the knowledge of a mutual mistake of fact between the mortgagor and the first mortgagee as to the subject-matter of the first mortgage has notice of that mistake of fact and cannot plead that he acquired his rights in good faith under section 21, Specific Relief Act : *Mahadeva Aiyar v. Gopala Aiyar*, (1911) I.L.R. 34 Mad. 51, folld. in

expressed in the said instrument. The said sale deed ought therefore to be rectified in order to bring it into conformity with the prior agreement.

The plaintiff claims—

That the said sale deed be rectified by substituting the words Khata-Khewat No. 2 in place of Khata-Khewat No. 1.

Sheikh Barsati v. Sarju Prasad, A.I.R. 1939 Oudh 10 (case of vendor and vendee).

- (a) **Rectification of instruments after decree :** The proper course is first to get the deed rectified, then to amend the plaint and then to apply for review of the decree or amendment of that decree under Sec. 152 of the Code of Civil Procedure : *Per* Reilly J., in *Latchayya v. Seethamma*, (1932) 62 M.L.J. 350, 358. In a Calcutta case, Mookerjee J., held, "If there is a mutual mistake in a mortgage in the description of property and the same mistake is reproduced in the decree, equity may go back to the original transaction and reform both the mortgage and the decree so as to make them conform to the intention of the parties concerned, but in a case where the decree has been executed and title has passed to a purchaser, fresh considerations may arise : *Bepin Krishna v. Priya Brata*, (1921-22) 26 C.W.N. 36, dissented from in *Latchayya v. Seethamma*, *supra*. In a Patna case, Wort J., held, that a suit for rectification of decree in a previous suit and for delivery of possession in accordance with the rectified decree could not be sustained in this country any more than it could be in England : *Mahindra v. Mt. Lal-Jhari*, A.I.R. 1931 Pat. 296. Cf. *Kazim Ali Khan v. Om Prakash*, A.I.R. 1937 All. 731.
- (a) **Where rectification not necessary :** Where the contract was for purchase of a full cargo of kerosine oil, and the defendant fraudulently inserted in the bought and sold notes the words, "100,000" cases, whereas the cargo really consisted of "125,000" cases, and the plaintiff sued for the whole of the said cargo, the Judicial Committee held, "The plaintiff's case rested not on the bought and sold notes which he was there to repudiate, but on the perfectly competent evidence which while disproving the bought and sold notes, proved the contract, which they falsely purported to record. For this case no rectification was needed and it was not touched by the 92nd Section of the Evidence Act : *Durga Prasad v. Bhajan Lall*, (1904) I.L.R. 31 Cal. 614, 626 (P.C.). Cf. *Sooramma v. Venkayya*, (1938) 1 M.L.J. 806. (When the substantial relief prayed for by the plaintiff is not rectification of the deed but some other relief which he is entitled to claim under the law on the basis of the transaction which he seeks to enforce, it is not necessary to ask for rectification.).
- (a) **Mutual mistake and unilateral mistake—distinction between :** Where there is unilateral mistake, rectification is refused on the ground that if the Court were to reform the writing to make it accord with the intent of one party only to the agreement, who averred and proved that he

PLAINT.

519.

REGISTRATION.

**Claim for Registration of a Document under Sec. 77
of the Registration Act. (b)**

1. At all material times the defendant C.D. was the certificated guardian of the defendant A.D., a minor.

2. On....., the defendant C.D., as such certificated guardian, executed a deed of conveyance in favour of the plaintiff for the price of Rs. 500/-, in respect of a certain immovable property situate at, fully described in the Schedule hereto annexed.

3. On, the said deed of conveyance was duly presented by the plaintiff for registration before the Sub-Registrar of.....

signed it, as it was written by mistake, when it exactly expressed the agreement as understood by the other party, the writing when so altered would be just as far from expressing the agreement of the parties as it was before, and the Court would have engaged in what would be singular task for a Court of Equity to undertake, namely, doing right to one party at the expense of a precisely equal wrong to the other : *Bepin Krishna v. Priya Brata*, (1921-22) 26 C.W.N. 36, 43, 44. Mutual mistake is an equitable remedy or defence and is available to a plaintiff, where the equitable remedy of rectification or cancellation is sought and to a defendant against whom an equitable remedy, e.g., specific performance is sought. If remedy sought is equitable, it is open to equitable defences : *Sayamma v. Venkata Reddy*, (1931) 1 I.L.R. 54 Mad. 973.

(a) **Specific performance of rectified contract** : Sec. 34, Sp. Rel. Act.

(a) **Limitation** : Arts. 95 and 96, Ind.Lim.Act ; *Bejoy v. Secy. of State*, (1918) 48 I.C. 972 ; *Gopal v. Arura*, (1901) P.R. No. 62. For limitation, where no rectification is necessary, see *Scoramma v. Venkayya*, (1938) 1 M.L.J. 806.

(b) **Cause of Action** : *Raj Lakhi v. Debendra*, (1897) I.L.R. 24 Cal. 668 (case where a document was executed by the certificated guardian of a minor in contravention of the terms of permission accorded by the District Judge and the registration was refused on the ground of the invalidity of the document : *Held*—In suit under Sec. 77 of the Registration Act, the Court cannot go into any matter affecting the validity of the document apart from its genuineness.) ; *Dwijendra v. Joges*, (1924) 39 C.L.J. 40, folld. in *Abdul Gafur Bhuiya v. Badial Haque*, (1932) 55 C.L.J. 107, 110 (In a case instituted under Sec. 77 the Court is not concerned with the validity but with the genuineness of the documents sought to be registered, that is, whether the document has been executed by the person by whom it is alleged to have been executed.) ; *U Te Zain v.*

4. The defendant C.D. contended before the Sub-Registrar that in executing the said deed for Rs. 500/- he had exceeded the permission given to him by the Court for selling the property at a price not less than Rs. 600/-. The Sub-Registrar thereupon refused to register the deed.

5. Thereafter on, the plaintiff appealed against the said order of the Sub-Registrar to the Registrar of district under Sec. 77 of the Registration Act but, on, the said Registrar also refused to register the deed on the self-same ground.

The plaintiff claims—

Decree directing registration of the document.

Daw Thuang, A.I.R. 1938 Rang. 176; *Ramaswami Chettiar v. Srinivasa Pillai*, (1933) 66 M.L.J. 424; *Barkha Nath v. Shiv Ram*, (1927) I.L.R. 8 Lah. 208, 211. (In a suit under Sec. 77, the Court will not consider whether the document was obtained by fraud, misrepresentation, undue influence, or coercion); *Prosunna v. Mothoora*, (1885) 15 Suth. W.R. 487; *U Te Zain v. Daw Thuang*, *supra*. (Under Sec. 77, the Court will not consider whether the transaction was a benami.); *Salamatulla Chaudhuri v. Aktar-er-Nessa*, (1931) I.L.R. 58 Cal. 681, 684. Nor the Court will consider that a document executed by an illiterate pardana-shin woman was inoperative, the sale not having been fully explained to and understood by her: *Abdul Gafur Bhuiya v. Badial Haque*, (1932) 55 C.L.J. 107. Nor will the Court consider that the document was void for want of consideration: *Balambal v. Arunachala*, (1895) I.L.R. 18 Mad. 255, 256.

- (b) **Limitation** : Under Sec. 77, the suit must be brought within 30 days after the making of the order of refusal. In computing the period of limitation the day on which the order refusing to register the document was passed ought to be excluded: *Venkataramachandra Rao v. Veerama*, (1899) 9 M.L.J. 107; *Abdul v. Latifunnessa*, (1903) I.L.R. 30 Cal. 532; *Sheik Sayed v. Sarada Prosad*, (1912-13) 17 C.W.N. 585; cf. *Abdul Ali v. Mirja Khan*, (1904) I.L.R. 28 Bom. 8.
- (b) **Jurisdiction** : Under Sec. 77, the suit may be instituted in the Civil Court within the local limits of whose jurisdiction is situate the office in which the document is sought to be registered: *Ramu Aiyar v. Sankara Aiyar*, (1908) I.L.R. 31 Mad. 89, 94, 95 (F.B.); *Kalimuddin v. Sahibuddin*, (1920) I.L.R. 47 Cal. 300, 315 (F.B.).
- (b) **Parties to suit** : The parties to the document are necessary parties: *Baikuntha Shil v. Sarat Chandra*, (1925) 89 I.C. 57 (Cal.); *Prasanna Ram Ghosh v. Anfar Ali*, (1933-34) 38 C.W.N. 900. Registering Officer is not a necessary party: *Radhakissen v. Chooneeloll*, (1880) I.L.R. 5 Cal. 445.
- (b) **Court fee** : Rs. 10/- under Art. 17 (vi) of the Second Schedule of the Court Fees Act, but the amount has been increased by the local enactments.

PLAINT.

520.

SALE OF GOODS.

1. Seller v. Buyer.

CLAIM by Seller for Price of Goods sold and delivered. (c)

1. On October 10th, 19..., the plaintiff, at defendant's request, sold and delivered to the defendant 200 bags of wheat weighing 400 maunds at Rs. 10/- per bag.

2. On....., the defendant paid Rs..... towards the price of the said goods and verbally promised to pay the balance within a week but has not paid the same.

Particulars of claim :

200 Bags at Rs..... per bag Rs.

.....19... Paid „

Balance due ... Rs.

The plaintiff claims—

(1) Rs.....

(2) Rs..... interest by way of damages, at the rate ofper cent. per annum, from.....to.....

(3) Further interest.

- (b) **Suits valuation :** *Golam Rahaman Mandal v. Sabekjan Bibi*, (1926) I.L.R. 53 Cal. 1023 ; *Ramu Aiyar v. Sankara Aiyar*, (1908) I.L.R. 31 Mad. 89 (F.B.).
- (b) **Joinder of claim :** In a suit under Sec. 77, no other claim such as a claim for possession, refund of consideration money, etc. can be joined with the prayer to enforce registration : *Dwijendra v. Joges*, (1924) 39 C.L.J. 40 ; *Probadha Goalini v. Banka Behari* (1932) 56 C. L. J. 413 ; *Bal Kishen Das v. Bechan Pandey*, (1932) I. L. R. 54 All. 68 ; cf. *Venkata-ramachandra Rao v. Veerama*, (1899) 9 M. L. J. 107 (where other claims were joined and the Court directed the plaintiff to amend the plaint).
- (c) **Seller's right to sue for price :** Sec. 55, Ind. Sale of Goods Act, 1930. For distinction between 'sale' and 'agreement of sale', see *Vithaldas Vishram v. Jagjivan Gordhandas*, A.I.R. 1939 Bom. 84.
- (c) **Interest :** In the absence of a contract to the contrary, the Court may award interest at such rate as it thinks fit on the amount of the price from the date of the tender of the goods or from the date on which the price was payable : Sec. 61 (2), Ind. Sale of Goods Act, 1930.
- (c) **Limitation :** Art. 52, Ind. Lim. Act : 3 years from the date of the delivery of the goods, where no fixed period of credit is agreed upon. Under Article 53, where goods are sold and delivered to be paid after a fixed period of credit, the suit must be filed within 3 years from the

PLAINT.

521.

SALE OF GOODS.

1. Seller v. Buyer.

CLAIM by Seller for Price of Goods sold and delivered when
no Price fixed (d)

1. On.....19..., the plaintiff at the defendant's request (oral or in writing, as the case may be) sold and delivered to the defendant at..... 100 maunds of Java sugar.

2. The goods were reasonably worth Rs.....

3. On..... 19..., the plaintiff submitted a bill to the defendant for the said amount.

4. The defendant has not paid the said amount or any part thereof.

The plaintiff claims—

(1) Rs.....

(2) Rs..... interest by way of damages, at the rate ofper cent. per annum, from.....to.....

(3) Further interest.

date the period of credit expires. Cf. *Helps v. Winterbottom*, (1831) 2 B. & Ad. 431; *K. M. P. R. N. M. Firm v. Somasundaram*, (1925) I.L.R. 48 Mad. 275; *Bhima Mal v. Rahmat Ullah*, A.I.R. 1931 Lah. 309.

(c) **Jurisdiction** : As regards the place of suing in contracts of sale, see sub-heading, 'Contract of sale' under "Cause of action and place of suing," Pt. II, Chap. XI.

(d) **Reasonable price** : Section 9 of the Ind. Sale of Goods Act, 1930 : "(1) The price in a contract of sale may be fixed by the contract or may be left to be fixed in manner thereby agreed or may be determined by the course of dealing between the parties. (2) Where the price is not determined in accordance with the foregoing provisions, the buyer shall pay the seller a reasonable price. What is a reasonable price is a question of fact dependent upon the circumstances of each particular case." Where the goods are such that there is a market for them, the market price will ordinarily be taken as the evidence of what is the reasonable price of the goods, though not conclusive, as accidental circumstances may make the contract price unreasonable in the particular transaction: *Acebal v. Levy*, (1834) 10 Bing. 376, 383. Cf. *Jhamandas v. Tirathdas*, A.I.R. 1933 Sind 404 (In a contract for sale of goods, if before goods are tendered customs duty is increased, the seller is entitled to claim the excess duty imposed from the buyer upon payment of the said duty.).

(d) **Interest** : Sec. 61, Ind. Sale of Goods Act, 1930.

PLAINT.**522.****SALE OF GOODS.****1. Seller v. Buyer.**

CLAIM by Seller for Price of Goods sold and delivered when Price was to be fixed by the Valuation of a Third Party (e)

1. By a contract in writing, dated....., the plaintiff sold and agreed to deliver to the defendant at certain household furniture, specified in Schedule "A" hereto, on....., upon the term that the price would be fixed by the valuation of of one Mr..... within one week from the date of delivery, and to be payable within one week from such valuation.

2. Pursuant to the said agreement, the plaintiff delivered, and the defendant received, the said furniture on at

3. The said Mr..... has not made the said valuation although called upon by the plaintiff in writing, dated, to do so.

4. The goods are reasonably worth Rs.....

5. On, the plaintiff verbally (or, in writing, as the case may be) demanded payment of said sum from the defendant.

6. The defendant has not paid the said sum or any part thereof.

The plaintiff claims—

(1) Rs.....

(2) Rs..... interest by way of damages, at the rate ofper cent. per annum, from.....to.....

(3) Further interest.

PLAINT.**523.**

(d) **Limitation** : Art. 52, Ind. Lim. Act, 1908. Cf. *Mukat Lal v. Gulab*, A.I.R. 1931 All. 229 (Time begins to run from the date of sale.).

(e) **Cause of action** : Section 10, Ind. Sale of Goods Act, 1930, provides :
 "(1) Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party and such third party cannot or does not make such valuation, the agreement is thereby avoided : Provided that, if the goods or any part thereof have been delivered to, and appropriated by, the buyer, he shall pay a reasonable price therefor. (2) Where such third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain a suit for damages against the party in fault."

(e) **Interest** : Sec. 61, Ind. Sale of Goods Act, 1930.

(e) **Limitation** : Art. 53, Ind. Lim. Act, 1908.

SALE OF GOODS.**1. Seller v. Buyer.****CLAIM by Seller for Price of Goods sold and delivered to be paid for by a Bill. (f)**

1. By an agreement in writing, dated....., it was agreed that the plaintiff should sell to the defendant certain plants, materials and tools (fully described in Schedule "A" hereto) at the price of Rs..... and that the defendant instead of paying the price in cash would give the plaintiff a bill of exchange payable 3 months from the date of delivery.

2. Under this agreement the plaintiff, on, delivered the said articles to the defendant, and the defendant gave the plaintiff a bill of exchange which was dishonoured, of which the defendant has had due notice.

The plaintiff claims—

(1) Rs..... price of the goods.

(2) Rs..... interest by way of damages, at the rate of per cent. *per annum*, fromto.....

(3) Further interest.

PLAINT.**524.****SALE OF GOODS.****1. Seller v. Buyer.****CLAIM by Seller for Price of Goods sold and delivered when the Price was to be determined in Manner agreed. (g)**

(f) **Reference :** Under Sec. 45 (1) (b) of The Ind. Sale of Goods Act, 1930, "The seller of goods is deemed to be an "unpaid seller" within the meaning of this Act, when a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise."

(f) **Limitation :** Art. 54, Ind.Lim.Act : For the price of goods sold and delivered to be paid for by a bill of exchange where no such bill is given, the limitation is 3 years from the time when the period of the proposed bill elapses. The seller can only sue for the price when the bill if given, would have matured. Cf. *Gordon v. Whitehouse*, (1856) 18 C.B. 747.

(f) **Interest :** S. 61, Ind. Sale of goods Act, 1930.

(g) **Reference :** *Orchard v. Simpson*, (1857) 2 C. B. N. S. 299 (In this case it was contended on behalf of the defendant that the canvas of the qualities used in making the tent were procurable at lesser price per yard than what the plaintiffs had charged. Cockburn C. J., held, "We think the words "market value" in this contract must be taken to mean, the price of the commodity in the market as between the

1. By an agreement in writing, dated, the plaintiffs, tent-makers, agreed with the defendant to make a covering for the wooden frame-work situate in, with cotton canvas, equal in quantity to pattern, and of the market value of 9 annas *per* yard, 24 inches wide, 3 annas to be charged for making up the same according to the plan submitted and explained, making together the sum of twelve annas *per* yard of 24 inches ; and it was agreed that if the market value of the canvas should be less than 9 annas *per* yard, the amount (*i.e.* the difference) should be deducted from the total amount calculated at 12 annas *per* yard.

2. By the said agreement, the plaintiffs undertook the completion of the work by, to the satisfaction of one Mr.....

3. The work was duly completed to the satisfaction of Mr..... and the finished materials were delivered to the defendant on

4. On, the plaintiffs submitted their bill to the defendant. In the said bill the plaintiffs gave the defendant credit for Rs..... paid on and claimed Rs..... as the balance due.

5. The defendant has not paid any portion of the said balance.

The plaintiffs claim—

(1) Rs.....

(2) Rs..... interest by way of damages, at *per cent. per annum*, on the said sum, from.....to.....

(3) Further interest.

manufacturer and an ordinary purchaser ; that those words are not to receive a different interpretation. because a person requiring so large a quantity as was wanted in this case, might have purchased the canvas at a lower rate. We think the contract is only to be construed to mean the ordinary price in the market, irrespective of the particular contract.”). The term ‘market’ is to be construed with reference to the surrounding circumstances : *Oharrington & Co. v. Wooler*, (1914) A. C. 71. Difficulties often occur in determining what is a reasonable price or a reasonable rate. These are difficulties which the Court is bound to overcome : *New Beerbhoom Coal Co. v. Boloram Mahata*, (1879-80) L. R. 7 I. A, 107, 114. If it is agreed that an article is to be made of certain material for a stipulated price, no higher price can be demanded on the ground that materials of a better kind were used : *Wilmot v. Smith*, (1828) 172 E. R. 498 N. P.

(g) **Limitation** : Art. 52, Ind. Lim. Act, 1908.

(g) **Interest** : S. 61, Ind. Sale of Goods Act, 1930.

PLAINT.

525.

SALE OF GOODS.

1. Seller v. Buyer.

CLAIM by Seller for Price of Goods bargained and sold but not delivered. (h)

1. On January 15th, 19....., the defendant agreed to buy from the plaintiff, and the plaintiff bargained and sold to the defendant 50 bales of jute, then lying on the plaintiff's godown at, at the price of Rs..... per bale, to be paid for within 10 days, but not to be removed from the plaintiff's said godown before payment.

2. The defendant has not paid the price of the said goods or any part thereof.

The plaintiff claims—

- (1) Rs....., price of the said goods.
- (2) Rs....., interest by way of damages, at per cent. per annum, on the said sum, from to.....
- (3) Further interest.

(h) **Reference :** Sec. 55 (1), Ind. Sale of Goods Act, 1930, under which the seller may sue for the price if under the contract of sale the property in the goods has passed to the buyer and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract. Under sub-section (2) of the said section, where under a contract of sale the price is payable on a day certain irrespective of delivery and the buyer wrongfully neglects or refuses to pay such price, the seller may sue him for the price although the property in the goods has not passed and the goods have not been appropriated to the contract. If the passing of the property depends upon the fulfilment of some condition and that condition is not fulfilled, the seller, in the absence of an agreement that the price should be payable on a day certain irrespective of delivery, cannot sue for the price even though the non-fulfilment of the condition is due to the default of the buyer: *Colley v. Overseas Exporters*, (1921) 3 K. B. 302 (where unascertained goods were sold f. o. b. and seller shipped them to the port of shipment, but, owing to failure of the buyer to name an effective ship, he was prevented from putting them on board.). On the other hand, if the property in the goods has passed and the payment of the price depends upon the fulfilment of some condition and that condition is not fulfilled owing to the default of the buyer then the seller is entitled to sue for the price: *Mackay v. Dick*, (1881) 6 A. C. 251, appld. in *Harrison v. Walker*, (1919) 2 K. B. 453. In each case the Court must endeavour to

PLAINT.

526.

SALE OF GOODS.

1. Seller v. Buyer.

CLAIM by Seller for Price of Goods bargained and sold, where

Goods were unascertained at the Date of Contract. (i)

1. At all material times the plaintiff had in his godown at a quantity of sugar in bulk, weighing 50 maunds, more than sufficient to fill 20 bags.

2. By a contract in writing, dated..... 19..., the plaintiff agreed to sell and the defendant agreed to buy 20 bags of sugar weighing 40 maunds out of the said quantity at Rs.....*per* maund, delivery on against payment.

3. On, the plaintiff filled up and appropriated to the defendant 20 bags of sugar weighing 40 maunds and informed the defendant in writing that they were ready and desired him to take them away.

4. The defendant did not take the goods although he promised in writing, dated, to do so as soon as possible.

5. On 19..., the said goods were destroyed by accidental fire.

The plaintiff claims—

(1) Rs.....price of the goods.

(2) Rs....., interest by way of damages, at.....*per cent. per annum* on the said sum, from, the date of the appropriation aforesaid, to.....

(3) Further interest.

ascertain when it was the intention of the parties that the property in the goods, the subject of the sale, was to be transferred : *Vithaldas Vishram v. Jagjivan Gordhandas*, A. I. R. 1939 Bom. 84.

(h) Interest : S. 61, Ind. Sale of Goods Act, 1930.

(i) Reference : *Rhode v. Thwaites*, (1827) 6 B. & C. 388 (The appropriation having been made by the plaintiff and assented to by the defendant the property in the goods passed to the taker and their value might be recovered by the plaintiff under a count for goods bargained and sold.) *referred to in Juggernath v. E. A. Smith*, (1907) I. L. R. 34 Cal. 173. Cf. Sec. 23, Ind. Sale of Goods Act, 1930. The assent of the vendee may be given prior to the appropriation by the vendor ; it may be either express or implied, and it may be given by an agent of the party, by the warehouseman or wharfinger : *Per Willes J.*, in *Campbell v. Mersey Docks & Harbour Board*, (1863) 14 C. B. N. S. 412 ; *Ford Automobiles v. Delhi*

PLAINT.

527.

SALE OF GOODS.

1. Seller v. Buyer.

CLAIM by Seller for Damages for Non-acceptance of Goods tendered (j)

1. By a contract in writing, dated, the defendant agreed to buy from the plaintiff maunds of to

Motor, A.I.R. 1923 Bom. 125. Cf. *Pignataro v. Gilroy*, (1919) 1 K. B. 459 (Where on a sale of unascertained goods by description, goods of that description are unconditionally appropriated to the contract by the seller and the seller sends notice of that appropriation to the buyer, if the buyer neglects to reply to that notice promptly it must be inferred that he assents to the appropriation and on the expiry of a reasonable time after receipt of the notice the property must be deemed to have passed.). For place of appropriation, see *Badische Anilin v. Ilickson*, (1906) A. C. 419. Appropriation and communication thereof to the purchaser should both take place before there has been repudiation or breach of the contract by either party. No assent by the purchaser can be implied by his mere silence after he has actually broken the contract. Once a party has by his conduct given an indication of his intention not to abide by his contract his neglect or refusal to reply to the communications of the other party to the contract thereafter, can not amount to an indication of his desire to keep the contract alive. An express or implied assent to an appropriation is an indication of such an intention : *Bij Raj v. Firm Gobind Pershad*, A. I. R. 1925 Lah. 581. Appropriation may be used in another sense, *viz.*, where both parties agree upon specific article in which property is to pass, and nothing remains to be done in order to pass it : *Per Parke B.*, in *Waite v. Baker*, (1848) 2 Exch. 1. This, however, is not the sense in which the word is used in Sec. 23, Ind. Sale of Goods Act. See Pollock and Mulla's Ind. Sale of Goods Act, p. 124. A retention of seller's lien does not necessarily imply an unconditional appropriation : *Firm Raghunath Dass v. Firm Ghamandi Lal*, A. I. R. 1925 Lah. 586. In case of sale of unascertained goods, where there is an agreement between the parties that the seller would have right of resale against buyer in breach and the right to recover godown and insurance charges, etc., although goods have not been appropriated by either party, seller is entitled to recover the charges although goods have not been appropriated : *Sheo Narain v. N. S. S. & G. Refg. Co.*, A. I. R. 1938 All. 272.

- (i) **Risk prima facie passes with property** : Sec. 26, Ind. Sale of Goods Act ; *Shoshi Mohun v. Nobokrishto*, (1879) I. L. R. 4 Cal. 801 ; *Shankar Das v. Bhana Ram*, A. I. R. 1926 Lah. 606 ; *N. S. Billimoria v. Gauri Mal*, A. I. R. 1928 Lah. 481 ; *Kanshi Ram v. Mul Chand*, A. I. R. 1930 Lah. 469.

- (j) **Cause of action** : Sec. 56, Indian Sale of Goods Act, 1930 provides : Where

be delivered by the plaintiff to the defendant at, on or before, at the price of Rs.....*per* maund payable on delivery.

2. On, the plaintiff sent the said goods through a carrier to (here state the place of delivery), but the defendant refused to accept the said goods or any part thereof or pay the plaintiff for the same.

Particulars of damage :

Difference between the contract price and
the market price of the goods on
the....., viz., Rs.....*per* ind.
on maunds... .. Rs.....
The plaintiff claims—
Rs.....damages.

PLAINT.

528.

SALE OF GOODS.

1. Seller v. Buyer.

CLAIM by Seller for Damages for Non-acceptance of

Goods tendered. (k).

(Another Form)

1. The plaintiffs are dealers in piece-goods and shirtings.

2. By a contract in writing, dated, the plaintiffs agreed to sell and the defendants agreed to purchase 45 bales of Grey shirtings No.....of Company, an importing firm, at Rs..... *per* bale, ready goods, godown due 90 days

the buyer wrongfully neglects or refuses to accept and pay for the goods the seller may sue him for damages for non-acceptance.

(j) **Measure of damages :** The measure of damages is the difference between the contract price and the market price of the goods at the time when the contract is broken : Sec. 73, Ind. Cont. Act. But this measure of damage postulates an available market at the place of delivery : *Dunkirk Colliery Co. v. Lever*, (1878) 9 Ch. D. 20, 25, C. A. If there is no available market at the place of delivery, the market price at the nearest place or the price prevailing in the controlling market or the price at the final destination of the goods may be taken into consideration : *Wertheim v. Chicoutimi Pulp Co.*, (1911) A. C. 301 (P. C.). If there is no available market the plaintiff is entitled to sue for the price of the goods.

(k) **Reference :** *Kasiram v. Hurnundroy*, (1921-22) 26 C.W.N. 354 (The real controversy in this appeal was, was there a valid trade usage as alleged

from 29th July, 19..., allowance and all conditions to be according to outside contract (that is, contract with European firms), interest and cooly charges to be according to the inside customs (that is, the customs prevailing among the Indian merchants).

3. The due date of the contract was 27th October, 19..., which was a Sunday. According to a well known usage in the market in connection with European importing firms, the contract could be performed on the following day, and, accordingly, on the 28th October, 19..., the plaintiffs tendered the goods to the defendants who refused to accept delivery.

4. By reason of the premises the plaintiffs have suffered damage which they are claiming on the basis of the difference between the contract rate and the market rate on the due date.

The plaintiffs claim—

Rs..... damages.

PLAINT.

529.

SALE OF GOODS.

1. Seller v. Buyer.

CLAIM by Seller for Resale Damages for Non-acceptance of Goods. (1).

1. By several contracts in writing, the plaintiff agreed to sell

by the plaintiffs, and if so, what was the effect upon the contract between the parties. *Held*: The usage as regards transactions with European firms is, if the due date for delivery of goods falls on a Sunday or on a public holiday, then the following day is taken as the due date. The usage of which evidence is received must not be repugnant to or inconsistent with the written contract: *Brown v. Byrne*, (1854) 3 El. & Bl. 703, 715. The plaintiffs must consequently not only prove the existence of a trade usage but also establish that the usage when read into the written contract does not make it insensible and inconsistent. In the present case the written contract states explicitly that the due date of delivery is ninety days from 29th July, 1918, that is, the 27th October, 1918. We have then to read into the contract the *proviso* that if such date falls on a Sunday, the due date will be the date following. It may be considered that this does vary the apparent contract; indeed if it did not, the parties would not seek to prove the usage; but although the apparent contract is varied, the contract as modified is sensible and self-consistent. The added term consequently is not open to the objection of repugnancy).

- (1) **Right of resale**: Sec. 54, Ind. Sale of Goods Act, 1930: 'The contract may expressly provide for the right of resale (Sub-sec. 4). Where

and the defendant agreed to buy shares in certain limited companies.

Particulars of contracts :

Date.	No.	Shares.	Rate.	Due Date.
-------	-----	---------	-------	-----------

2. The defendant did not apply to take the said shares on the respective due dates.

3. At the oral request of the defendant on the respective due dates, the time for taking delivery was extended as follows :

4. On default of the defendant to take up and pay for the shares on the extended due dates, the plaintiff gave the defendant notice in writing on that if the shares were not taken up and paid for within a week from the date of receipt of the notice, the said shares would be resold on and the plaintiff would hold the defendant liable for all losses.

5. The defendant made default in spite of the said notice and, accordingly, the plaintiff resold the said shares on and suffered damage in the sum of Rs.....!.....

Particulars :

6. In the alternative, the plaintiff claims the said sum as the difference between the contract rates and the market rates on the extended due dates aforesaid.

The plaintiff claims—

Rs..... damages.

there is no such express provision in the contract the unpaid seller after giving notice to the buyer of his intention to resell may, if the buyer does not within a reasonable time pay or tender the price, resell the goods within a reasonable time and recover from the original buyer damages for any loss occasioned by his breach of contract, but the buyer shall not be entitled to any profit which may occur on the resale (Sub-sec. 2) ; *Nanak Chand v. Panna Lal*, A.I.R. 1930 Lah. 389. Giving a notice is a condition precedent to the lawful exercise of power of resale by vendor. It is, therefore, for the plaintiffs to plead and prove that the notice has been given and condition fulfilled : *Naraindas v. Kunjilal*, A.I.R. 1924 Nag. 162 (2). As in the case of a statutory right of resale, so in the case of a resale under a contract, the seller must give notice to the buyer of his intention to do so and resell them after the lapse of a reasonable time : *Nathu Mal v. Ram Sarup & Co.* (1931) I.L.R. 12 Lah. 692. For effect of delay in resale by seller, see *Mohan Bhasin Share Agency v. Khuda Bakhsh*, A.I.R. 1939 Lah. 260 ; *Sheo Narain Gopi Ram v. N. S. S. & G. Refy. Co.*, A. I. R. 1938 All. 272 (case of delay due to unreasonable and unfair attitude adopted by buyer).

PLAINT.

530.

SALE OF GOODS.

1. Seller v. Buyer.

CLAIM by Seller for Damages for Wrongful Repudiation of Contract. (m)

1. By a contract in writing, dated, the defendant purchased and agreed to accept from the plaintiff 500 tons of scrap iron to be delivered at in one lot on19..., at the price of Rs..... per ton, payable on delivery.

-
- (l) **Reasonable time** : Under Sec. 63 of the Ind. Sale of Goods Act, the question what is reasonable time is a question of fact. It is well settled rule that if the vendor chooses to enforce his right to resell, he must do so within a reasonable time from the date of the breach, and that he should not allow the value of the goods to depreciate by making undue delay in reselling them. If the goods are resold within a reasonable time after the breach of the contract by the purchaser, the measure of damages is the difference between the contract price and the price realized on the resale, with the costs and expenses of the sale. But if the resale has been unreasonably delayed until the market has fallen, the price realized on resale will not afford a true criterion of the damages. The delay of more than a year in the present case was wholly unreasonable and the finding of the learned District Judge, proceeding as it does upon an erroneous view of the transaction which resulted in the sale of one package in April 1922, cannot be sustained. The measure of damages must therefore be the difference between the contract price and the market price on the date of the breach of the contract : *Nikkumal v. Gur Parshad*, (1931) I.L.R. 12 Lah. 452.
- (l) **Waiver of stipulation as to time** : See *Hickman v. Haynes*, (1875) I.L.R. 10 C. P. 598 ; cf. *Polts & Co. v. Brown, Macfarlane & Co.*, (1925) 30 Com. Cas. 64, H. L. ; cf. *Md. Habid Ullah v. Bird & Co.*, (1920-21), L. R. 48 I. A. 175.
- (l) **Buyer's obligation to apply for delivery** : S. 35, Ind. Sale of Goods Act, 1930 ; *Ganesh Das-Ishar Das v. Ram Nath*, (1928) I.L.R. 9 Lah. 148. Cf. *Sivayya v. Ranganayakulu*, (1934-35) L.R. 62 I. A. 89.
- (m) **Repudiation** : Per Atkin L.J., in *Consorzio Nenexiano v. Northumberland Shipbuilding Co.*, (1919) 88 L. J. K. B. 1194, 1200 : "A repudiation has been defined in different terms, by Lord Selborne as 'an absolute refusal to perform a contract', by Lord Esher as 'a total refusal to perform', by Brown, L. J. as 'a declaration of an intention not to carry out the contract when the time arrives', by Lord Haldane as 'an intention to treat the obligation as altogether at an end'. All these definitions come to the same thing, and make it clear that 'to constitute a repudiation one of the parties to the contract must make quite plain

2. The plaintiff was ready and willing to deliver the said iron on the said19... according to the said contract, but before the time for performance the defendant, by a letter dated (or, verbally on or, otherwise, as the case may be), wrongfully purported to repudiate the said agreement.

3. By letter dated, the plaintiff accepted the said repudiation.

4. By reason of the premises the plaintiff has suffered damage.

Particulars of damage :

Difference between the contract price and the market price on the day the goods ought to have been accepted or delivered, at Rs..... per ton Rs.....

The plaintiff claims—

Rs..... damage.

PLAINT.

**531.
SALE OF GOODS.**

his intention not to perform the contract." Where the seller treats the repudiation as a wrongful putting an end to the contract, the repudiation operates as a waiver of conditions precedent to be performed by the seller; and the buyer cannot, after repudiation, set up as a defence to the action for damages that the goods were not in conformity with the contract: *Steel Brothers & Co. v. Dayal Khatao & Co.*, (1923) I. L. R. 47 Bom. 924, following *Frost v. Knight*, (1872) I. L. R. 7 Exch. 111, 112, 113. Cf. *Jhandoo Mal v. Phul Chand*, (1924) I. L. R. 5 Lah. 497; *Manindra Chandra v. Aswini Kumar*, (1921) I. L. R. 43 Cal. 427, 436; *Nagiseti v. Venkatasubbayya A. I. R.* 1935 Mad. 345.

- (m) **Measure of damages :** The promisee who elects to treat the repudiation of the other party as a wrongful putting an end to the contract may at once bring his action as on a breach of it, in which he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss: *Frost v. Knight*, (1872) I. L. R. 7 Exch. 111, followed in *Manindra Chandra v. Aswini Kumar*, (1921) I. L. R. 43 Cal. 427, 436; *Maung Po Kyaw v. Saw Tago*, A. I. R. 1933 Rang. 25; cf. *Steel Brothers & Co. v. Dayal Khatao & Co.*, (1923) I. L. R. 47 Bom. 924; *Ramgopal v. Dhanji*, (1928) I. L. R. 55 Cal. 1048 (P.O.)
- (m) **Limitation :** Art. 115, Ind. Lim. Act, 1908: A contract is broken on the date when promisee receives communication of intention of cancellation: *Gaekwar Baroda State Rty. v. Seikh Habib Ullah*, (1954) I. L. R. 56 All. 828; *Daswant Singh v. Syed Shah Ramjan Ali*, (1907) 6 C.L.J. 398 (where Art. 116 was applied as the claim was for compensation for breach of a contract in writing and registered).

1. Seller v. Buyer.

CLAIM by Seller for Damages for Wrongful Repudiation of Contract. (n)

(Another Form).

1. On 19..., the defendant, by broker A.B., agreed to buy from the plaintiff, and the plaintiff by the said broker, bargained and sold to the defendant, 50 tons of scrap iron then lying on the plaintiff's godown at, at Rs..... per ton, upon terms and conditions embodied in the bought and sold notes hereinafter mentioned.

2. On 19..., the sold note was sent by the broker to the plaintiff and the plaintiff received the same and duly signed a confirmation slip and made it over to the broker.

3. On 19..., the bought note was tendered by the broker to the defendant, but the defendant not only refused to sign any confirmation slip therefor but repudiated the contract altogether.

4. On the due date, that, is, on, the plaintiff offered delivery of the goods but the defendant refused to accept the same.

5. By reason of the breach of contract on the part of the defendant, the plaintiff has suffered damage.

Particulars of damage :

Difference between the contract price and the market price on
....., the date of the breach Rs.....
The plaintiff claims—
Rs..... damage.

(n) **Bought and Sold notes :** The broker sends to the seller a "sold note", and to the buyer a "bought note." "When each note discloses the name of both parties to the transaction, each is a complete memorandum of the bargain. When each note only discloses the name of one party, the two may be treated as one memorandum. The bought and sold notes are deemed to constitute a single document, and if they differ materially they are nullities unless one has been assented to by the parties as constituting the terms of the contract." : Wharton's Law Lexicon, 14th Edn., p. 141.

(n) **Seller's remedies :** Sec. 60, Ind. Sale of Goods Act, 1930 : "Where either party to a contract of sale repudiates the contract before the date of delivery, the other may either treat the contract as subsisting and wait till the date of delivery, or he may treat the contract as rescinded and sue for damages for the breach." : *Nagiseti v. Venkatasubbayya*, A. I. R. 1935 Mad. 345.

(n) **Limitation :** 3 years under Art. 115, Ind. Lim. Act.

PLAINT.**532.****SALE OF GOODS.**

1. Seller v. Buyer.

CLAIM for Damages for Anticipatory Breach of Contract. (o)

1. By a contract in writing, dated 19..., the plaintiff agreed to sell, and the defendant agreed to buy, 50 tons of scrap iron at Rs..... *per* ton, delivery to be made by the plaintiff in the manner following, namely, 25 tons on and the rest on

2. Before the time for performance, the defendant by letter dated purported to cancel (or repudiate) the said contract, whereby the plaintiff has suffered damage.

Particulars of damage :

Difference between contract price and the market price of the goods on the respective due dates of delivery.....

Rs.....

The plaintiff claims—

Rs.....damages.

DEFENCE.**533.****SALE OF GOODS.**

1. Seller v. Buyer.

DEFENCE to a Claim for Price of Goods sold and delivered.

The defendant denies that the plaintiff sold or delivered to him

- (o) **Cause of action :** Where either party to a contract of sale repudiates the contract before the date of delivery, the other may either treat the contract as subsisting and wait till the date of delivery, or he may treat the contract as rescinded and sue for damages for the breach : Sec. 60, Ind. Sale of Goods Act, 1930. Cf. *Manindra Chandra v. Aswini Kumar*, (1921) I. L. R. 48 Cal. 427 (Anticipatory breach takes effect as a premature destruction of the contract rather than as a failure to perform it in its terms); *Ramgopal v. Dhanji* (1928) I. L. R. 55 Cal. 1048 (P. C.).
- (o) **Measure of damages :** Where a contract is for delivery of goods on a certain day and the defendant repudiates the contract before that date, damages must be assessed on the basis of the market rate prevailing on the due date of delivery and not on the basis of the rate prevailing on the date of the repudiation : *Maung Po Kyaw v. Saw Tago*, A.I.R. 1933 Rang. 25; *Boorman v. Nash*, (1829) 9 B. & C. 145; *Phillipotts v. Evans*, (1839) 5 M. & W. 475; *Melachrino v. Nickoll & Knight*, (1920) 1 K.B. 693. Cf. *Nagiseti v. Venkatasubbayya*, A.I.R. 1935 Mad. 345.

the alleged or any goods at his request or under circumstances which would render the defendant liable in respect thereof.

Or,

The defendant admits that the said goods were sold and delivered to him but says that it was expressly agreed (verbally, or, as the case may be) by and between the plaintiff and the defendant at the time of the sale that the defendant should pay for the goods months after delivery. The suit was instituted before the expiry of the said period of credit.

Or,

The defendant admits that the said goods were sold and delivered to the defendant, but says that on the plaintiff accepted from the defendant certain goods of which the following are particulars, in full satisfaction and discharge of the plaintiff's claim in respect of the said goods.

Or,

Before the date of the alleged sale the defendant had sold to the plaintiff various articles of On it was verbally agreed by and between the plaintiff and the defendant that the claims of the plaintiff in respect of the said goods should be satisfied and discharged by setting off the claims of the defendant in respect of the goods supplied by him as aforesaid and the balance should be paid. Pursuant to the said agreement, the said claims were set off one against the other and there was found due from the defendant to the plaintiff Rs., and in this way an account was stated in writing between the parties on The next day the defendant offered to pay the said sum to the plaintiff in full satisfaction of the plaintiff's claim but the latter refused to accept the same. The defendant brings the said money into Court.

Or,

No price of the said goods was agreed upon between him and the defendant. The price claimed is not fair or reasonable. The reasonable price is Rs. and no more.

Or,

The said goods were not in accordance with the description in the contract and the defendant rejected them immediately after inspection and called upon the plaintiff in writing on, to take back the goods, but the plaintiff has not done so. The goods are lying on the defendant's premises at the plaintiff's risks.

Or,

At the time of the contract the defendant made known to the plaintiff in writing that the goods were required for the purpose of

..... The goods supplied were not reasonably fit for such purpose and, on, the defendant wrote a letter to the plaintiff asking him to take back the goods or to replace them, but the plaintiff has not complied with the said letter.

DEFENCE.

534.

SALE OF GOODS.

1. Seller v. Buyer.

DEFENCE to a Claim by Seller for Non-acceptance of Goods tendered.

The defendant may take, amongst others, the following defences :

The defendant denies that the plaintiff tendered the goods onor at all.

Or,

Under the contract of sale the plaintiff was bound to send the goods to the defendant on but he did not do so. The plaintiff sent the goods on and, accordingly, the defendant did not accept the said goods.

Or,

The sale of the goods was by description (add the particular description). The goods tendered by the plaintiff did not answer the description in the contract (give particulars). Accordingly, the defendant did not accept the said goods.

PLAINT.

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SALE OF GOODS.

2. Buyer v. Seller.

CLAIM by Buyer for Damages for Non-delivery of an Instalment of Goods. (p)

1. By a contract in writing, dated 19 ..., the defendant agreed to sell, and the plaintiff agreed to buy, 1500 bags of

-
- (p) It is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract, or whether it is a severable breach giving rise to a claim for compensation, but not to a right to treat the whole contract as repudiated : Sec. 38 (2), Ind. Sale of Goods Act. 1930. Such an agreement is frequently made expressly : *Manilat & Co. v. Fazul Ellahie*, (1914) I. L. R. 41 Cal. 825. But where nothing is expressed on the point it is necessary to see what is implied : *Rutilul Kothari v. Lakmichand*, A. I. R. 1938 Rang. 364.

....., each bag weighing maunds, in three equal instalment deliveries in May, June and July, 19..., such deliveries to be deemed as those under three separate contracts and to be separately paid for at the rate of Rs. *per bag*.

2. The defendant has not delivered the first instalment and the plaintiff has thereby suffered a loss of Rs., being the difference between the contract rate and the market rate on 31st May, 19..., the date of the breach in respect of the said instalment.

The plaintiff claims—

Rs. damages.

PLAINT.

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SALE OF GOODS.

2. Buyer v. Seller.

CLAIM by Buyer for Damages for Short Delivery, where the Buyer elects to treat the Breach of Condition as a Breach of

Warranty. (q)

1. By a contract in writing, dated, the plaintiffs agreed to buy, and the defendants agreed to sell, 2000 gross of six-cord sewing thread with lengths, of 200 yards on reels at the price of Rs.....*per gross*, f.o.b., Bombay. The said contract provided, *inter alia*, as follows :—

“The goods delivered shall be deemed to be in all respects in accordance with the contract and the buyers shall be

(q) **Reference :** *Beck & Co. v. Szymanowski & Co.*, (1924) A. C. 43 (In this case, eighteen months after delivery, the buyers discovered for the first time that the length of cotton *per reel* was less than 200 yards, the average shortage being about 6% and they brought an action against the sellers for damages for breach of contract. The sellers pleaded that the condition in the contract was a bar to the action. The House of Lords held that the condition applied to quality only and not to quantity, and that the buyers were entitled to damage. *Per Lord Wrenbury* : “Assuming that the condition extended to quantity, while the condition excluded the right to reject, it did not extend to the right to claim damages.” *See also Exportles v. Allen & Sons*, (1938) 3 All E. R. 375.

(q) **Note :** Under Sec. 37 of the Indian Sale of Goods Act, 1930, where the seller delivers to the buyer a quantity of goods less than he contracted to sell the buyer may reject them. Under Sec. 13 of the said Act, where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition or elect to treat the breach of the condition as a breach of warranty and not as a ground for treating contract as repudiated. In this case, the buyer by accepting

bound to accept and pay for the same accordingly, unless the sellers shall within 14 days after the arrival of the goods at their destination receive from the buyers notice of any matter or thing by reason whereof they may allege that the goods are not in accordance with the contract."

2. In pursuance of the said contract, on 19..., the defendants delivered to the plaintiffs at Bombay 2000 gross of six-cord sewing thread and the plaintiffs paid to the defendants Rs....., the price thereof.

3. The reels as received by the plaintiffs from the defendants were packed in cases each containing 20 gross. Each reel had a label pasted on the end of it bearing the figures and word "200 yards".

4. The plaintiffs allowed the goods to remain in the warehouse at until, when they shipped 200 gross out of the said goods to Messrs. & Co., their customers in Burma. In, the plaintiffs received complaints from their said customers that the reels delivered to them were defective in that each reel contained thread of length less than 200 yards. Thereupon, the plaintiffs had the bulk of the goods, which still remained at the said warehouse, examined by Testing House, on....., when it was established that the average length of thread *per* reel was 188 yards.

5. On, the said Messrs. & Co. claimed compensation from the plaintiffs for the deficiency in value of the thread supplied to them and, in default of such compensation, refused to accept the thread.

6. The plaintiffs, to avoid the heavy expense of reshipping the thread to this country from Burma and to prevent further loss, paid to the said Messrs. & Co. on, the sum of Rs.....being the deficiency in value of the said thread caused by the defendants' aforesaid breach of contract.

7. The plaintiffs have further suffered loss to the extent of Rs..... for deficiency in value of the thread still remaining in the plaintiffs' said warehouse.

8. The defendants are wrongfully contending that by virtue of the condition in the contract (set out in paragraph 1 hereof) the plaintiffs are not entitled to any compensation for short delivery.

when he is entitled to reject, waives the condition but may still treat the breach of it as a breach of warranty. Cf. *Barker Junior v. Agius Ltd.*, (1928) 43 T. L. R. 751.

The plaintiffs claim—

Rs..... damages.

PLAINT.

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SALE OF GOODS.

2. Buyer v. Seller.

CLAIM by Buyer for Damages for Breach of Implied Warranty of Fitness. (r)

1. The plaintiff, an ink and sealing wax manufacturer, wished to start the manufacture of carbon-paper, and, with that object in view, he consulted the defendant, an import merchant dealing in machineries for making paper, in August, 19..., as to the suitable plant and machinery for that purpose.

2. On the advice of the defendant, the plaintiff, by an agreement in writing, dated....., agreed to buy from the defendant for the purpose aforesaid a machine for winding and cutting paper and also a low pressure steam and hot water boiler "Perfekt" No. 2 with accessories as *per* prospectus handed to the plaintiff, delivery 'in one lot as quick as possible', shipment to.....through....., payment 60 days after delivery, price 850 RM. net, including package f. o. b. Continental port.

3. The machineries together with the boiler were delivered to the plaintiff in.....and were taken by him to his works at..... and thereafter installed so as to form part of the plant for making carbon-paper.

-
- (r) **Reference :** *Joseph Mayr v. Phani Bhusan Ghosh*, I. L. R. (1938) 2 Cal. 88 (Upon the facts of the case, Derbyshire C. J., held : "The boiler was not reasonably fit for the purpose for which it was ordered and supplied The plaintiff purported to reject the boiler. In my view he had kept it too long to be in a position to be able in law to reject it. He must be deemed to have accepted it, and if he has a remedy against the defendant for breach of contract that remedy is one not of rejection but for damages. The plaintiff did not get rid of the unusable boiler and get one that was usable in order to go on with manufacture of carbon-paper." Accordingly, His Lordship disallowed damages on the head of loss of profit and allowed damages on the other heads. *Per* Ameer Ali J. : "Fitness for a particular purpose means intrinsic fitness for the particular object to which the goods were to be applied. The article must be fit for a particular purpose notified to the defendant and notified in a particular way so that the defendant should know that his skill and judgment is to be relied upon to supply an article which shall be fit for that purpose.

4. The plaintiff paid the defendant for the machine and the boiler, Rs.....in two instalments, the first, on....., and the second, on.....

5. The boiler was worked for three days and was found to be not physically fit for the purpose for which it was supplied (Here set out defects), and the authorities under the Indian Boilers Act also refused to certify it fit for use under the Act, because the seams were welded and the boiler plates were too thin. The said defects were latent or hidden and were not discoverable by the plaintiff before the boiler was worked as aforesaid.

6. On....., the plaintiff wrote to the defendant rejecting the said boiler and demanded back the price paid for it. In reply the defendant refused to take back the boiler and to refund the purchase money.

7. On....., the plaintiff placed an order for another boiler with.....and the said boiler was received on.....and thereafter fitted up to the plant and was found satisfactory.

8. The plaintiff sold to one....., the boiler supplied by the defendant, on, for Rs.....

9. The plaintiff has suffered damage by reason of the defective boiler supplied by the defendant.

Particulars of damage :

(a) Expenses incurred in removing the boiler
supplied by the defendant ... Rs.

..... The mere fact that a license could not be obtained is not *ipso facto* a breach of implied warranty of fitness.That, at any rate, raises a presumption that it was not fit. The presumption has not been rebutted.") Note : The grounds upon which damages for loss of profit were not allowed by their Lordships in the above case, will not apply to the above form of plaint. Cf. *Khoyee & Co. v. Woodroffe & Co.*, I. L. R. 1937 Mad. 479. (The combined effect of Cl. (2) to Sec. 16 and the *Proviso* to Sec. 16 is that the implied condition extends to merchantability less patent defects, and where the defects in the goods are not patent or discoverable, the seller, who under Sec. 16 is answerable for latent defects, remains liable. Where, there is an express condition in the contract of sale as to the quality of the goods, it is unnecessary to invoke Sec. 16 (2). The express condition gives the purchaser a higher right than he would possess under a contract where the term would be merely implied in law. The buyer might treat the condition as a warranty, a breach of which would give rise to a claim for damages, although he would be precluded from rejecting the goods).

(b) Expenses incurred in installing the new boiler Rs.

(c) Difference between the price of the new boiler and the price for which the first boiler was resold Rs.

(d) Estimated overhead charges in respect of the carbon-paper plant, during the time necessarily taken up in removing the first boiler and installing the new one Rs.

(e) Loss of profit on the manufacture of carbon-paper from....., the date of supply of the first boiler, to , the date when the second boiler was installed Rs.

Total ... Rs.

The plaintiff claims—

Rs.....damage.

PLAINT.

538. SALE OF GOODS.

2. Buyer v. Seller.

CLAIM by Buyer of Shares for Damages for Breach of Warranty of Goods being free from Encumbrances. (s)

1. The plaintiffs are a firm of dealers and brokers in stocks and shares, carrying on business at.....Calcutta.

2. By three several contracts the plaintiffs purchased 20,000 shares in the defendant company from the first defendant on 19.....

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- (s) Reference : *Kissen Chand v. Ramprotap*, (1939-40) 44 C. W. N. 505 (*Per* Panckridge J., "Shares are goods within the meaning of Sec. 78 of the Ind. Cont. Act (*Maneckji Pestonji v. Wadilal*, (1925-26) L. R. 53 I. A. 92) and it is not contended that the enactment of the Ind. Sale of Goods Act, which repealed Chapter VII of the Ind. Cont. Act, which is the Chapter that contains the section I have mentioned, has altered the law in this respect. It appears therefore that sec. 14 of the Sale of Goods Act will apply, and, *prima facie*, by delivery of shares over which the company had a lien, the first defendant broke the implied warranty that they should be free of any charge or encumbrance in favour of any third party not declared or known to the buyer before or at the time the contract was made. I fully concede that a person who buys shares in a company must be presumed to have notice of the provisions of the Articles of Association of the company with respect to the shares generally. But it does not follow from that he is

Particulars of contracts :

<i>No.</i>	<i>Shares.</i>	<i>Rate.</i>	<i>Date of delivery.</i>
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3. On....., the plaintiffs paid Rs....., the value of the said shares, to the first defendant and obtained from him share certificates covering 20,000 shares together with blank transfer deeds executed by S. K. & Co., who were then the registered holders of the said shares.

4. By the said contracts the first defendant impliedly warranted that the shares covered by the said contracts were free of any encumbrance, charge or lien.

5. The plaintiffs, on, lodged the said shares with the defendant company asking that their names should be registered in respect thereof.

6. On, the secretary of the defendant company informed the plaintiffs that the said shares were subject to a first and paramount lien in favour of the defendant company, and, in exercise of the discretion given to them by Articleof the Articles of Association of the defendant company, the directors had declined to register the transfer of the said shares.

7. The plaintiffs at no material time had notice of any lien on the said shares in favour of the defendant company.

8. On, the plaintiffs' solicitors wrote the following letter to the first defendant :

"Our clients' representative will call at your office to-day with the shares and will deliver the same back to you either against new shares to be handed over to our clients or against payment of the price thereof as per *bill* enclosed therein. This is of course without prejudice against you for damages."

9. Accordingly, the plaintiffs' representative.....called at the place of the first defendant with the shares but the latter refused to accept the return of the shares and, on....., his solicitors wrote to the plaintiffs' solicitors stating that the plaintiffs had notice of the

to be presumed to have notice of circumstances affecting particular shares.In those circumstances I hold that there was a breach of warranty.....I think I am entitled to award the sum of Rs.....as damages which the first defendant will have to pay, the plaintiffs undertaking to return the share scrips and blank transfer deeds").

lien on the shares in favour of the defendant company, that their client was advised that the shares were not bad delivery and regretted that he could not take back the shares or give fresh shares in exchange thereof or return the price.

10. The defendant company are added as proper parties and no relief is claimed against them.

The plaintiffs claim—

(1) Rs..... damages, against the first defendant.

PLAINT.

539.

SALE OF GOODS.

2. Buyer v. Seller.

CLAIM for Damage for Breach of Express Condition and also for Breach of Warranty. (t)

1. The plaintiffs are shipbuilders. The defendants are makers of ship propellers and other articles of manganese-bronze manufactured in accordance with a special process belonging to them. The defendants are known as propeller experts.

2. In 19..., the plaintiffs contracted to build a single screw motor-ship for the Company, hereinafter referred

(t) Reference : *Cammell, Laird and Co. v. Manganese etc. Co.*, (1934)

A. C. 402. (In this case it was held that the defendants were liable because they had broken the express condition of the contract that the propeller to be delivered should be to the entire satisfaction of the plaintiffs and of the owner. They were also liable because they had broken the warranty implied by Sec. 14(1) of the English Sale of Goods Act, 1893. On the last question it was contended on behalf of the defendants that the words "relies on the seller's skill and judgment" in Sec. 14(1) cannot apply to a case when the reliance is not total or exclusive, where for instance the buyer specifies so much and leaves so much to the seller's skill and judgment. Lord Wright held, "I do not find in the section anything inconsistent with a division of reliance, the buyer relying in part on himself and in part on the seller On Lord Sumner's interpretation reliance need not be "exclusive", though it must be substantial and effective. It follows I think that a reliance partial but substantial and effective will bring the implied condition into play ; it would then be a matter for construction of the particular contract whether the condition that 'the goods shall be 'reasonably fit for such purpose' is to be read without qualification or whether it is to be limited to the matters within the particular province entirely left to the seller's skill and judgment". See the reference to this case in Chitty on Contracts, 19th Edn., p. 582.

to as 'the owners', for Rs. lump sum. The ship which was numbered 972 was to be fitted with main propelling Diesel engines of "North-Eastern type with 2300 shaft horse-power at 110 revolutions *per* minute. It was to be completed and handed to the owners not later than calendar months from December, 19.... It was to be classed as Lloyd's 100 A1, for carrying and all things necessary to obtain the classification were to be done by the plaintiffs.

3. In 19..., the defendants contracted with the plaintiffs in writing to provide a propeller of special manganese-bronze of 16'-0" diameter, with a pitch of 11'-0" and maximum B.H.P.—2150 at 105 revolutions *per* minute for the said ship manufactured in accordance with a working drawing supplied by the plaintiffs and to be to the entire satisfaction of the plaintiffs and of the representative of the owners.

4. The propeller was delivered by the defendants on It was fitted to the ship which then underwent trial on On the trial a noise of a severe character occurred when the engines were running at revolutions below 100 *per* minute and after a number of trials and experiments the source of the noise was ascertained to be in the propeller. Accordingly the ship was not passed and classed as Lloyd's 100 A1 for carrying and the propeller was rejected.

5. The defendants then provided a first replace, without prejudice to the rights of the parties, on, but that also on trial, which took place on, proved unsatisfactory for the same reason and was rejected.

6. The defendants, without prejudice to the legal position, provided a second replace on and that proved satisfactory and was accepted and the ship was passed and classed as Lloyd's 100 A1, on

7. By reason of the above facts, the plaintiffs could not complete the ship before and have thereby suffered loss.

Particulars of damage :

The plaintiffs claim—

Rs. damage.

PLAINT.

540.

SALE OF GOODS.

2. Buyer v. Seller.

CLAIM by Buyer for Damages for Breach of Contract to supply Goods answering the Description in the Contract. (u)

1. By letter, dated.....19..., the plaintiff offered to buy from the defendant 200 bales of.....(here add description) at Rs.....*per* bale, delivery on or before.....

2. By the said letter the plaintiff also gave the defendant notice that the plaintiff had entered into a contract in writing, dated.....19..., with C. D. for the sale at the price of Rs.....*per* bale to the said C.D. of goods of the same description, quality and quantity and that the plaintiff wanted to buy the said goods for the purpose of fulfilling that contract.

3. By letter, dated.....19..., the defendant accepted the said offer of the plaintiff.

4. On.....19..., the defendant delivered 200 bales of.....to the plaintiff, who in his turn tendered them to C.D. in alleged fulfilment of the said contract on.....

5. C.D. refused to accept the goods as not being of the description and quality contracted for.

5. By reason of the premises the plaintiff has suffered a loss of Rs....., being the difference between the price at which the defendant agreed to sell the goods to the plaintiff and the price at which the plaintiff agreed to sell the goods to the said C.D.

The plaintiff claims—

Rs.....damages.

PLAINT.

541.

SALE OF GOODS.

2. Buyer v. Seller.

CLAIM by Buyer against Retail-Dealer on the Contract of Sale and against the Manufacturer in Tort. (v)

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- (u) **When condition to be treated as warranty :** S. 13, Ind. Sale of Goods Act, 1930.
 - (u) **Sale by description :** S. 15, Ind. Sale of Goods Act, 1930. Cf. S. 16 (2) of the said Act.
 - (u) **Notice of special damage :** S. 61, Sale of Goods Act, 1930. Cf. S. 73, Ind. Cont. Act; *Hadley v. Baxendale*, (1854) 9 Ex. 341, 354.
 - (v) **Reference :** *Grant v. Australian Knitting Mills*, A. I. R. 1936 P. C. 34. [This was an appeal from the High Court of Australia, and as regards the liability of the retailer in contract, the judgment of the Privy Council rested upon the interpretation of S. 14 of the South Australian Sale of Goods Act, 1895 (identical with S. 16 of the Ind. Sale of Goods Act). Following, *Donoghue v. Stevenson*, (1932) A. C. 562. *Lord Wright*

1. The defendant company are the manufacturers of a woollen underwear known as 'G. F.'. The said underwear consists of a pair of underpants and a singlet.

2. At all material times defendant A. B. was the retail seller of the said underwear.

3. On.....19..., the plaintiff bought an underwear, consisting of a pair of underpants and a singlet, of the defendant company's manufacture known as 'G.F.,' at the shop of the defendant A.B., at.....

4. The plaintiff wore the said underwear on... .., and on the next day he became ill of a dermatitis which gradually developed into an acute form. In a few days his condition became so serious that on.....19..., he went into.....hospital where he remained until.....19...

5. The said dermatitis was caused by the presence in the said underwear of free sulphite, a chemical irritant, which the defendant company omitted to remove in the process of manufacture.

6. The said underwear was not fit for the purpose for which it was required and was not of a merchantable quality.

7. The plaintiff has suffered damage caused by the defective condition of the underwear which the defendant A.B. sold to him, and which the defendant company, without using due or proper care in the manufacture, made and put forth for indiscriminate sale.

The plaintiff claims—

(a) against the defendant A.B., Rs. as damages for breach of implied warranty or condition on the contract of sale.

(b) against the defendant company, Rs. as damages for negligence in manufacture.

held, that the liability of each defendant depends on a different cause of action, though it is for the same damage (p. 97). The liability of the retailer is made out under both exception (i) and exception (ii) to S. 14 (identical with cl. (1) and (2) of S. 16 of the Ind. Sale of Goods Act). The first exception entitled the buyer to the benefit of an implied condition that the goods are reasonably fit for the purpose for which the goods are supplied, but only if that purpose is made known to the seller "so as to show that the buyer relies on the seller's skill or judgment". The reliance will usually arise by implication from the circumstances. The second exception in truth overlaps in its application the first exception. The implied condition only applies to defects not reasonably discoverable to the buyer on such examination as he made or could make. In

PLAINT.

542.

SALE OF LAND.

1. Vendor v. Purchaser.

CLAIM by Vendor for Price of Land sold. (w)

1. By a registered conveyance, dated, the plaintiff sold the undermentioned property to the defendant, for the price of Rs. 10,000-.

effect the implied condition of being fit for the particular purpose for which they are required, and the implied condition of being merchantable, produce in cases of this type the same result (p. 100). As regards the manufacturers there is no privity of contract between them and the plaintiff. Between them the liability, if any, must be in tort and the gist of the cause of action is negligence, in this case, it is the negligence in manufacture. "A manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the 'preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.'" Cf. *Griffiths v. Peter Conway Ltd.*, (1939) 1 All E. R. 685 (Where it was found as a fact that the plaintiff's skin was abnormally sensitive, and that there was nothing in the cloth which would have affected the skin of a normal person. The abnormality of the plaintiff's skin was not made known to the seller :— *Held* : the Eng. Sale of Goods Act, 1893, Sec. 14 (1), did not apply in the present case, as what was being dealt with here was something abnormal, which no seller would assume to exist.). See also *Locket v. Charles*, (1938) 4 All E. R. 170 ; *Daniels v. Whites & Sons*, (1938) 4 All E. R. 258 ; and *Grenfell v. E. B. Meyrowitz*, (1936) 2 All E. R. 1313.

(w) **Purchaser's liability to pay the purchase money** : Sec. 55 (5) (b), Tr. of Pty. Act, 1882. The execution of the conveyance by the seller and the payment of price are reciprocal duties to be performed simultaneously. Cf. *Mahtab Singh v. Collector of Saharanpur*, A. I. R. 1932 All. 454 (The buyer is bound to pay or tender the purchase money to the seller or to such person as he directs. If he makes default, the vendor is entitled to reasonable interest.). See *Kartar Singh v. Sant Singh*, A. I. R. 1940 Lah. 321.

(w) **Limitation** : Where a major portion of the sale consideration is left with the vendee for payment to the various creditors of the vendor and the vendee commits default, a suit by the vendor against the vendee for loss occasioned by the default is in substance a suit for damages for breach of a contract of indemnity and is governed by Art. 83 which must be read with Art. 116 where the sale deed on which the claim is based is a document in writing registered. Time runs from the date

2. The plaintiff on the said date received Rs. 5,000/- from the defendant and left the balance of the purchase money with the defendant for payment to one A. B. of

3. The defendant has not paid the said balance or any part thereof to the said A. B. or to the plaintiff in spite of demand made in writing on 19...

The plaintiff claims—

Rs. including interest at 6 *per cent. per annum*, by way of compensation, from the date of default as aforesaid.

PLAINT.

543.

SALE OF LAND.

1. Vendor v. Purchaser.

CLAIM by Vendor against Purchaser for Damage for not completing Purchase. (x)

1. By a memorandum of agreement, dated.....19..., the plaintiff agreed to sell and the defendant agreed to buy at the price of Rs. 20,000/- a zamindari property in the district of, bearing Touzi No..... (more fully described in the schedule hereto annexed and marked "A"), free from encumbrances. At or about the same time the defendant paid Rs. 1000/- to the plaintiff as earnest money, and, by the said agreement, agreed to complete the purchase and to pay the balance of the purchase money on or before the 19...

on which the vendor is actually damnified : *Kartar Singh v. Sant Singh*
A. I. R. 1940 Lah. 321.

- (x) **Time of performance :** As regards contract for the sale of land, the Court must look not at the letter, but at the substance of the agreement, in order to ascertain whether the parties, notwithstanding that they named a specified time within which completion was to take place, really intended more than that it should take place within a reasonable time : *Jamshed Khodaram Irani v. Burjorji Dhumjibhai*, (1915-16) L.R. 43 I.A. 26, folld. in *Abduali v. Gokaldas*, A.I.R. 1927 Sind 49. Where time is not originally of the essence of the contract, it may be made so in the case of unreasonable delay by either party in the performance of his part of the contract, by a notice served on him by the other party requiring him to do the acts which he delays to perform, within a specified time (which must be a reasonable space of time) and intimating the other party's intention to consider the contract at an end if the notice is not complied with. In India, such notices are not expressly mentioned in Sec. 55 of the Ind. Cont. Act, but they are well known in relation to contracts between vendors and purchasers of land : *Burn & Co. v. Lukhdirjee*, (1923-24) 28 C.W.N. 104, 112.

2. The defendant accepted the plaintiff's title on 19..., but did not complete the purchase or paid the said balance of purchase money or any part thereof to the plaintiff within the time aforesaid, whereupon notice in writing, dated, was given by the plaintiff to the defendant to the effect that the plaintiff would consider the contract at an end, if the same was not completed and the balance of purchase money paid, within one week from date of receipt of the notice.

3. The defendant has not completed the purchase, or paid the balance of the said purchase money or any part thereof to the plaintiff.

4. By reason of the premises the plaintiff has lost the benefit of the said contract and has suffered damage.

Particulars of damage :

The plaintiff claims—

Rs.....damage.

PLAINT.

544.

SALE OF LAND.

1. Vendor v. Purchaser.

CLAIM by Vendor for Damages for Default on the part of Purchaser to release Property sold of an existing Mortgage. (y)

1. By a registered conveyance, dated 19..., the plaintiff sold the property, fully described in the schedule hereunder, to the defendant, for the price of Rs. 15,000/-, the defendant thereby agreeing to forthwith release the said property of a mortgage then subsisting in favour of one C. D., and to pay the balance of purchase money, if any, to the plaintiff, and further agreeing to indemnify the plaintiff against the consequences of his default in carrying out the said agreement.

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- (y) **Reference :** *Ohand Bibi v. Santoshkumar*, (1933) I. L. R. 60 Cal. 761 (Where a purchaser has agreed by a registered deed to release the property sold of an existing mortgage but he fails to do so, the cause of action for a suit by the vendor on such covenant arises either on the date when such payment is to be made or at least not later than the date when the plaintiff called upon the defendant to fulfil it. Such a suit is not a "suit for land" and is governed by Art. 116 of the Ind. Limitation Act.). Art. 89 is applicable where the contract to indemnify is unregistered. Art. 113 shall apply if the suit is one for specific performance. For the question whether a provision in a sale deed is or is not a contract to indemnify, see *Kaliyammal v. Kolandavela*, 38 I. C.

2. On 19..., the plaintiff called upon the defendant in writing, to pay Rs. 12,500/- within three days to the said C. D., who had then agreed to accept the said sum in full satisfaction of his dues provided the same was paid to him within three days, and to pay the balance of the purchase money to the plaintiff.

3. The defendant did not comply with the said request and, on '....., the plaintiff paid, as he had to, Rs. 13,000/- to the said C. D. in satisfaction of his dues, and has thereby suffered damage.

Particulars of claim :

Purchase money unpaid	...	...	...	Rs. 15,000/-
Excess paid to C. D.	...	...	...	" 500/-
Interest on Rs. 15,000/- from				
(date of demand) to			at	
6 per cent. per annum	...	...	...	"
Total ...				Rs.

The plaintiff claims—

Rs.....

PLAINT.

545.

SALE OF LAND.

2. Purchaser v. Vendor.

CLAIM by Purchaser against Vendor for not deducting a good and marketable Title. (z)

1. By an agreement in writing, dated.....19..., it was agreed that the defendant would sell to the plaintiff, the house

188. Cf. *Tripura Charan v. Nikunja*, A. I. R. 1940 Cal. 360 (Where consideration left in the hands of the purchaser is insufficient to pay off mortgage, the vendee is entitled to retain the balance of the purchase money until vendor has provided funds necessary to free the property from encumbrance. The balance of the purchase money in the vendee's hands should not be regarded simply as a deposit of the money of the vendor, but it was a sum which the vendee was entitled to retain as security that the property sold should be free from encumbrance.

- (z) **Marketable title—what is :** Marketable title is one which could be forced on an unwilling purchaser under a contract for sale made without any special conditions, at all times and under all circumstances : *Pyrke v. Waddingham*, (1853) 10 Hare 1, folld. in *J. N. Duggan v. K. N. Taylar-khan*, A. I. R. 1938 Bom. 77 (case where the defendant contended that the title was marketable as the property was held in undisturbed possession for over 12 years.). If vendor's title depends on proof of disputed fact and if the vendor does not prove that fact he cannot be

situate at..... (more fully described in the schedule hereto annexed and marked 'A'), hereinafter referred to as 'the said property', for the price of Rs. 21,500/- of which Rs. 1000/- should be paid immediately as a deposit in part payment of the purchase money and the balance on.....19..., on which date the sale should be completed.

2. It was an express term of the said agreement that time should be deemed to be of the essence of the contract.

3. The said agreement also provided that the defendant should on or before.....19 .., deduce and make out a good and marketable title to the said property.

4. The plaintiff duly paid the said deposit and at all material times was ready and willing to perform his part of the agreement.

held to have made out good title : *Seetharamamma v. Patta Reddi*, A.I.R. 1940 Mad. 739.

- (2) **Cause of action and measure of damages** : In England, owing to the difficulties and uncertainty of the English law of real property, the purchaser's right to damages for breach of contract is governed by the special rule that where the breach of contract is occasioned by the vendor's inability, without his own fault, to show a good title, he (purchaser) shall be entitled to recover, as damages, his deposit, if any, with interest and his expenses incurred in connection with the agreement, but not more than nominal damages for loss of his bargain : *Flureau v. Thornhill*, (1776) 2 W. Black. 1078 ; *Bain v. Fothergill*, (1874) L. R. 7 H. L. 158 ; *Barnes v. Cadogan Developments Ltd.*, (1930) 1 Ch. 479, 488. In India, it has been held by a Full Bench of the Madras High Court, that under Sec. 55 (2) of the Transfer of Property Act, subject to any special stipulations to the contrary, certain stipulations will be presumed in every transaction of sale of immovable property and a warranty of title on the part of seller is one of those stipulations. Knowledge of the purchaser of any defect of title in the vendor, does not affect his right to recover damages : *Adikesavan Naidu v. Gurusnatha Chetty*, (1917) I.L.R. 40 Mad. 338 (F.B.). This case has been followed by other High Courts in India and it may now be taken as settled that the rule in *Flureau v. Thornhill* and restated in *Bain v. Fothergill* is not applicable to Indian conditions and that the purchaser is entitled to recover damages for breach of contract under Sec. 73, Indian Contract Act : *Nabin Chandra v. Krishna Barana*, (1911) I.L.R. 38 Cal. 458 ; *Abdulali v. Gokaldas*, A.I.R. 1927 Sind. 49 ; *Panna Lal v. Husain Beg*, A.I.R. 1924 All. 167. The mere fact of knowledge on the purchasers' part of the earlier transactions of the vendor will not disentitle the purchasers to insist upon proof of the vendor's title unless they had agreed to limit the nature of the enquiry into title or had agreed to accept the title of the vendor such as it was.When a vendor's title depends not upon a question of law but upon proof of a disputed fact, that fact must

5. The defendant has not deduced a good and marketable title to the said property.

(Here set out particulars of the defects in title)

6. By reason of the premises, the plaintiff has lost the use of the money paid by him as deposit aforesaid and has incurred expenses in investigating the title of the defendant and has otherwise suffered damage.

Particulars of claim :

The plaintiff claims—

Rs....., damages.

PLAINT.

546.

SALE OF LAND.

3. Vendor's Creditor v. Vendor and Purchaser.

CLAIM by Vendor's Creditor for Purchase Money payable to him under an Agreement between the Vendor and the Purchaser. (a).

1. On 19..., the defendant A.B. borrowed Rs. 10,000/- from the plaintiff, verbally agreeing to repay the said loan on

be proved and if the vendor does not prove it, he cannot be held to have made out a good title: *Seetharamamma v. Patta Reddi*, A. I. R. 1940 Mad. 739. Cf. *Sakharam v. Jairam*, A.I.R. 1933 Nag. 263 (The loss will be estimated on the basis of the difference between the contract price and market price on the day of the breach). The word "compensation" used in the Sec. 19, Specific Relief Act, must be understood in the sense of damages contemplated in Sec. 73 of the Indian Contract Act. The plaintiff is entitled to the recovery of the earnest money, not as money had and received by his vendor defendant but only as part of the damages he has suffered and by way of damages: *Pratapchand v. Raghunath*, A.I.R. 1937 Nag. 243. For purchaser's right to sue for the recovery of advance paid, see *A. K. Oosman v. Gurtajee*, A.I.R. 1935 Mad. 903.

(z) **Interest on the deposit amount :** It can be recovered under the provisions of Sec. 18 cl. (d) of the Specific Relief Act IX of 1877: *Municipal Committee, Gujranwala v. Prabhu Dial*, A.I.R. 1933 Lah. 556, provided there is nothing in the conduct of the purchasers to disentitle them to the same: *Seetharamamma v. Patta Reddi*, *supra*. Interest is recoverable on the amount of purchase money paid under S. 55, sub-s. (6), cl. (b), Tr. of Pty. Act: *Kapadvanj Municipality v. Ochhalal*, A.I.R. 1928 Bom. 328, 332.

(a) **Reference :** *Dwarika Nath Ash v. Priyanath*, (1917-18) 22 C.W.N. 279 (The claim in this case was not based on novation of contract. It was based on the ground that the purchaser-defendant was in essence a

demand with interest at 9 *per cent. per annum*, and, by way of security for the said loan, executed on the same date a promissory note in favour of the plaintiff.

2. Thereafter, by a registered conveyance, dated.....19..., the defendant A.B. transferred his properties (fully described in the schedule hereto annexed and marked "A") to the defendant C.D. for Rs. 12,000/- without receiving any payment, and, on that very date, the said defendant C.D. executed an agreement in writing in favour of his vendor, expressly undertaking to pay to the plaintiff his dues out of the consideration money retained in his hands.

3. On 19..., the said arrangement was communicated to the plaintiff in writing by the defendant A.B. (or, On 19..., the plaintiff by a mere accident came to know of the said arrangement).

4. The plaintiff has not received any payment towards his dues in spite of demand in writing made on

Particulars of claim :

Principal Sum...	...	...	Rs.
Interest from.....up to.....			"
Total ...			Rs.

The plaintiff claims—

Rs..... from C. D. alternatively, from A.B.

DEFENCE.

547.

SALE OF LAND.

trustee of the money in his hands for the benefit of the plaintiff, who could clearly enforce it, whether or not the arrangement had been communicated to him : The rule enunciated in *Tweedle v. Atkinson*, (1861) 1 B. & S. 393 is not applicable to this country. The plaintiff's suit is maintainable, being based on the original debt.).

- (a) **Other cases :** Where a contract between A. and B. is intended to secure a benefit to C. as a *cestui que trust*, C. may sue to enforce the trust : *Khwaja Muhammad Khan v. Husaini Begam*, (1909-10) I.L.R. 37 I.A. 152 ; *Khirod Behari v. Man Gobinda*, (1934) I.L.R. 61 Cal. 841 ; *Adhar Chandra v. Dolgobinda*, (1936) I.L.R. 63 Cal. 1172 ; *Subbu Chetti v. Arunachalam Chettiar*, (8930) I.L.R. 53 Mad. 270 ; *Hare Krishna v. Fakir*, (1935-36) 40 C.W.N. 703 ; *District Board, Malda, v. Chandra Ketu*, (1936-37) 41 C.W.N. 1008 ; *Motilal v. Akbarbhai*, A.I.R. 1939 Bom. 309 (A person who merely takes a benefit under a contract cannot sue directly upon that contract without invoking the doctrine of trust or agency).

Vendor v. Purchaser.

DEFENCE to a Claim by Vendor for Damage for not completing Purchase. (b)

The defendant denies that he accepted the plaintiff's title as alleged or at all. The plaintiff had, and has, no title to the said premises and could not, and cannot, convey the said premises to the defendant in terms of the said contract.

Or,

The plaintiff could not deduce a good and marketable title to the said premises in terms of the said contract and has thereby prevented the defendant from completing the purchase.

DEFENCE.**548.****SALE OF LAND.**

Vendor v. Purchaser.

DEFENCE to a Claim by Vendor for alleged Default on the part of the Purchaser to release the Property sold of an existing Mortgage. (c)

1. The said sum of Rs. 15,000/- was insufficient to pay off the mortgage subsisting in favour of C.D. who, on tender made on refused to accept the said sum in full satisfaction of his claim.

2. On 19..., the defendant called upon the plaintiff (verbally, or, in writing, as the case may be) to provide funds necessary to free the property from the said encumbrance.

3. The plaintiff failed and neglected to provide the necessary funds, and, accordingly, the said sum of Rs. 15000 was and is retained by the defendant as security that the said property sold to him should be free from encumbrances.

PLAINT.**549.****SLANDER.****CLAIM by Trader for Slander in Relation to his Profession or Trade. (d).**

(b) This is a defence to Form No. 543.

(c) This is a defence to Form No. 544.

(c) See notes under Form No. 544.

(d) **Reference :** *Thomas v. Jackson*, (1825) 3 Bing. 104 (The question in this case was whether the action was maintainable without proof of special damage. *Held :* The words which imputed to a man fraudulent conduct in his business whereby he gained his bread were actionable with-

1. The plaintiff is a farmer and vendor of corn and carries on his trade at

2. On or about October 10th, 19..., the defendant falsely and maliciously spoke of the plaintiff in the way of his trade and in relation to his conduct therein, to J. D., the words following, that is to say (here set out the actual words spoken), and meaning thereby that the plaintiff is a rogue and a swindling rascal and was guilty of dishonest practices in his said trade.

out proof of special damage.); *De Stempel v. Dunkels*, (1938) 1 All E.R. 238. It is however necessary for the plaintiff to prove (1) that at the time the words were spoken he carried on such profession or trade : *Bellamy v. Burch*, (1847) 16 M. & W. 590, and (2) that the imputation is connected with the duties of his profession : *Per Tindal, C. J.*, in *Doyley v. Roberts*, (1837) 3 Bing. N. C. 835, 840 ; cf. *Ayre v. Craven*, (1834) 2 Ad. & E. 2, 7 ; *Jones v. Jones*, (1916) 1 K.B. 351, 361, on appeal, (1916) 2 A.C. 481, where the law is laid down thus : "It is well settled that words spoken, although calculated to injure a person in his profession, vocation, or office, but not relating to his conduct or capacity therein, are not actionable *per se*."). See *Rahim Bakhsh v. Bachcha Lall*, (1929) I.L.R. 51 All. 509, 516, 517 (A malicious intent or an intent to damage the reputation of a person is not a necessary ingredient of actionable slander. Any words which have a tendency to hurt or prejudice a man in the exercise of his trade or business are actionable without proof of special damage.).

- (d) **Slander, if actionable without proof of special damage :** In England, no action for slander lies without proof of special damage, except (1) where the words charge the plaintiff with having committed a criminal offence : *Webb v. Beavan*, (1883) 11 Q.B.D. 609 ; (2) where the words impute that the plaintiff has been guilty of a criminal offence : *Gray v. Jones*, (1939) 1 All E.R. 798 (K.B.D.) ; (3) where the words impute that the plaintiff has a contagious disease of a particular kind : *Carslake v. Mapledoram*, (1788) 2 T.R. 473 ; (4) where the words are spoken of the plaintiff in relation to his office, profession or trade : *De Stempel v. Dunkels*, *supra* ; (5) where they impute unchastity or adultery to a woman or girl : Slander of Women Act, 1891, S. 1.

The trend of Indian decisions seems to be that the common law of England is applicable to India only in the Presidency towns where the High Courts administer the law which would have been applied by the Supreme Court. It was held in a Bombay case, that Parsis in Bombay being governed by the common law of England, an action for slander of women cannot be maintained without proof of special damage : *Hirabai v. Dinshaw*, A.I.R. 1926 Bom. 302, *folg. Bhooni Money v. Natobar*, (1901) I.L.R. 28 Cal. 452. The Madras High Court also held that a claim for damages by a Hindu woman in respect of an allegation of unchastity is sustainable in the original side of a High Court without

3. In consequence of the said words the plaintiff was injured in his credit and reputation as a vendor of corn, and in his trade, and the said J. D., who before the speaking of the words, was about to make a purchase of the plaintiff, refused to do so.

The plaintiff claims—

Rs..... damage.

PLAINT.

550.

SLANDER.

CLAIM by Medical Man for Slander in Relation to his Profession or Trade. (e)

1. The plaintiff is a Fellow of the Royal College of Surgeons

proof of special damage : *Narayana v. Kannamma*, (1932) I. L. R. 55 Mad. 727.

In the mufassil towns, the rule to be applied is the rule of justice, equity and good conscience, which has been generally understood to be principles of common law in England, so far as they are applicable to Indian society having regard to the circumstances of the case. But where the principles of common law in England are in a state of uncertainty, there is nothing to preclude the Court applying that view of the law which is essentially just and equitable : *Balammal v. Palandi*, A.I.R. 1938 Mad. 161. Thus, it has been held that an imputation of dishonesty to a person who is a tradesman, is actionable *per se* : *Rahim Bakhsh v. Bachcha Lall*, (1929) I.L.R. 51 All. 509. In a case imputing witchcraft to the plaintiff, Mookerjee J., held : "The English cases, *Rogers v. Gravatt*, (1596-97) Croke Eliz. 571, *Hughes v. Farrer*, (1628-29) Croke Car. 141, *Dacy v. Clinch*, (1658) Sid. 52, lay down that the words, "Thou art a witch and sorcerer" are a slander and are actionable without proof of special damage. But it is to be observed that under the criminal law of England when those slanders were uttered witchcraft was a crime punishable with death and therefore were actionable without proof of special damage. It would not be right to base our decision on the English authorities which were founded on the state of the criminal law prevalent at the time. I prefer to rest my conclusion on the ground that the words spoken in this case, which imputed the practice of witchcraft or sorcery are not words of mere vulgar abuse, that they were calculated not only to outrage her feelings but also to lower the estimation in which she was held by persons of her own class and to bring her into disrepute, and might indeed involve serious consequences to her, and, that under such circumstances, they are actionable without proof of special damage." *Shoobhages Koeri v. Bokhori Ram*, (1906) 4 C.L.J. 390, 397. See notes under Form No. 553.

(e) See *Edsall v. Russell*, (1842) 4 M. & Gr. 1090, and notes under Form No. 449.

and has been carrying on his profession as a surgeon in the city of and its neighbourhood for the last years.

2. On, the plaintiff performed an abdominal operation on the defendant's wife. On, the patient died.

3. On, the defendant falsely and maliciously spoke and published to one B. D. of the plaintiff in relation to his said profession, the words following:

"Mr..... (meaning the plaintiff) killed my wife."

4. The said words meant and were understood to mean that the plaintiff had acted in his said profession negligently and was unfit to be employed as a surgeon.

5. In consequence of the said words the plaintiff has been greatly injured in his credit and reputation and in his said profession.

The plaintiff claims—

Rs..... damage.

PLAINT.

" 551.

SLANDER.

CLAIM by Solicitor for Damages and Injunction for Slander in Relation to his Profession or Trade. (f)

1. The plaintiff is a solicitor, carrying on business at

2. In19..., the plaintiff acted as solicitor for the defendant in a suit instituted by the defendant against on the original side of the High Court of (Suit No..... of).

3. On or about, the defendant falsely and maliciously spoke and published to one A. B. of the plaintiff in the way of his profession as solicitor the following words :—

(Here quote the exact words).

4. The said words mean, and were understood to mean, that the plaintiff was guilty of dishonesty and unprofessional conduct in the discharge of his duties as a solicitor.

5. In consequence of the said words the plaintiff has been injured in his credit and reputation, and in his profession as a solicitor.

The plaintiff claims—

(1) Rs.....damages.

(2) An injunction to restrain the defendant from repeat-

ing the said slander, and from publishing any slander of a similar nature injuriously affecting or tending to affect the plaintiff in his said profession.

PLAINT.

552.

SLANDER.

CLAIM for Damages for Slander spoken of the Plaintiff in Court in Relation to his Trade. (g)

1. At all material times the plaintiffs were partners of the firm of M. R. P. which carried on an extensive business at as commission agents in the purchase and sale of grain.

2. In19..., one C. B. had agreed to purchase from the said firm through B. L., 200 bags of grain and paid through the said B. L. Rs. 200/- by way of earnest money. This transaction led to a criminal case filed by C. B. against B. L. under section 420 of the Indian Penal Code. The said case was dismissed on as false.

3. On 19..., during the trial of the said case and while the cross-examination of C. B. was proceeding, K., a vakil for B. L., asked C. B. whether the firm of M. R. P. was the biggest arhatia firm for grain in the city or not. C. B. answered the question in the affirmative.

4. The defendant, who was a muktear for C. B. in the said case, immediately upon hearing that answer, interjected the observation that they (meaning the members of the firm of M. R. P.) were the most dishonest men also in the city. These words were spoken in the presence of, and were audible to, the Magistrate, the peshkar, the lawyers, and other persons present in Court.

5. In consequence of the said words, the plaintiffs as members of the firm of M. R. P. were injured in their credit and reputation as dealers in grain.

The plaintiffs claim—

Rs.....damages.

- (g) **Reference:** *Rahim Bakhsh v. Bachcha Lall*, (1929) I. L. R. 51 AIL 500 (This case decides (i) that any words which have a tendency to hurt or prejudice a man in the exercise of his trade or business are actionable without proof of special damage; (ii) a malicious intent or an intent to damage the reputation of a person is not a necessary ingredient of actionable slander; (iii) for defamatory statements made by an advocate outside his office of advocate and with no reference to the subject-matter before the Court, and which therefore were necessarily made in

PLAINT.

553.

SLANDER.

CLAIM for Damage for Slander consisting in defamatory Abuse. (h)

1. The plaintiff is an orthodox Hindu Brahmin.

2. On or about....., the defendant falsely and maliciously spoke and published of the plaintiff to A.B. and C.D. (the plaintiff's neighbours) the words following, that is to say, the plaintiff's wife was an unchaste woman and the plaintiff, knowing her to be unchaste, cohabited with her and ate the food cooked by her and that he had lost his caste.

3. The plaintiff in consequence has been injured in his reputation and brought into contempt, hatred and ridicule.

The plaintiff claims—

Rs.....damages.

bad faith and were irrelevant, the advocate might be proceeded against in an action.).

(g) See notes under Form No. 449.

(h) **Reference :** *Sukan Teli v. Bipal Teli*, (1906) 4 C.L.J. 388 (In India, a distinction is made between abusive language which is defamatory and abusive language which is not defamatory. When words defamatory in themselves and not mere verbal abuse, have been used, a plaintiff is entitled to damage, though no special damage is proved to have been suffered), follg. *Parvathi v. Mannar*, (1885) I.L.R. 8 Mad. 175 and distg. *Girish Chunder v. Jatadhari Sadukhan*, (1899) I.L.R. 26 Cal. 653. An abuse may be uttered merely to cause an affront to the feelings of another or as an insult to his sense of dignity or self-respect without other persons knowing of it or without producing an impression in the minds of others hearing it, prejudicial to his position or dignity. It may, however, be uttered in circumstances tending, if not vindicated, to lower the person addressed in the estimation of the people present. In such a case the words will amount to defamation and will be actionable. When on the face of them, the words used by the defendant clearly must have injured the plaintiff's reputation, the plaintiff is entitled to recover a substantial amount without giving any evidence of actual pecuniary loss. General damages differ in this respect from special damages : *Bastiram v. Bansidhar*, 1939 Mar.I.L.R. 133 (Civ.) ; *Suraj Narain v. Sita Ram*, A.I.R. 1939 All. 461 (Slandorous words conveying insult can themselves be actionable and it is not necessary for the plaintiff to prove any pecuniary loss in order to succeed in his claim provided he succeeds in proving that the words used by the defendant excited against the plaintiff feelings of contempt and ridicule, etc.)

PLAINT.

554.

SLANDER OF TITLE.

CLAIM for Damages for Slander of Title to Goods. (i)

1. The plaintiff at all material times was and is a dealer in furniture.

2. On, the plaintiff in the ordinary course of his business advertised in the newspaper, the "Commercial Gazette" that on the following items of furniture, the property of the plaintiff (hereinafter referred to as the 'said goods'), would be sold by auction at :

3. On, the defendant falsely and maliciously caused to be printed and published in relation to the said intended sale the following statement in the form of a notice in the issue of the "Commercial Gazette" for June, 20th, 19... (Here set out the notice).

4. The defendant thereby meant, and was understood to mean, that the said goods mentioned in the plaintiff's advertisement were the property of the defendant and not of the plaintiff and that any person buying any of the said goods would do so at his own risk.

5. By reason of the publication of such notice, C., D., and F., all of who were desirous of purchasing the said goods or some of them, were deterred from attending and bidding at such sale

(h) **Measure of damages :** Vindictive damages should not be awarded, and a distinction should be drawn in awarding damages when the defendant acts from carelessness and when he acts maliciously. In the latter case, the plaintiff is entitled to full compensation for the pain suffered, and in the former to a sum sufficient to establish his innocence of the charges made : *Purvathi v. Mannar*, (1885) I.L.R. 8 Mad. 175.

(i) **Slander of title—definition of :** Slander of title is a false and malicious statement in writing, printing, or by word of mouth injurious to any person's title to property and causing special damage to such person. For the publication of such a statement, an action will lie : Fraser on Libel and Slander, 7th Edn., p. 45. It makes no difference whether the falsehood is oral or in writing : *Ratcliffe v. Evans*, (1892) 2 Q. B. 524, 532.

(i) **Cause of action :** In a suit for slander of title, it is necessary for the plaintiff to allege and prove (a) that the statements were untrue, (b) that they were made maliciously, (c) that the plaintiff has suffered special damage thereby : See Fraser on Libel and Slander, 7th Edn., p. 45 ; cf. *Nemi Chand v. Wallace*, (1907) I.L.R. 34 Cal. 495 ; *Imperial Tobacco Co. v. A. Bonnan*, (1927) 46 C.L.J. 455, 504-507 (which also decides, at p. 505, that in an action for damages for slander of goods, the precise words complained of, must be set out in the statement of action.). The

held on and abstained from purchasing any of the said goods, and no fair and reasonable bid was made for the said goods and the said auction sale failed altogether, and the expenses incurred by the plaintiff in advertising and preparing for the holding of the said auction sale were thrown away, and the plaintiff has been and is and will be prevented from selling the said goods.

6. By reason of the premises the plaintiff has suffered damages.

Particulars :

The plaintiff claims—

(1) Rs..... damages.

(2) An injunction to restrain the defendant from further publishing the said words or any of them or similar words disparaging the plaintiff's title to the said goods.

malice in such a case is any corrupt or wrong motive : *British Rly. etc. Co. v. C. R. C. Co.*, (1922) 2 K. B. 260, 268. Acting maliciously means acting from a bad motive. If the defendant's intent was bad and his words false, the plaintiff is entitled to damages. If a person make a statement which is partly *bona fide* and partly *mala fide*, and it occasions injury to another, that other is not entitled to recover damages, unless he can trace the injury to that part of the statement which is made *mala fide* : *Brook v. Rawl*, (1849) 19 L. J. Ex. 114, 115. Mere want of reasonable and probable cause is not sufficient : *Pitt v. Donovan*, (1813) 1 M. & S. 639. The law will, however, presume malice where the defendant is himself in no way concerned or interested in the property : *Pennyman v. Rabanks*, (1595) Cro. Eliz. 427. The necessity of alleging and proving actual temporal loss with certainty and precision has always been insisted on : *Ratcliffe v. Evans*, (1892) 2 Q.B. 524, 532. The disparagement need not necessarily relate to title but may be of any description, *e.g.*, a false statement that a person's house which he was proposing to sell was haunted : *Barrett v. Associated Newspapers*, (1907) 23 T.L.R. 666.

- (i) **Slander of title and libel :** A slander of title may also injuriously affect a man's reputation. Thus, in a given case, the words used, though directly disparaging goods, may also impute such carelessness, misconduct or want of skill in the conduct of his business by the trader as to justify an action of libel : *Per Cozens-Hardy, J.*, in *Griffiths v. Benn*, (1911) 27 T.L.R. 346, 350 (C.A.). Cf. *South Helton Coal Co. v. N. E. News Association*, (1894) 1 Q.B. 133, (C.A.) ; *Linotype Co. v. British Empire etc. Co.* (1899) 81 L.T. 331.
- (i) **Limitation :** Art. 36, Ind. Lim. Act. Where a person dissuades other persons from taking a certain building on rent by making false statements as to habitability and safety of the building, the person so representing is liable in tort, the tort being analogous to slander of title and falling within the broader description of injurious falsehood. The action

DEFENCE.**555.****SLANDER.****DEFENCE to a Claim for alleged Slander in relation to the Plaintiff's Trade or Business. (j)**

• The defendant may take one or more of the following defences:—

1. The defendant did not speak or publish the words set out in paragraph of the plaint or any of them.

2. The said words did not refer to the plaintiff.

3. The said words are incapable of the alleged or any defamatory meanings.

4. The said words without the alleged meanings are true in substance and in fact.

5. The said words were spoken honestly and in good faith by the defendant without malice on a privileged occasion.

(Give particulars).

6. In so far as the said words consist of statements of fact, they were in their natural and ordinary signification true in substance and in fact, and in so far as they consist of comment the same were fair and *bona fide* comment upon matters of public interest made by the defendant without any malice towards the plaintiff.

7. The plaintiff is a man of bad general reputation.

8. The plaintiff has alleged no special damage sufficient to support his claim.

is one for misfeasance independent of contract and Art. 36 applies to such action : *Hargovind v. Kikabhai*, A.I.R. 1938 Nag. 84.

- (j) **Defence of privilege :** In general, an action lies for malicious publication of statements which are false in fact and injurious to the character of another (within the well-known limits as to verbal slander) and the law considers such publication as malicious unless it is fairly made by a person in the discharge of some public or private duty whether legal or moral or in the conduct of his own affairs in matters where his interest is concerned. In such cases the occasion prevents the inference of malice which the law draws from unauthorized communications and affords a qualified defence depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency and honestly made, such communications are protected for the common convenience and welfare of society and the law has not restricted the right to make them within any narrow limits : *Toogood v. Spyring*. (1834) 3 L.J. Ex. 347, folld. in *Daulat Singh v. Prem Singh*, A.I.R. 1938 All. 447.

- (j) **Matters in mitigation of damages :** At the trial the defendant may prove

PLAINT.
556.
SOLICITOR.

1. Solicitor v. Client.

CLAIM by a Solicitor to recover settled Costs. (k)

1. The plaintiff is a solicitor of
2. In, the defendant employed the plaintiff as his solicitor to act in various matters.
3. Between and, the plaintiff acted as the defendant's solicitor in the said matters, and on, he delivered to the defendant his untaxed bills of costs in respect of work done.
4. Thereafter, on, an account was settled on the said untaxed bills between the plaintiff and the defendant, and the defendant executed in favour of the plaintiff a promissory note for Rs....., the amount of such settled costs, repayable on demand, with interest at 6 *per cent. per annum*.

Particulars of claim :

..... 19...	Principal sum ...	...	...	Rs.
	Interest at 6 <i>per cent.</i> from			
	..... to .....	...	..

Net amount due ... Rs.

The plaintiff claims—

Rs.....

PLAINT.
557.
SOLICITOR.

1. Solicitor v. Client.

CLAIM by a Solicitor for Professional Charges. (l)

in mitigation of damages that, (a) the plaintiff was a man of no reputation, and (b) the defendant did not act maliciously but in good faith: *Hobbs v. Tinling*, (1929) 2 K.B. 1, 17, 18. As to the necessity of pleading matters in mitigation of damages, see 'Damages' under "Special Defences", Pt. II, Chap. XVII, pp. 400, 401.

- (k) **Reference :** *Shamaldhone Dutt v. Lakshimani Debi*, (1909) I. L. R. 36 Cal. 493 (According to the practice prevailing in the original side of the High Courts, taxation of bills by solicitors is optional, and bills are often adjusted without taxation.).
- (k) **Limitation :** Art. 84, Ind. Lim. Act.
- (l) **Quantum meruit :** The claim for *quantum meruit* arises upon a promise to be implied from the request by the defendant to the plaintiff to

1. In 19..., the defendant retained and employed the plaintiff as his solicitor to act for the plaintiff in (here specify the nature of work).

2. The plaintiff acted as the solicitor for the defendant and duly performed the said work, and delivered to the defendant on a bill of costs amounting to Rs..... The defendant has not paid the said sum or any part thereof.

3. The said costs are reasonable costs.

The plaintiff claims—

Rs.....

PLAINT.

558.

SOLICITORS.

2. Client v. Solicitor.

CLAIM by Client against Solicitor for Damages for Professional Negligence. (m)

1. The defendant is a solicitor of and was employed by the plaintiff in 19... to advise him as to the best way of investing a sum of Rs. 10,000/-.

2. The defendant as such solicitor, in 19..., advised the plaintiff to invest the said sum of Rs. 10,000/- on a second mortgage of a house property situate at and recommended

perform services for him or for the acceptance of such services as plaintiffs rendered so as to imply a promise to pay for the same : *Liladhar v. Mathuradas*, (1934) I.L.R. 58 Bom. 583. An attorney is not entitled to any reward for services rendered to his client beyond his just and professional remuneration during the subsistence of the relationship of attorney and client, unless the client had competent and independent advice : *Brojendra v. Luckhimoni*, (1902) I.L.R. 29 Cal. 595.

(m) **Liability for negligence :** *Hart v. Frame*, (1839) 6 Cl. & Fin. 193 (In undertaking a client's business, an attorney or agent undertakes on his own part for the existence and due employment of skill and diligence. Where an injury is sustained by his client in consequence of the absence of either, he is responsible to his client for such injury.) ; *Donaldson v. Haldane*, (1840) 7 Cl. & Fin. 762 H. L. Cf. *William Shaw v. Frederick Jac*, A. I. R. 1932 P. C. 194 (where the solicitor was held not responsible for loss). Cf. *Official Trustee v. Mrs. Raeburn*, A. I. R. 1940 Rang. 207. (Where the principles for estimating the loss to the trust funds on account of investment on insufficient securities have been discussed. The said principles may by analogy be applied to this case.). See also notes under Form No. 559.

to the plaintiff that the said mortgage would be more than a sufficient security for the said amount.

3. At all material times the plaintiff reposed implicit confidence in the skill and integrity of the defendant as a solicitor, and relying on the advice of the defendant, the plaintiff invested the said sum on the said mortgage, and the defendant acted as the solicitor for the plaintiff in effecting the said mortgage.

4. In March 19..., the first mortgagees filed a suit to enforce their mortgage, and, in execution of their decree, brought the mortgaged property to sale on, when it fetched a net sum of Rs..... only which was just sufficient to pay off their claim. The mortgagor is a man of no means and the plaintiff has lost the whole of the said sum of Rs. 10,000/- together with interest thereon.

5. The defendant was guilty of professional negligence by advising the plaintiff to lend money on a worthless security.

6. The defendant was further guilty of professional negligence in not having the mortgaged property valued by a surveyor before he advised the plaintiff to invest any money on a second mortgage of the said property.

7. By reason of the premises the plaintiff has suffered damage.

Particulars :

..... 19... Principal	Rs. 10,000/-
Interest thereon at	
per cent. per annum from	
..... to	„
<hr/>	
Total ...	Rs.

The plaintiff claims—

(1) Rs.....

(2) Further interest until payment or judgment.

PLAINT.

559.

SOLICITORS.

2. Client v. Solicitor.

CLAIM by Client against Solicitor for damages for Misrepresentation and Breach of Fiduciary Duty. (n)

(n) Reference : *Nocton v. Lord Ashburton*, (1914) A. C. 932 (*Per* Viscount Haldane, L. C., at p. 956, "The solicitor contracts with his client to be skilful and careful. For failure to perform his obligation he may be made liable in contract or even in tort, for negligence in breach of a

1. The defendant is a solicitor of.....

2. In.....19..., the defendant advised the plaintiff to advance Rs. 60,000/—on the first mortgage of two buildings, premises Nos.....and.....in....., belonging to a man named.....and recommended the said mortgage to the plaintiff as a good security for that amount.

• 3. The plaintiff relying on the advice and skill of the defendant invested Rs. 60,000/- on the said mortgage, and the defendant acted as the solicitor for the plaintiff in the said transaction.

4. In.....19..., the defendant approached the plaintiff in order to have premises No....., hereinafter called 'the said property', released from the plaintiff's security and verbally represented to the plaintiff that if the plaintiff released the said property he would still have sufficient security and that a valuation made by the defendant showed this.

5. The plaintiff reposed implicit confidence in the defendant's judgment and integrity and believing in his representation and induced thereby, the plaintiff released the said property from his security.

6. The plaintiff instituted a suit on the mortgage and, on, realised a sum of Rs.....only by the sale of the mortgaged property. The balance of his claim, namely, Rs..... is not recoverable from the mortgagor personally.

7. The defendant had in breach of his fiduciary duty misrepresented to the plaintiff that after releasing the said property, the remaining security would be sufficient. The plaintiff has suffered loss in consequence of the release.

duty imposed on him..... This action ought properly to have been treated as one in which the plaintiff had made out a claim for compensation either for loss arising from misrepresentation made in breach of contract to exercise due care and skill (p.950). The proper mode of giving relief might have been to order Mr.....to restore to the mortgage security what he had procured to be taken out of it, in addition to making good the amount of interest lost by what he did (p. 958). Cf. *Donaldson v. Haldane*, (1840) 7 Cl. & Fin. 762 (liability for gratuitous services, where loss was suffered by the lender through the insufficiency of the security); *Whiteman v. Hawkins*, (1878) 4 C. P. D. 13 (where the solicitor omitted to ascertain that a third person had an equitable charge upon the land mortgaged to the plaintiff); *Brickenden v. London Loan & Savings Co.*, A.I.R. 1934 P.C. 176 (where the solicitor was held liable for damages for non-disclosure of material facts.).

8. In....., the plaintiff discovered that by getting the plaintiff to release the said property from his security the defendant himself obtained over the said property a further security for a mortgage of his own.

The plaintiff claims—

Rs.....damages.

PLAINT.

560.

SPECIFIC PERFORMANCE.

1. Sale of Land.

Purchaser v. Vendor.

CLAIM by Purchaser for Specific Performance of a Contract to sell Land with an Alternative Claim for Damages. (o)

1. By an agreement in writing, dated....., the defendant agreed to sell and the plaintiff agreed to buy at the price of Rs.....,

(o) **Readiness and willingness—averment of :** “In a suit for specific performance the plaintiff treats and is required by the Court to treat the contract as still subsisting. He has in that suit to allege, and if the fact is traversed, he is required to prove a continuous readiness and willingness, from the date of the contract to the time of hearing, to perform the contract on his part. Failure to make good that averment brings with it the inevitable dismissal of his suit..... Although so far as the Specific Relief Act is concerned there is no express statement that the averment of readiness and willingness is in an Indian suit for specific performance as necessary as it was always in England (S. 24(b) is the nearest), it seems invariably to have been recognised, and, on principle, their Lordships think rightly, that the Indian and the English requirements in this matter as the same.” : *Mama v. Sassoon*, (1927-28) L.R. 55 I.A. 360, 373, 375 ; *Narinjan v. Md. Yunus*, A.I.R. 1932 Lah. 265. After a bargain of sale has been repudiated by the vendor. the purchaser claiming specific performance can, in the absence of any evidence to the contrary, easily discharge the onus about readiness and willingness by simply showing that he is still ready and willing to carry out his bargain : *Brijmohan v. Ohandrabhagabai*, A.I.R. 1939 Nag. 173. Cf. *Ramakrishnayya v. Sreeramulu*, A.I.R. 1939 Mad. 547.

(o) **Suit for specific performance, if suit for land within the meaning of clause 13 of the Letters Patent :** A distinction must be drawn between a vendor's suit and a purchaser's suit for specific performance. A vendor's suit for specific performance, that is to say, for the purchase price is not a suit for land : *Land Mortgage Bank v. Sudurudeen Ahmed*, (1892) I.L.R. 19 Cal. 358, folld. in *Nagendra Nath v. Eraligool Co.* (1922) I. L. R. 49 Cal. 670 ; cf. *Velliappa Chettiar v. Govinda Dass*, (1929) I. L. R. 52 Mad. 809 (F. B.) ; *Sewdayal Ramjeedas v.*

a plot of land specified at the foot of the plaint, free of all encumbrances.

2. The said agreement provided, *inter alia*, that Rs. 1000/- should be paid immediately by the plaintiff to the defendant as a deposit in part payment of the purchase money and the remainder on the.....day of.....19..., on which date the sale should be completed.

3. The plaintiff duly paid the said deposit.

4. A draft conveyance was drawn up and was approved in writing by the parties on.....

5. Thereafter, the said draft conveyance was engrossed and stamped and, on.....19..., the date fixed for completion of the sale, the plaintiff offered to pay to the defendant Rs.... , the remainder of the purchase money but the defendant failed and neglected to execute the conveyance, whereupon on....., notice in writing was given by the plaintiff to the defendant requiring him to complete the sale on or before.....

Official Trustee of Bengal, (1931) I.L.R. 58 Cal. 768, 779. A purchaser's suit for specific performance is a suit for land : *All India Sugar Mills v. Sardar Sundar Singh*, I.L.R. (1937) 2 Cal. 644.

- (o) **Specific performance—an equitable relief** : A contract to be specifically enforceable must be mutual : *Debendra v. Lalit Krishna*, (1937-38) 42 C.W.N. 1090. The relief of specific performance is an equitable relief lying in the discretion of the Court : *Subbarayadu v. Tatayya*, 1937 M.W.N. 1158. See S. 22, Sp. Rel. Act ; *Saukhi Sah v. Mahamaya*, A.L.R. 1934 Pat. 518. The Court will not decree specific performance of an act which the defendant is not in a position to perform : *Lal Chand v. Hari Chand*, (1938-39) 43 C.W.N. 903.
- (o) **Specific performance and/or damages** : Under Sec. 19, Sp. Rel. Act, 1877, any person suing for the specific performance of a contract may also ask for compensation for its breach, either in addition to, or in substitution for, such performance. If in any such suit the Court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant and that the plaintiff is entitled to compensation for that breach, it shall award him compensation accordingly. If in any such suit the Court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly. Compensation awarded under this section may be assessed in such manner as the Court may direct. "Except as to the case provided for in the Explanation to Sec. 19 as to which there is introduced an express divergence from Lord Cairns' Act as

6. On the last mentioned date the plaintiff again offered to pay to the defendant Rs....., the remainder of the purchase money. Yet the defendant has not completed the sale.

7. The plaintiff has been and still is ready and willing to perform his part of the said agreement.

8. If the defendant completes the sale, the plaintiff shall claim damage to the extent of Rs....., which the plaintiff has suffered by reason of the defendant's wrongful refusal to complete the sale in accordance with the terms of the said agreement. The following are the particulars of such damage :

Particulars :

9. If the Court does not direct specific performance of the said agreement, then the plaintiff shall claim Rs..... damages made up as follows :

expounded in England, Sec. 19 embodies the same principle as the English Act and does not, any more than did the English statute, enable the Court in a suit for specific performance to award compensation for breach of the contract, where at the hearing the plaintiff has debarred himself by his own action from asking for a decree for specific performance : *Mama v. Sassoon*, (1927-28) L. R. 55 I. A. 360. Where the vendee on a breach of contract by the vendors claimed a decree for specific performance or in the alternative a refund with interest of the amount of the purchase price paid by him to the vendors but withdrew during the pendency of the suit his claim for specific performance and the vendors did not suffer from the suit, *Held* : that the vendee was not debarred from claiming the refund as the claim sought only *restitutio in integrum* and was not strictly one for damages : *Jaggo Bai v. Harihar Prasad*, A. I. R. 1940 All. 41. Cf. *Ramakrishnayya v. Sreeramulu*, A. I. R. 1939 Mad. 547. The word "compensation" in Sec. 19, Spec. Rel. Act must be understood in the sense of damages contemplated in Sec. 73, Contract Act : *Pratapchand v. Raghunath*, A. I. R. 1937 Nag. 243.

- (o) **Interest upon deposit** : In a suit on breach of contract by the vendor, the vendee is entitled to a claim for interest upon the amount of purchase price paid by him to the vendor and retained by him even after his repudiation of the contract : *Jaggo Bai v. Harihar*, A. I. R. 1940 All. 41.
- (o) **Where no time is fixed for performance** : Cf. Sec. 46, Ind. Cont. Act.
- (o) **Limitation** : Three years, under Art. 113, Ind. Lim. Act, from the date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused. Even a suit for specific performance of a registered contract comes under this Article and not under Art. 116 : *Srinivasa v. Rengasami*, (1908) I. L. R. 31 Mad. 452, 453.

The plaintiff claims —

(1) Specific performance of the said agreement.

(2) Rs..... damages under paragraph 8 hereof.

Alternatively—

(3) Refund of the said deposit of Rs....., together with interest thereon at the rate of Rs..... *per cent. per annum.*

(4) Rs..... damages, under paragraph 9 hereof.

PLAINT.

561.

SPECIFIC PERFORMANCE.

1. Sale of Land.

Purchaser v. Vendor.

**CLAIM by Purchaser for Specific Performance
and/or Damages. (p).**

IN THE HIGH COURT ETC.

O. O. C. JN.

1. By an agreement in writing, dated.....19..., it was agreed that the defendant would sell and the plaintiff would buy unincumbured premises No....., the particulars whereof are specified in the schedule hereto, upon, *inter alia*, the following terms :

(Here set out the terms).

2. Upon the signing of the said agreement, the plaintiff paid to the defendant the sum of Rs.....by way of deposit.

3. On....., the defendant's solicitors delivered to the plaintiff's solicitors the abstract of the defendant's title to the said property.

4. On the said.....19..., the plaintiff's solicitors forwarded to the defendant's solicitors their requisitions in writing in respect of such title.

(o) **Parties to suit :** Cf. Secs. 23 and 27, Spec. Rel. Act. Specific performance cannot be enforced against a minor: *Krishna Chandra v. Rishabha*, A. I. R. 1939 Nag. 265 ; cf. Sec. 24 (a).

(o) **Court fee :** The Court Fees Act, S. 7, Cl. X (a), according to the amount of the consideration.

(o) **Agreement for sale, if compulsorily registrable :** Expl. to Sec. 17, Ind. Reg. Act, inserted by the Amending Act of 1927. It is now settled law that a mere agreement for the sale of immovable property is not compulsorily registrable.

(p) See notes under Form No. 560.

5. On.....19..., the defendant's solicitors delivered to the plaintiff's solicitors, their answers to the said requisitions.

6. On.....19..., the plaintiff's solicitors forwarded the draft conveyance to the defendant's solicitors for approval. The said draft conveyance has not been returned to the plaintiff or his solicitors.

7. The defendant is wrongfully neglecting and refusing to complete the sale although thereunto requested in writing, datedand.....

8. The plaintiff has always been and is ready and willing to complete the said purchase in accordance with the terms of the said agreement.

9. If the defendant completes the sale, the plaintiff shall claim damage to the extent of Rs....., which the plaintiff has suffered by reason of the defendant's wrongful refusal to complete the sale in accordance with the terms of the said agreement. The following are the particulars of such damages :

Particulars :

10. If the Court does not direct specific performance of the said agreement then the plaintiff shall claim Rs..... damages made up as follows : (Here give particulars)

The plaintiff claims—

(1) Specific performance of the said agreement.

(2) Rs.....damages under paragraph 9 hereof.

Alternatively—

(3) Refund of the said deposit of Rs....., together with interest thereon at the rate of Rs.....*per cent. per annum.*

(4) Rs.....damages, under paragraph 10 hereof.

PLAINT.

562.

SPECIFIC PERFORMANCE.

1. Sale of Land.

Purchaser v. Vendor and Third-party Purchaser.

CLAIM by Purchaser for Specific Performance of Contract for Sale of Property subsequently sold to Third Party. (q).

1. By a registered agreement, dated..... 19..., the defendant A. B. agreed to sell to the plaintiff the house and premises

(q) Reference : *Kafiladdin v. Samiraddin*, (1929-30) 34 C.W.N. 698,701
(When subsequently to a contract for sale of a property, the said pro-

No..... Road, situate within the local limits of the jurisdiction of this Court, more particularly described in the schedule hereto, for the price of Rs,.....whereof Rs..... was payable forthwith as earnest money and the balance payable on the.....day of..... 19..., when the sale should be completed. It was also agreed that in these respects time was to be deemed to be of the essence of the contract.

2. The plaintiff duly paid the said earnest money and, on....., the date fixed for completion of the sale, tendered the balance of the consideration money and called upon the defendant A. B. to transfer the said property by a sufficient instrument, but the defendant A.B. has not done so.

3. The plaintiff has been and still is ready and willing to perform his part of the said agreement.

4. On.....19..., the defendant A.B. sold the said property to the defendant C.D. who purchased the same with notice of the aforesaid agreement for sale.

5. If the Court does not direct specific performance of the said agreement, then the plaintiff shall claim Rs.....damages made up as follows : (Here give particulars).

The plaintiff claims—

(1) A declaration that he is entitled to specific performance of the agreement dated.....

(2) That the defendants do execute a proper conveyance of the said property to the plaintiff.

erty is conveyed to a third party who purchases with notice of the contract and a suit for specific performance of the contract succeeds the proper decree to pass is to direct both the original contracting party and the subsequent purchaser to convey the property to the plaintiff.).

- (q) **Court fee :** Where the plaintiff not only seeks for specific performance of a contract of sale, but also asks that the defendant may be compelled to execute a conveyance and to deliver possession of the property to him, the suit is in substance one for possession of the property and should be valued under S. 7, cl. (v) of the Court Fees Act, according to the value of the subject-matter : *Madan Mohan v. Gaja Prasad*, (1911) 14 C. L. J. 159. But see *Ramanujam v. Sivalingam*, (1924) I. L. R. 47 Mad. 150 (where it has been held that a suit for specific performance and delivery of possession clearly falls within the description of a suit for specific performance, under cl. x (a) and the addition of the prayer for possession makes no difference. The suit cannot be properly described as a suit for possession of property and brought under cl. (v) of Court Fees Act, simply because a prayer for possession is added).

(3) Rs....., damage for withholding the transfer.

(4) Possession of the said property.

Alternatively—

(5) Refund of the said deposit of Rs....., together with interest thereon at the rate of Rs.....*per cent. per annum.*

(6) Rs.....damages, under paragraph 5 hereof.

PLAINT.

563.

SPECIFIC PERFORMANCE.

2. Agreement to lease.

CLAIM for Specific Performance of an Agreement to lease. (r)

1. By an agreement made between the plaintiff and the defendant contained in letters, dated respectively the and the, 19..., the defendant agreed to let, and the plaintiff agreed to take lease of, premises No..... for a term of 5 years from at a monthly rental of Rs..... .. inclusive of all taxes, payable by the 15th of each month, and it was also agreed that the defendant would execute a formal registered lease embodying those terms.

-
- (r) **Reference :** Sec. 27A, Specific Relief Act, which provides as follows :
 "Subject to provisions of this Chapter, where a contract to lease immovable property is made in writing signed by the parties thereto or on their behalf, either party may, notwithstanding that the contract, though required to be registered, has not been registered, sue the other for specific performance of the contract,—(a) where specific performance is claimed by the lessor, he has delivered possession of the property to the lessee in part performance of the contract ; and (b) where specific performance is claimed by the lessee, he has in part performance of the contract, taken possession of the property, or, being already in possession, continues in possession in part performance of the contract, and has done some act in furtherance of the contract : Provided that nothing in this section shall affect the right of a transferee for consideration who has no notice of the contract or the part performance thereof." This section applies to contracts to lease executed after the 1st. day of April 1930. The effect of the section is to supersede as from the 1st. day of April 1930 the decision in *Sanjib Chandra v. Santosh Kumar*, (1922) I.L.R. 49 Cal. 507, where Rankin J., held, that an agreement of lease inadmissible in evidence for want of registration would not support the suit for specific performance although the lessee had taken possession under the agreement. Under the Indian law the equity of part performance is an active equity, assisting the plaintiff, only in the case of

2. The plaintiff in part performance of the said contract took possession of the said premises and paid Rs....., rent for the first month, to the defendant onand has been and is ready and willing to perform the agreement on his part.

3. The defendant has failed and neglected to execute any formal lease in terms of the agreement, although repeatedly thereunto requested by the plaintiff. The last of such request was made in writing dated requiring him to execute the lease on or before.....

The plaintiff claims—

That the defendant do forthwith execute a formal lease in respect of the said property.

DEFENCE.

564.

SPECIFIC PERFORMANCE.

Vendor v. Purchaser.

DEFENCE to a Claim by Vendor for Specific Performance.

The defendant may take one or more of the following defences :—

1. The defendant denies the alleged or any agreement.
2. There was no concluded agreement between the plaintiff and the defendant.
3. The agreement is uncertain in the following respects (state in what respects).
4. The plaintiff was not ready and willing to convey the said premises according to the terms of the said agreement.
5. The plaintiff had not, nor, has he, any title to the said premises.
6. The plaintiff's title to the said premises was and is not such as the defendant is bound to accept. Particulars of the defect of title are as follows :

specific performance as provided in Sec. 27A, Spec. Rel. Act : *Dantmara Tea Co. v. Probodh Kumar*, (1936-37) 41 C.W.N. 54.

- (r) **Specific performance of an oral agreement :** Specific performance, under Sec. 27(a) of the Spec. Rel. Act, can be obtained if there is a contract to lease in writing. In a recent Calcutta case, *Gokul Chandra v. Haji Mohammad*, (1937-38) 42 C.W.N. 97, it was held that there could be in law, an oral contract to lease provided it does not create a present demise and operate as a lease. *Per Nasim Ali J.*, "The provisions of Sec. 27(a) are subject to the other provisions contained in Ch. II of the Spec. Rel. Act, including Chap. XII Sec. 27(a) does not abrogate the right to the specific performance of an oral agreement which is given by Sec. 12 of the Spec. Rel. Act."

7. The agreement was subject to an express condition that the plaintiff should deduce a good and marketable title to the said premises. The plaintiff failed to deduce a good and marketable title and, accordingly, the defendant rescinded the said agreement on..... by notice in writing.

8. The plaintiff has been guilty of unreasonable delay.

9. The defendant was induced to enter into the said agreement by the fraud (or misrepresentation) of the plaintiff.

10. The agreement was entered into by mutual mistake. (Give particulars).

11. The plaintiff's claim is barred by the Statute of Limitations.

PLAINT.

565.

TRADE MARK.

Registered Trade Mark.

CLAIM for Infringement of a registered Trade Mark. (s).

1. The plaintiff is a manufacturer of mustard.

2. On, the plaintiff registered a trade mark for mustard, consisting of the letter and numeral 'A.1', and has acquired

(s) **Mode of registration :** See Sec. 14, Trade Marks Act, 1940.

(s) **Right conferred by registration :** Under Sec. 21, Trade Marks Act, 1940 :

".....The registration of a person in the register as proprietor of a trade mark in respect of any goods shall, if valid, give to that person the exclusive right to the use of the trade mark in relation to those goods and,, that right shall be deemed to be infringed by any person who, not being the proprietor of the trade mark or a registered user thereof using by way of the permitted use, uses a mark identical with it or so nearly resembling it as to be likely to deceive or cause confusion, in the course of trade, in relation to any goods in respect of which it is registered, and in such manner as to render the use of the mark likely to be taken either—(a) as being use as a trade mark ; or (b) to import a reference to some person having the right either as a proprietor or as registered user to use the trade mark or to goods with which such a person as aforesaid is connected in the course of trade." Cf. Sec. 40 of the Act. Cf. *Thomas Bear & Sons (India) Ltd. v. Prayag Narain*, (1939-40) 44 C. W. N. 737.

(s) **Jurisdiction :** No suit for the infringement of a trade mark or otherwise relating to any right in a trade mark shall be instituted in any Court inferior to a District Court having jurisdiction to try the suit : Sec. 73, 'Trade Marks Act, 1940.

Note: On other points, see notes under Form No. 495, pp. 1182-1185. Cf. *Hoover, Ltd., v. Air-way, Ltd.*, (1936) 1 All E. R. 466 (Infringement by sale of reconditioned goods); *Farrow (Joseph) & Co. v. Seyfried*

ed the exclusive right to the use of the said trade mark in relation to the said mustard manufactured by him.

3. The defendant has infringed the plaintiff's trade mark. The following are the acts of infringement complained of :

4. The defendant threatens and intends to continue the said infringement.

The plaintiff claims—

(1) An injunction to restrain the defendant, his servants and agents from infringing the plaintiff's said trade mark.

(2) Rs.....damages, or, in the alternative, an account of profits and payment of the amount to be found due to the plaintiff on the taking of such account.

PLAINT.

586.

TRESPASS TO GOODS.

CLAIM for Trespass to a House and to Goods. (t)

1. The plaintiff carries on business of a gold-smith and silver-smith at his dwelling house No.....

2. On....., at about.....p.m., the defendants broke and entered the said house and took and carried away the tools and implements relating to the plaintiff's business and converted the same to their own use.

3. By reason of the premises, the plaintiff was prevented from carrying on his business for.....days and deprived of the profits which he otherwise would have made and also incurred expenses in procuring another set of tools and implements on19...

Particulars of special damage :

Loss of business from.....to..... Rs.

Expenses incurred in purchasing tools etc. ... „

Total „... Rs.

The plaintiff claims—

Rs.....damage.

(*John F. & Sons*, (1921) 38 R.P.C. 114 ; *Lewis v. Vine & Vine's Perfumery Co.*, (1913) 31 R.P.C. 12.

- (t) **Cause of action :** For an action for trespass simply, an owner will not be entitled to sue unless entitled to possession. But irrespective of an ordinary suit for trespass, such an owner has the right of ~~sue~~ ^{suit} if there has been some "permanent injury" to the goods in respect of which the trespass has been committed : *Udai Chand Pannalal v. Thansing Karamchand*, (1935) I.L.R. 62 Cal. 586.

PLAINT.**567.****TRESPASS TO GOODS.****CLAIM for Trespass and Injury to Animal.**

1. In.....19..., the plaintiff owned and possessed a horse (add description).

2. The defendant, on....., wrongfully took the said horse out of the plaintiff's stable at.....and rode the same at full speed for.....hours in the sun, thereby causing injury to the said horse.

Particulars of injuries :

3. By reason of the premises, the plaintiff has suffered damage.

Particulars of special damage ;

The plaintiff claims—

Rs.....damage.

PLAINT.**• 568.****TRESPASS TO GOODS.****DEFENCE to a Claim for Trespass and Injury to an Animal. (u₁)**

1. The defendant took the horse with the previous permission orally given to him by the plaintiff to ride the said horse from.....to.....and back.

2. Accordingly, on....., the defendant rode the said horse from.....to.....and back. He says that he rode the horse at a moderate pace and not at full speed.

3. The defendant denies that the horse sustained the alleged or any injuries as a result of his riding, or that the defendant is liable for any of the said alleged injuries.

(t) **Measure of damages :** Where the plaintiff has cause of action owing to the infringement of civil right but in which no real damage has been caused to him, he is entitled to nominal damages only: *Kumud Kanta v. Bignold*, A.I.R. 1923 Cal. 306 ; *Uday Chand Pannalal v. Thansing Karamchand*, (1935) I. L. R. 62 Cal. 586. A person who has moved the goods of another without a lawful right to do so even to put them out of the way, is liable only for the natural consequences of the removal: *Walker v. Sheerman*, (1862) 3 F. & F. 259. See Pollock on Torts, 14th Edn., pp. 279, 280. In assessing damages allowance must be made for any element of malice, using the expression "malice" in its extended meaning.

(t) **Limitation :** Art. 48, Ind.Lim.Act. Cf. Art. 49,

(u₁) This is a defence to Form No. 567.

PLAINT.**569.****TRESPASS TO GOODS.**

(Cattle Trespass).

CLAIM for Trespass to Land by Animal infecting Plaintiff's Animal. (u)

1. The plaintiff at all material times was and is the owner and occupier of a farm known as.....in.....

2. On or about.....19..., the defendant's sheep, about six in number, suffering from cattle plague, wrongfully entered upon the plaintiff's aforesaid farm and came in contact with the sheep, the property of the plaintiff, which were upon the said farm.

3. The next day the plaintiff's sheep, four in number, who had been in contact with the trespassing sheep, developed plague and died on....., in consequence whereof the plaintiff has lost the value and use of the said sheep and has suffered damage.

Particulars of damage :

The plaintiff claims—

Rs.....damage.

PLAINT.**570.****TRESPASS TO GOODS.**

(Cattle Trespass).

CLAIM for Trespass to Land by Animal causing Injury to Plaintiff's Animal. (v)

1. The plaintiff at all material times was and is the owner and

(u) **Reference :** *Theyer v. Purnell*, (1918) 2 K.B. 333 (*Held* : The doctrine of *scienter* had no application to an action founded on trespass and that the plaintiff was entitled to recover all such damages as were the natural and probable consequences of the defendant's sheep on his land)

(v) **Reference :** *Lee v. Riley*, (1865) 18 C.B.N.S. 722 (*Held* : (1) the defendant was responsible for his mare's trespass and it was unnecessary to give evidence that the mare was vicious to the defendant's knowledge, as it was through his negligence that the horse and the mare came together ; (2) the damage was not too remote), folld. in *Ellis v. Loftus Iron Co.*, (1874) L.R. 10 C.P. 10 (case of defendant's horse injuring plaintiff's mare by biting and kicking her through the fence separating plaintiff's land from the land of defendant who was held liable apart from any question of negligence on his part, in as much as the same act, if done by himself would have been a trespass.), consd. in *Smith v. Cook*, (1875) 1 Q.B.D. 79 ; and *Bradley v. Wallaces*, (1913) 3 K.B. 629, C.A.

occupier of premises No....., in The defendant at all material times was and is the owner and occupier of the adjoining premises No.....

2. By an agreement in writing, dated, made between the plaintiff and the defendant, the defendant agreed to keep in repairs the fence dividing the said two premises.

3. The defendant did not keep the said fence in proper repair in terms of the said agreement.

4. On 19..., in the night time, the defendant's mare strayed through a gap in the said fence into the plaintiff's land in which the plaintiff kept a horse.

5. The defendant's mare while on the plaintiff's land kicked the plaintiff's horse and broke his leg, in consequence whereof the plaintiff had to kill the said horse and has thereby suffered damage.

The plaintiff claims—

Rs..... damage, being the value of the said horse.

PLAINT.

571.

TRESPASS TO LAND.

CLAIM for Trespass to Land. (w)

1. The plaintiff at all material times was the owner and occupier of a land situate at in, hereinafter called 'the said land'.

(w) **Trespass to land—what is :** Every invasion of private property, be it ever so minute, is a trespass : *Entick v. Carrington*, (1765) 19 St. Tr. 1029. See Pollock on Torts, 14th Edn., p. 7. It is commonly described by the terms 'breaking and entering'. Thus, a trespass may be committed by driving a nail into a person's wall : *Lawrence v. Obee*, (1815) 1 Stark. 22 or by placing anything against his wall : *Gregory v. Piper*, (1929) 9 B. & C. 591 ; *Westripp v. Baldock*, (1938) 2 All E.R. 779 (Where ladders and planks were placed against plaintiff's wall by an adjoining owner) ; *Willcox v. Kettell*, (1937) 1 All E.R. 222 (case of encroachment by extension of concrete foundation beyond adjoining owner's wall). *Hiralal v. Ramdulare*, A.I.R. 1935 Nag. 237 (A search of another's house is, *Prima facie*, trespass, and the fact that the search was made in good faith does not justify the trespass, nor is it necessary for the plaintiff to prove that damage was actually committed) ; *Ma on v. K.V.A.L.M. Chettyar*, A.I.R. 1940 Rang. 100 ; *Shamasuddin v. Abdul Aziz*, A.I.R. 1932 Lah. 423.

(w) **Party entitled to sue :** Trespass is a possessory action only to be brought by person in possession, and from time of possession : *Stannynough v. Cosins*, (1746) 94 E. R. 1002. "In order to maintain the action

2. On 19..., the defendant, by himself and his servants, broke and entered the said land and trampled and injured the crops (add description) of the plaintiff, growing upon the same. The plaintiff has thereby suffered damage. (Give particulars).

3. The defendant threatens to repeat and continue the said trespasses.

The plaintiff claims—

(1) Rs.....damage.

(2) An injunction to restrain the defendant, his servants and agents from continuing or repeating the said or similar trespasses.

plaintiff ought to have had possession, actual or constructive.”: *Per* Tindal, C. J., in *Topham v. Dent*, (1830) 6 Bing. 515. In trespass plaintiff need not make title: *Goslyn v. Williams*, (1720) 92 E. R. 900; *Revett v. Brown*, (1828) 5 Bing. 7 (Possession alone is sufficient). An owner would not be entitled to sue unless entitled to possession: *Udai Chand Panna Lal v. Thansing Karamchand*, (1935) I. L. R. 62 Cal. 586 (case of trespass to goods); *Milnapore Zamindari Co. v. Ram Kanai*, A. I. R. 1926 Pat. 130; *Currimbhoy & Co. v. Creet*, A. I. R. 1930 Cal. 113.

- (w) **Reliefs**: Pecuniary compensation is not an adequate or proper remedy for the injury caused by trespass; Courts in proper cases restrain the defendant by means of an injunction in addition to giving damages: *Jethalal v. Lalbhai*, (1904) I. L. R. 28 Bom. 298. No man can, by merely trespassing upon the land of another, and constructing costly buildings upon it, claim a right to retain possession of it. He has no right to compel the real owner to receive compensation for the land instead of the land itself: *Bene Ram v. Kundan Lal*, (1899) I.L.R. 21 All. 496 (P.C.); *Ladooram v. Durgaprasadarayudu*, A. I. R. 1938 Mad. 463 (In cases of actual encroachment or trespass by the encroacher on the land of owner the appropriate remedy is delivery of possession to the owner and not the award of damages.). Damage is not the gist of the action and the Court can award whatever amount it thinks right under the circumstances: *Soha Lal v. Amba Prasad*, A.I.R. 1922 All. 526 (1). The trespass may consist of a mere wrongful entry without causing actual damage, as by a man walking over another's ground. In such a case the damage recoverable will, in the absence of aggravating circumstances, be merely nominal: *Kumud Kanta v. Bignold*, A. I. R. 1923 Cal. 306. Where the trespass has been committed in a *bona fide* assertion of title, it is a case for award of nominal damages: *Shashti Bhusan v. Ramjas*, A. I. R. 1924 Pat. 402. But, substantial damages may be recovered, though no loss or diminution in value of property may have occurred, and exemplary damages may be awarded in an action for wanton trespass on land persisted with violent and intemperate behaviour: *Ramaswami v. Suppiah*, A. I. R. 1935 Mad. 699.

PLAINT.

572.

TRESPASS TO LAND.

CLAIM for Injunction for Trespass to Land committed by a
Joint Tenant. (x).

1. The plaintiffs and the defendant are joint owners and occupiers of 15 *biswas* of land in Mauza in hereinafter called 'the said land'.

2. In 19..., the defendant without the knowledge or consent of any of the plaintiffs started erecting a pucca building on 5 *biswas* of the said land. The land so built upon is greatly in excess of what would come to the defendant's share on partition and is by far the most valuable portion of the said land.

3. The plaintiffs came to know of the said construction of the building on, and immediately thereafter orally called upon the defendant to desist, but he has not done so.

4. The defendant is claiming the land so built upon as his exclusive property and threatens to continue the said construction.

(w) **Limitation :** For compensation for trespass upon immovable property, 3 years from the date of the trespass ; Art. 39, Ind. Lim. Act. Trespass by occupation of land is a continuing wrong which is actionable from day to day.

(x) **Cause of action :** According to the Allahabad High Court one of several joint owners of land is not entitled to erect a building upon the joint property without the consent of the other joint owners notwithstanding that the erection of such building may cause no direct loss to the other joint owners : *Shadi v. Anup Singh*, (1890) I. L. R. 12 All. 436 (F.B.), folld. in *Nojju Khan v. Intiazuddin*, (1896) I.L.R. 18 All. 115. The Calcutta High Court, however, has held that there is no such broad proposition that one co-owner is entitled to an injunction restraining another co-owner from exercising his rights absolutely and without reference to the amount of damage to be sustained by the one side or the other from the granting or withholding of the injunction..... Unless there is ouster or other substantial injury, no restrain should be put and no injunction should be granted. Sole occupation by itself is not ouster unless it is attended by an assertion of a hostile title : *Akshay Kumar v. Bhajayobinda*, (1930) I.L.R. 57 Cal. 92. *Hans Raj v. Jagat Singh*, A. I. R. 1938. Lah. 208 (construction of an overhanging structure in assertion of an exclusive right to a lane which is alleged by the plaintiff to be joint, amounts to an injury so far as the plaintiff's rights are concerned and a suit for demolition of the structure is maintainable).

The plaintiffs claim—

(1) A declaration that the land so built upon is the joint property of the plaintiffs and the defendant.

(2) An injunction to restrain the defendant from proceeding further with the construction of the building.

(3) A mandatory injunction directing that the building so far as it has proceeded be pulled down.

PLAINT.

573.

TRUSTS.

Public Charitable Trusts.

CLAIM for Administration of a Public Charitable Trust under Sec. 92 of the C. P. Code. (y)

1. A. B., late of....., by an indenture of trust, dated July 3rd 19..., conveyed all his house properties situate in Benares, specified in the said indenture and also set out in the schedule hereto, to himself and the defendant C. D. as trustees, to hold the same upon trust following, namely, to maintain out of the income of the said properties a charitable dispensary, called....., situate at Benares, for the exclusive benefit of the.....community of the locality.

2. The said deed provided that in the event of the death of a trustee the survivor would be entitled to nominate in writing a successor.

3. A. B. died December 10th, 19..., whereupon the defendant C. D., the surviving trustee, on....., duly appointed the defendant B. F. as the trustee in place of the deceased.

4. The defendants are guilty of mismanagement and breaches of trust. The following are all the particulars of mismanagement and breaches of trust that the plaintiff can give before discovery :

5. Due to the mismanagement and breaches of trust on the part

(y) **Parties to suit :** See 'Suits under Sec. 92, C. P. Code under "Classes of Persons", Pt. II, Chap. IX, pp. 175-179.

(y) **Pleading breaches of trust :** Breaches of trust must be pleaded unless the trustee has refused to show the trust account : *Shirinbai Dinshaw v. Navroji Pestonji*, A.I.R. 1936 Bom. 30.

(y) **Limitation :** Art. 120, Ind. Lim. Act. A claim for an account of the corpus of trust funds which became vested in the trustees falls within the ambit of Sec. 10, Ind. Lim. Act and is not barred by limitation ; but a claim for an account of the interest which the trustee ought to have earned for the trust funds but failed to earn is governed by

of the defendants as such trustees, the said charitable dispensary has been closed down since.....and it has become necessary for the Court to take up the administration of the trust.

6. The plaintiffs are members of.....community of Benares and are interested in the administration of the trust. On....., the plaintiffs obtained the consent of the Advocate-General of.....to institute this suit.

The plaintiffs claim—

(1) Removal of the defendants as trustees and appointment of new trustees in their place.

(2) Framing of a proper scheme for the administration of the trust.

(3) Appointment of a receiver of the trust properties.

(4) An account of the dealings of the defendants with the income of the trust properties and payment of the amount to be found due upon the taking of such account to the new trustees.

PLAINT.

574. TRUSTS.

Private Trust.

CLAIM by Beneficiary against the Legal Representatives of a deceased Trustee for Account and Payment of Trust Money. (z)

1. One P. died in 19..., leaving a widow and the plaintiffs, his two sons, then minors.

Art. 120 : *Official Trustee v. Mrs. Raeburn*, A.I.R. 1940 Rang. 207 ; cf. *Shirinbai Dinshaw v. Navroji Pestonji*, A.I.R. 1936 Bom. 30.

- (z) **Reference :** *Chintaman v. Khanderao*, (1928) I.L.R. 52 Bom. 184 (*Per* Martin, C.J., "The money was vested for a specific purpose. It was given to for the boys—for their benefit and education. The section applicable is, section 10 of the Ind. Lim. Act. Under Art. 98, the period of limitation for making good out of the general estate of a deceased trustee the loss occasioned by a breach of trust was three years. But that is the case of an ordinary breach of trust and not one covered as here, by Sec. 10.) *folg. Bhurabhai v. Bai Ruzmanti*, (1908) I.L.R. 32 Bom. 394. But compare *Mt. Sahaudra Bai v. Shri Deo Radha Ballabhji*, A.I.R. 1938 Nag. 30 (Where a suit was brought against a daughter in respect of a breach of trust committed by her father. She herself was not a trustee, and she had not committed any wrong act : also the defalcated money was not in her possession ; nor was there anything else in her hands which could be said to represent it : *Held* : that the suit against her was clearly one to make good the

2. The assets of P. consisted in part of certain moneys coming under a Provident Fund and of certain other moneys.

3. In 19..., P.'s widow as the natural guardian of the plaintiffs handed over Rs. 5000/- out of the said moneys to her brother R., since deceased, for the benefit and education of the plaintiffs during their minority.

4. R. applied part of this trust money for that purpose, but after 19..., he committed breach of trust by not applying any part of the trust money for that purpose.

5. R. died in 19..., intestate, leaving him surviving the defendants, his sons and legal representatives.

6. The plaintiffs attained majority respectively on and

7. On 19..., the plaintiffs demanded from the defendants an account of the trust money and refund of the balance of the trust money in their hands; but the defendants have failed and neglected to comply with the said demand.

The plaintiffs claim—

(1) An account of the trust money.

(2) Payment of the amount shown to be due to the plaintiffs upon the taking of such account, out of the general estate of the deceased trustee in the hands of the defendants.

loss occasioned by her father's breach of trust out of his general estate To such a suit Art. 98 would apply.).

- (z) **Essentials of Sec. 10, Ind. Lim. Act :** In order to bring a case within the purview of Sec. 10, there must be a trust for a specific purpose, i.e., a purpose that is either actually or specifically defined or a purpose which from the specified terms can be certainly affirmed : *Annamalai Chettiar v. Muthukaruppan*, (1930-31) L.R. 58 I.A. 1. Cf. *Mahomed Habeeb v. Anjuman Ara Begum*, (1935) I.L.R. 62 Cal. 393. The purpose of following the properties in the hands of the trustees, referred to at the end of Sec. 10, must be the purpose of restoring it to the trust, which is specified in the earlier part of the section : *Bibhu Buusan v. Anadi Nath*, (1934) I.L.R. 61 Cal. 119. It is not necessary that the property followed should be identical property in respect of which a breach of trust has been committed. It can be anything into which the original property has been converted, whatever form the conversion may have taken, provided of course the one can be clearly and definitely connected with the other. But under Sec. 10, whatever the form the original property may have taken, it is essential that it should be in the hands of the person sued : *Mt. Sahaudra Bai v. Shri Deo Radha Ballabhji*, A.I.R. 1938 Nag. 30.

PLAINT.

575.

WAY.

Private Way.

CLAIM for obstructing a Private Right of Way. (a).

1. The plaintiff at all material times was and is the owner and occupier of the house and premises No..... at, hereinafter called 'the said premises', and was and is entitled to a right of way from the said premises over the defendant's land to a public highway called, and back again from the said highway over the said land to the said premises for himself and his

(a) Private right of way—how acquired : Sec. 26 (1), Ind. Lim. Act :

".....Where any way or watercourse, or the use of any water or any other easement (whether affirmative or negative) has been peaceably and openly enjoyed by any person claiming title thereto as an easement and as of right without interruption, and for twenty years, the right to such access and use of light or air, way, watercourse, use of water, or other easement shall be absolute and indefeasible. Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested," A party cannot allege his right to an easement generally, but should specifically state the manner in which he claims title to the easement, whether by grant (actual or lost), prescription at common law, or under the Easements Act : *Manmatha Nath v. Rakhal Chandra*, A. I. R. 1933 Cal. 215 ; *Harris v. Jenkins*, (1882) 22 Ch. D. 481 ; *Palmer v. Guadagni*, (1906) 2 Ch. 494. Subject to exceptions an ordinary right of way would not pass on severance unless language is used by the grantor to create a fresh easement : *Annapurna v. Santosh Kumar*, I. L. R. (1937) 2 Cal. 727. Where two tenements are severed, the grantee takes by an implied grant all quasi-easements of an apparent and continuous nature. A right of way is not classed generally amongst quasi-easements of such a nature unless there is a formed road over the quasi-servient tenement at the time of the severance : *Dakshina Ranjan v. Surendra*, (1934-35) 39 C. W. N. 1202.

- (a) **Kinds of way :** By the common law of England there are three distinct classes of rights of way and other similar rights. First, there are private rights in the strict sense of the term vested in particular individuals or the owners of particular tenements, and such rights commonly have their origin in grant or prescription. Secondly, there are rights belonging to certain classes of persons, certain portions of the public, such as the freemen of a city, the tenants of a manor, or the inhabitants of a parish or village. Such rights commonly have their origin in custom. Thirdly, there are public rights in the full sense of the term which exist for the benefit of all the Queen's subjects ; and the source

servants on foot (and with carts and cattle) at all times of the year.

2. The position of the way and *terminii* thereof are shown in the plan hereto annexed and marked 'A.'

3. The said way was peaceably and openly enjoyed by the plaintiff as an easement and as of right, without interruption, and for twenty years until such time as hereinafter mentioned (or, The plaintiff and his predecessors in title enjoyed the said right of way from time immemorial, or, by the grant of the said land from....., then the owner in possession thereof, by deed dated.....).

4. The defendant on, wrongfully obstructed the said way by erecting a fence in the said land.

The plaintiff claims—

(1) A mandatory injunction directing the defendant to remove the said obstruction.

(2) An injunction to restrain the defendant, his servants and agents from repetition of the acts complained of or of acts similar thereto.

(3) Damages.

PLAINT.

576.

WATER-COURSE.

CLAIM for obstructing a Water-course. (b).

1. The plaintiff at the times material hereto was, and is, the owner and occupier of (or is possessed of) land situate in the village of, district of, fully described hereunder, and hereinafter called 'the said land'. Through the said land there runs a stream known as, and as such riparian owner and occupier the plaintiff was and is entitled to the natural flow of the said stream to and through the said land.

of these is ordinary dedication : *Chuni Lall v. Ram Kishen* (1888) I. L. R. 15 Cal. 460, 464 (F. B.); cf *Mt. Ram Kali v. Munna Lal*, I. L. R. (1939) All. 754.

(a) **Particulars to be given :** See 'Right of way' under "Particulars", Pt. II, Chap. XX, pp. 507, 508.

(a) **Form of decree :** The decree allowing a right of way should state definitely the limits of pathway : *Ramhary Pal v. Nidhi Mahanty*, A. I. R. 1934 Pat. 420.

(b) **Riparian rights :** Every riparian proprietor has a natural right to use the water of a stream which flows past his land equally with other proprietors ; to have the water come to him undiminished in flow, quantity

2. The defendant on or about 19..., cut the bank of the stream at and thereby diverted large quantities of water thereof away from the said land and deprived the plaintiff of the flow of water to which he was entitled to and through the said land.

3. The defendant still continues such obstruction and diversion and threatens and intends to continue the same.

4. By reason of the acts hereinbefore complained of, the plaintiff has suffered damage and will continue to suffer damage as long as such obstruction and diversion last.

Particulars of special damage :

The plaintiff claims—

(1) Rs....., damages.

(2) An injunction to restrain the defendant, his servants and agents from continuing or repeating the said or similar obstruction and/or diversion so as to interfere with the plaintiff's said rights.

DEFENCE.

577.

WATER-COURSE.

and quality, and unaffected in temperature ; and to go from him without obstruction : *Hanuman Prasad v. Mendiva*, A. I. R. 1935 All. 836 ; *Dawood v. Tuck Shein*, (1930-31) L.R. 58 I.A. 80. For extent of right, see *Secretary of State v. Subbarayudu*, (1931-32) L.R. 59 I.A. 56. Owner of upper holding can use as much water for irrigation as convenient provided supply to owner of lower holding is not materially diminished —Owner of lower holding cannot restrain owner of upper holding from use of water without proof of damage actual or feared : *Ah Li v. U San Baw*, A. I. R. 1939 Rang. 446 ; *Sethuramalinga v. Ananda*, A.I.R. 1934 Mad. 583 (2) ; cf. Sec. 7, iii. (j) of Easements Act, 1882 ; *Jagannadharaju v. Rajah of Vixanagaram*, A. I. R. 1937 Mad. 310. Right to surplus water flowing from another person's land through artificial channel must be proved by prescription : *Ah Li v. U San Baw*, *supra* ; *Ghulam Mohideen v. Secy. of State*, A.I.R. 1935 Mad. 700 ; *Sheikh Fakir v. Moslem Mandal*, A. I. R. 1935. Cal. 253. The rights of the riparian owner are not founded on a right of property in the water, nor on prescriptions, but they exist *ex jure* natural as incident to the property in the land ; *Chasemore v. Richards*, (1859) 7 H.L.C. 349.

- (b) **Limitation :** Under Art. 37, Ind.Lim.Act, 3 years from the date of obstruction. Obstruction to water-course is a continuing wrong : *Rajrup Koer v. Abul Hossain*, (1881) 6 Cal. 394 ; *Sona Patil v. Laxman*, A.I.R. 1935 Nag. 189.

DEFENCE to a Claim for obstructing a Water-course. (c).

1. The plaintiff was not and is not the owner or occupier of the said land.

2. The plaintiff was not entitled to the flow of the said stream to and from the said land as alleged or at all.

3. If, which is not admitted, the plaintiff was entitled to the flow of the said stream, the defendant says that, at the time of the acts complained of by the plaintiff, the defendant was possessed of a farm to the south of the said stream, the occupiers whereof for twenty years before this suit peaceably and openly enjoyed as of right and without interruption, the right of diverting and using the water of the said stream for purposes of irrigation of the said farm of the defendant; and the acts complained of were uses by the defendant of the said right.

4. In the alternative, the defendant states that the acts complained of have not caused any material injury to the plaintiff.

PLAINT.**578.****WORK.****CLAIM by a Painter for Reasonable Remuneration for Services rendered. (d).**

1. The plaintiff is a painter by profession.

2. Between January 5th, 19... and April, 12th, 19..., the plaintiff executed certain oil paintings, specified in schedule "A" hereto, for the defendant, at his verbal request. There was no express agreement as to the sum to be paid to the plaintiff for his services.

3. The services were reasonably worth rupees.

4. The defendant has not paid the said sum or any part thereof in spite of demand in writing made on 19...

The plaintiff claims—

Rs.....

(c) This is a defence to Form No. 576.

(c) Under certain circumstances and provided no material injury is done, water may be diverted by the upper riparian owner for the purpose of irrigation subject to the limitation that the amount taken shall not be so much as to hurt the rights of the inferior owner to have stream passed on to him practically undiminished. Thus in any case there should be no material injury to the flow of water down the stream : *Sethuramalinga v. Ananda*, A.I.R. 1934 Mad. 583 (2).

(d) Cause of action : Sec. 70, Ind. Cont. Act. Where one has expressly or impliedly requested another to render him a service without specifying

PLAINT.

579.

WORK.

CLAIM by an Artist for being prevented from completing a Contract for Work. (e).

1. The plaintiff is an artist.
2. By an agreement in writing, dated, the plaintiff agreed to paint, in accordance with the specification mentioned in the said agreement, a portrait of a lady whom the defendant was about to marry, and the defendant agreed to pay Rs. 500/- for the portrait, inclusive of work, labour and materials.

any remuneration, but the circumstances of the request imply that the service is to be paid for, the law will imply a promise to pay *quantum meruit*, i. e., so much as the party doing the service has deserved or, as it is normally said, a reasonable sum. Thus, where a railway company got the benefit of the work of a contractor and the contractor did not do the work gratuitously in the absence of any settlement of the rates, the contractor was held entitled to get reasonable rates or market rates : *Bengal Nagpur Ry. v. Ruttanji Ramji*, (1935) I.L.R. 62 Cal. 175 ; affd. on appeal, I.L.R. (1938) 2 Cal. 72, P.C., (Interest cannot be awarded by way of damages under S. 73 of the Ind. Cont. Act, when it cannot be claimed under any provision of the law) ; *Liladhar v. Mathuradas*, (1934) I.L.R. 58 Bom. 583 (case of broker) ; *Satchidananda v. Nitya Nath*, (1923) I.L.R. 50 Cal. 878 (case of principal and agent).

- (d) **Limitation** : For the price of work done by the plaintiff for the defendant at his request, where no time has been fixed for payment, the period of limitation is 3 years from the time when the work is done : Art. 56, Ind. Lim. Act, See *Laxminarayan v. Shriram*, A.I.R. 1938 Nag. 286 ; *Ambica v. Nityanund*, (1903) I.L.R. 30 Cal. 687.
- (c) **Reference** : *Robinson v. Graves*, (1935) 40 Com. Cas. 217 (In this case, an interesting question was raised as to whether the contract was one for work and labour or was one for sale of goods within the meaning of Sec. 4 of the Sale of Goods Act, 1893. The Court of Appeal held, that in this case, the substance of the matter was an agreement for the exercise of the skill, and it was only incidental that some materials would have to pass from the artist to the man who commissioned the artist to paint the portrait. For these reasons, this was not a sale of goods, but that it was a contract for work, labour and materials. The plaintiff is entitled to recover, as damages, the full amount which he would have recovered if he had been allowed to complete the contract, less such expenditure the artist would have had to incur on the cost of the canvas, and the cost of paint to be put on the canvas.).
- (e) **Limitation** : Where the plaintiff in a suit for the recovery of a certain sum of money alleged to be due to the plaintiff for material supplied and work done makes no mention of the price of the materials as distinct

3. On 19..., before the portrait was completed, the defendant repudiated in writing the contract, and the plaintiff was thereby prevented from completing the portrait and has suffered damages.

Particulars :

Agreed sum	Rs. 500/-
Less saving of cost of canvas and other materials	„ 20/-
	<u>Rs. 480/-</u>

The plaintiff claims—

Rs. 480.....damages.

PLAINT.

580.

WORK.

Breach of Warranty.

CLAIM for Breach of Warranty as to Fitness of Materials in a Contract for Work and Materials. (f).

1. The plaintiff was the owner of a Six-Cylinder Essex Motor Car bearing registered No.....

2. On 19..., the plaintiff entrusted the said car to the defendants, who were repairers of motor cars, for repairs, and instructed the defendants in writing to execute such repairs as were

from the price of the work, and contains no reference whatsoever to two claims and there is only one indivisible claim, and that is for the balance of the money due to the plaintiff on the basis of a contract by which he was to be paid for everything supplied and done by him in connection with the contract work at a comprehensive rate, *Held*: that the suit falls neither under Art. 52 nor under Art. 56 but is governed by Art. 115 : *Mahomed Ghastia v. Siraj-ud-din*, A.I.R. 1923 Lah. 198. (F.B.).

(f) *Reference : G.H. Myers & Co. v. Brent Cross Service Co.*, (1934) 1 K.B. 46, 54, 55 (In a contract for work and materials the obligation of the person supplying the materials is certainly no less than that of the person supplying the goods in a contract for the sale goods. A person contracting to do work and supply materials warrants that the materials which he uses will be of good quality and reasonably fit for the purpose for which he is using them, unless the circumstances of the contract are such as to exclude any such warranty.).

necessary to cure a "knock" in the engine, and to renew any parts, which, in their opinion, required replacement.

3. The defendants, in pursuance of the said instructions, fitted six connecting rods to the engine of the said car, for which they charged Rs.....

4. On, while the car was on the road, one of the connecting rods through a latent defect broke, causing extensive damage to the engine.

Particulars of damage.

5. The plaintiff has had the engine repaired at a cost of Rs. 500/-.

The plaintiff claims—

Rs. 500/-, damage for breach of implied warranty of fitness of the materials supplied by the defendants as aforesaid.

PLAINT.

581.

. WORK.

Building Contract.

CLAIM by Contractor for being prevented from completing a Contract for Work. (g)

1. By a contract in writing, dated the.....19..., the plaintiff agreed to build for the defendant a dwelling house on certain land of the defendant situate at and beingin, according to the several elevations, plans and specifications thereto annexed, for the sum of Rs....., and to complete the said house on or before....., and the defendant agreed to pay the said sum to the plaintiff within one month after the completion of the said house.

- (g) **Cause of action :** "Where the employer prevents completion, the builder may sue for breach of contract. If the builder has done nothing the measure of damages is the loss which he would otherwise have earned. If the work is partially completed the measure of damages is the contract price, deducting therefrom what it would have cost to complete the work when it was stopped. But instead of suing for damages the builder may, at his option, treat the special contract as at an end, and sue for the value of the work actually done and of the materials supplied, or he may sue alternatively for damages or for the value of the work and materials." Hudson on Building Contract, 4th Edn., Vol. 1, p. 495. See *Gopal Ukera v. Bengal Nagpur Railway Co.*, (1932) 56 C.L.J. 285,

2. The plaintiff commenced to execute and carry out the said work according to the terms of the said contract and expended much labour and material thereon, but the defendant by notice in writing, dated....., put an end to the contract, and thereafter refused to allow the plaintiff to continue to execute the said work and thereby prevented the plaintiff from completing the same.

3. By reason of the premises the plaintiff has suffered damage.

Particulars of damage :

Contract price	...	...	...	Rs.
Less what it would have cost the plaintiff				
to complete the work...	...	...	...	"
				<hr/>
			Balance...	Rs.

The plaintiff claims—

- (1) Rs.....damages.
- (2) Alternatively, Rs.....the value of the work done and materials supplied.

DEFENCE.

582.

WORK.

Building Contract.

DEFENCE to a Claim by Contractor for being prevented from completing a Contract for Work. (h)

1. The contract referred to in paragraph 1 of the plaint is admitted. It was, however, a condition of the said contract that the said house should be executed and completed in a thorough and workmanlike manner and with the best materials, and that if the defendant should at any time during the progress of the works be dissatisfied with the quality of the materials used or of the workmanship, he might by notice in writing determine the contract and call in another builder to complete the same and might pay the said builder the cost of such completion out of the said sum of Rs.....payable under the said contract and if such cost be more than such sum, then the difference between it and such sum should be a debt due from the plaintiff to the defendant.

2. The defendant did not execute or carry out the work in accordance with the terms of the contract. He used bricks, lime and sand

(h) This is a defence to Form No. 581.

of inferior quality and did the brick-work in an unworkmanlike manner, whereupon, the defendant gave the plaintiff notice in writing, dated, determining the said contract.

3. Thereafter the plaintiff had had to employ another builder at an increased cost to complete the said house, and had to pay him forthwith Rs..... which was in excess of the sum payable under the said contract.

4. The defendant is entitled and claims to set off the said sum of Rs..... by way of counter-claim against the plaintiff's claim.

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